Case Number: 2202173/2020
2203994/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS J GRIFFITHS**
MR F BENSON

BETWEEN:

Ms C Balaneanu

Claimant

AND

Winmark Ltd

Respondent

ON: **27, 28, 29, 30 September and 1, 4, 5, 6, 7 and 8 October 2021**
(7 and 8 October In Chambers)
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr D Jones, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for unfair dismissal, direct sex and race discrimination, harassment, victimisation and equal pay fail and are dismissed.

2. The claim for unlawful deductions from wages succeeds in part.

REASONS

1. By a claim form presented on 8 April 2020 the claimant Ms Corina Balaneanu brings claims of sex and race discrimination as to direct discrimination and harassment, equal pay and unlawful deductions from wages. In a second claim presented on 5 July 2020 the claimant brings a claim for unfair dismissal and victimisation.

2. The claimant worked for the respondent as a Network Director, her period of service was from 18 January 2016 to 20 June 2020.

3. The respondent is a company which provides knowledge to, and facilitates

connections for business leaders in relation to the governance, performance and sustainability of their organisations. It also provides management research to its business clients.

The issues

4. The issues in this case were identified at a preliminary hearing before Employment Judge A James on 7 December 2020 and were confirmed with the parties at the outset of this hearing as follows:

Time limits

5. Were all of the complaints presented within the time limits set out in sections 123(1)(a) and (b) Equality Act 2010? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/conduct extending over a period and/or a series of similar acts or failures and whether time should be extended on a just and equitable basis and when the treatment complained about occurred.

Unfair dismissal

6. What was the principal reason for dismissal and was it a potentially fair reason under section 98 ERA 1996? The respondent asserts that it was redundancy which is a potentially fair reason under section 98(2)(c). The claimant asserts that she was unfairly selected for redundancy and would have been retained had a fair process being followed. She maintains that she was made redundant because she submitted a grievance about her treatment.

7. If the Tribunal finds that the dismissal was redundancy, was it fair under section 98(4) and did the dismissal fall within the band of reasonable responses?

Remedy for unfair dismissal

8. The claimant seeks compensation only.

9. Should there be any reduction to the compensatory award to reflect the possibility that had a fair procedure been followed the claimant would have been dismissed in any event? (the *Polkey* argument)

10. The respondent accepted on day 1 that this case involving a redundancy dismissal was not one for contributory fault, although they would address the issue of the claimant not applying for alternative roles.

Direct sex and race discrimination

11. The claimant relies on her Romanian nationality and she is female.

12. Has the respondent subjected the claimant to the following treatment:

a. In March 2017 the claimant was asked to take on additional responsibility. She was offered £5,000 increase in salary to perform this, while a British colleague, Natalie Hogg was paid approximately £37,000 for carrying out a similar role. The claimant said in evidence that this was only relied upon as race discrimination based on nationality and not sex discrimination.
b. In September 2018 the respondent promoting Mr Amar Garcha from Network Director to Head of Revenue, without advertising the position internally and therefore automatically denying the claimant the opportunity to apply.
c. On 7 December 2018 the CEO Mr Jeffcock, telling the claimant "*You do know that I'm going to start looking for your replacement now*".
d. On 11 April 2019 Mr Jeffcock sending the claimant an unpleasant email and subsequently stating "*You are right that the communication I sent was a classic example of passive-aggressive management but I wanted to set up our conversation for when we meet*." The parties agreed that the date for this issue was 13 May 2019 and not 11 April 2019.
e. Mr Jeffcock unfairly criticising the claimant's work in emails dated 14 May and 30 May 2019 with no guidelines on how to improve despite the claimant requesting feedback.
f. Mr Jeffcock criticising the claimant's work on 19 September 2019 who said "*there was no cleverness in your budgets*". This was relied upon as sex discrimination only and not race discrimination.
g. Cancelling a meeting scheduled between the claimant and Louise Gulliver, the new COO, due to be held on 9 July 2019 and not rescheduling it. The claimant was the only Network Director who the new COO did not meet, making the claimant feel deliberately excluded.
h. On 17 July 2019 Mr Jeffcock emailing the claimant criticising her unfairly for spending "*too much money*" on a hotel for a company trip.
i. On 1 August 2019 for incorrect reason Mr Jeffcock rejecting the claimant's request to purchase books to secure a speaker for a CEO network meeting.
j. On 13 August 2019 Mr Jeffcock removing the claimant's photograph from draft report which was relating to her department, against company custom.
k. On 16 September 2019 Mr Jeffcock writing a distorted and false account of the claimant's financial performance to the board and colleagues. No other Network Director was subject to distorted figures.
l. On 19 September 2019 Mr Jeffcock unfairly and pettily criticising the quality of the claimant's work completing an internal report.
m. On 19 September 2019 Mr Jeffcock criticising the claimant for not having a plan for an online campaign for a new report, even though she had not been asked to provide one and it was not part of her responsibility.
n. On 19 September Mr Jeffcock threatening to remove from the claimant's remit her core area of responsibility, the CEO Network.
o. In all one-to-one meetings with the claimant since December 2018, Mr Jeffcock unjustifiably criticising the claimant's performance, for example stating "*you have done well overall but CEO network is not good*" and

"*you are very good but no cluster is perfect!"* when at the time the claimant was the best performing Network Director in the business and had received no complaint.

p. In September 2019 Mr Jeffcock asking the claimant's direct report Mr Michael Yeouart if he could take over her networks should the claimant be absent for a period of time which Mr Yeouart reported to the claimant.
q. On 22 September 2019 Mr Jeffcock demoting the claimant – her line manager moved from being Mr Jeffcock to the respondent's CCO, Stephen Moore who in turn reported to Mr Jeffcock.
r. The respondent not advertising the CCO role nor was she (or any other Network Director) given an opportunity to apply for the role.
s. On 23 September 2019 Mr Jeffcock emailing the claimant stating incorrectly and without example that she had criticised the leadership of the business.
t. On 26 September 2019 Mr Jeffcock criticised the claimant by email for not having a business case for a business trip when she had not been asked to do so and such a practice was not standard.
u. On 7 October 2019 Mr Jeffcock unjustifiably deleting one of the slides the claimant had prepared for a PowerPoint presentation, without informing the claimant which made her look incapable to her colleagues and humiliated her.
v. On 7 October 2019 Mr Jeffcock emailing the claimant incorrectly implying that she was not meeting financial targets, copying in Mr Yeouart, despite him not having any commercial responsibilities thereby upsetting and humiliating her. The allegation that the email was copied to Mr Yeouart was withdrawn on the afternoon of day 3. The claimant did not withdraw the remainder of the allegation.
w. On 21 October 2019 Mr Jeffcock again emailing the claimant incorrectly implying that she was not meeting financial targets, copying in Mr Yeouart despite him not having any commercial responsibilities thereby upsetting and humiliating her. Mr Jeffcock told the claimant this was a standard email he sent to all network directors yet the claimant's peers, Tudne, Amar and Sandy (respectively female, British, male British and female British) did not receive it.
x. On Thursday, 21 November 2019 Mr Moore asking the claimant at a team meeting in front of colleagues, in a deeply unpleasant and sarcastic tone, to explain the sales funnel picture on the screen, adding "*considering you know so much about sales Corina can you explain what sales funnel is?".* This belittled and humiliated the claimant.
y. At the same meeting on 21 November 2019 Mr Moore aggressively and angrily:
    i. told the claimant to "*Stop copying John into emails – I'm your line manager, John doesn't want to know*" and
    ii. "*You seem to have an aversion to writing the Tel Aviv delegation report. I emailed you twice about it. If I ever have to write you an email twice about the same thing it's not good*" which humiliated and upset the claimant.
z. On Friday, 22 November 2019 Mr Moore sent the claimant a follow-up email which did not reflect the face-to-face conversation the two had on

the previous day. The email was intimidating, belittling and gave totally unreasonable deadlines.

13. Was this less favourable treatment than the respondent treated or would have treated others in not materially different circumstances?

14. The claimant relies on the comparators named above and/or hypothetical comparators.

15. Was the treatment because of the claimant's race/nationality and/or sex?

Harassment related to sex and race

16. Did the respondent engage in the conduct set out at (a) to (z) above?

17. Was this unwanted conduct?

18. If so did it relate to race, nationality or sex?

19. Did it have the purpose or, taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect, the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Victimisation

20. Did the claimant do a protected act? She relies upon her grievance on 10 December 2019 which contained allegations of sex and/or race discrimination. The respondent accepted on day 1 that the claimant's grievance was a protected act.

21. Did the respondent subject the claimant to the detriment of making her redundant in April 2020? It is not in dispute that the claimant was made redundant in April 2020.

22. Was this because she did the protected act?

Equal pay

23. The claim is that the claimant was paid less than male colleagues: in March 2018 the respondent recruited Mr AG to perform the same role as the claimant. He had the same level of experience as the claimant but his salary was 7% higher.

24. Was the claimant performing like work to Mr Garcha?

25. Can the respondent show that there is a material factor (MF) unrelated to sex that explains the difference in pay? The respondent confirmed on day 1 of the hearing that it did not rely on a MF defence and that their case

was solely on the basis that it was not like work.

26. On day 4 the claimant confirmed that the period of comparison with Mr Garcha was from 1 March 2018 to 3 October 2018. She did not seek to compare their roles past this date. We checked this with the claimant again on day 5.

Remedy for discrimination

27. If the claimant succeeds – how much compensation should she be awarded? The claimant also seeks a recommendation and a declaration. We decided that remedy was best hived off and would be dealt with at a separate hearing, if applicable.

Unlawful deductions from wages

28. Is the claimant entitled to a bonus for having won a sales competition and/or commission on sales which has not been paid?

29. If so how much unpaid bonus and commission is due?

Witnesses and documents

30. For the claimant the tribunal heard from two witnesses: the claimant herself and Mr Michael Yeouart, who reported to the claimant during her employment with the respondent. He left the respondent's employment in January 2021.

31. We also had witness statements for the claimant from Ms Annalisa Belluci who worked for the respondent from May 2013 to May 2021 and Ms Sarah Robinson, another former employee of the respondent. The respondent did not have any cross-examination for these witnesses so their statements were taken as read.

32. The claimant had not dealt with the discrimination allegations in her witness statement. It was suggested by counsel for the respondent on day 1 that the claimant may wish to prepare a supplemental witness statement. The claimant is a litigant in person and there was a lot to be done on day 1 of the hearing in terms of housekeeping. We considered that it would be too much for the claimant to prepare a further statement on day 1. The parties agreed with the tribunal's suggestion that the claimant swear to the truth of the discrimination allegations (a) to (z) in the list of issues, as her evidence in chief.

33. The claimant said that she did not know how she needed prepare her witness statement. We did not accept this because what was required was clearly set out in paragraph 17 of Employment Judge James' Case Management Order (bundle page 259). She had prepared a witness statement as Ordered in connection with her unfair dismissal claim but had not done so for all her other claims. She had assisted her witness Mr

Yeouart in preparing his witness statement and she provided statements from two other witnesses.

34. As we found the cross-examination on the unlawful deductions claim difficult to follow, at lunchtime on day 2 we ordered that overnight the claimant should prepare and serve on the respondent a witness statement covering the claims for commission and competition bonus as set out in paragraph 4 of her Schedule of Loss and to cross-reference the documents. This was to be sent to the respondent and the tribunal by 8pm.

35. At 19:30 hours on the evening of day 2 the claimant sent to the respondent and the tribunal the witness statement we had Ordered on her unlawful deductions claim.

36. At 09:17 on day 3 the claimant sent another witness statement dealing with her discrimination allegations (o) to (z) and her victimisation claim. The respondent had reached allegation (o) in cross-examination by the end of day 2. On day 2, one of the tribunal Members had asked the claimant to make sure she had all the references for the documents that she wanted to refer to for the remaining allegations and the claimant said she had understood that this meant she was to prepare a witness statement. We accept that the claimant misunderstood what had been asked. Time had to be taken on day 3 for the respondent to read this new 10-page statement and to take instructions.

37. For the respondent the tribunal heard from four witnesses:

    a. Mr John Jeffcock, Chief Executive
    b. Mr Stephen Moore, Chief Commercial Officer
    c. Mr Christopher Honeyman-Brown, Chief Finance Officer.
    d. Ms Kerry Ghize, Non Executive Director

38. We had a witness statement from Mr John Dembitz, Chair of the respondent and grievance officer. The respondent made a decision not to call this witness and we did not consider the statement.

39. There was an electronic bundle of around 1,734 pages. There were different versions of the bundle which had been prepared by the respondent's HR Manager and not by the respondent's solicitors. We have referred to the electronic page number throughout, rather than the page number appearing on the document as these numbers did not correspond. We also had a supplementary bundle of about 23 pages.

40. Within the main bundle we had the decision of Employment Judge Brown in case number 2204021/2020 between Mr A Garcha and the same respondent (this bundle page 1463). The decision was sent to the parties on 28 July 2021, two months before the start of our hearing. Mr Garcha was the claimant's equal pay comparator and is her current business partner. We told the parties that although the decision of Judge Brown

was not binding upon us, it was of persuasive value. Mr Garcha claimed unfair dismissal arising out of the same redundancy situation and his claim failed.

41. On day 4 the claimant sought two documents from the respondent which she said she had asked for three times. We gave the parties a break of 15 minutes at the start of the day to see if they could resolve this. After a discussion between the parties we were told that we were not required to make a decision on this.

42. We took breaks during the hearing to accommodate the claimant as a litigant in person.

43. We had written submissions to which the parties spoke. All submissions and authorities referred to were fully considered whether or not expressly referred to below.

Findings of fact

44. The claimant joined the respondent on 18 January 2016 as a Head of Network and on 1 April 2017 she was promoted to Network Director. The claimant was recruited by the Chief Executive Mr Jeffcock and she said she believed he knew her nationality from the outset.

45. There were three other Network Directors, Mr Amar Garcha, who became Head of Revenue on 3 October 2018, a more senior role; Ms TH and Mr SM. Thus there were two women and two men in the team. We have given initials for the other Network Directors as they were not witnesses or senior officers of the respondent. We have referred to Mr Garcha by name as we have referred to the Judgment in his case, which is already on the public Register.

46. The respondent is a small company. Before the redundancy exercise with which we were concerned, it employed about 23 people and after that exercise it employed 14 people, 12 full time and 2 part time. (Organisational Chart page 916). The respondent's business is that of connecting people within business and building networks for the purpose of sharing knowledge and creating opportunities for businesses to grow. It works with a structure of networks and partnerships.

47. The respondent has an ethnically diverse workforce. We saw statistics in a spreadsheet at page 1483 of the bundle. Nationalities among the workforce included Chinese, Danish, Slovakian, Hungarian, Italian, Czech, Bulgarian, Brazilian, Estonian, French, German and from Hong Kong. This is dealing with nationality and not ethnicity as the claimant's case relied on her nationality. There were two other Romanians employed by the respondent, one of whom the claimant knew, the other she did not. Of the two Romanians, one was male and one was female.

48. The gender split amongst the employees was roughly 50:50.

49. When the claimant first became a Network Director she reported to the Chief Executive Mr John Jeffcock. The Network Director role in which she worked involved face-to-face sales to new business and membership renewals. The claimant was responsible for what was known as a 'cluster' which was a suite of Networks including CEOs, NEDs and Pension Chairs. The claimant focused particularly on the CEO Network. She was regarded as a high performing sales person. This was not in dispute.

50. We make the following findings of fact: The claimant was successful at revenue generation by selling and renewing memberships of her Networks. The respondent acknowledged her success and wanted to keep her on board. They made some changes to her terms and conditions to facilitate this. The respondent expected the claimant to continue to grow sales by increasing her targets.

51. The claimant did not react well to any feedback that was less than 100% positive. Mr Jeffcock felt he had to manage the claimant very carefully because he was concerned about her negative reactions to less than positive feedback. The claimant was not in the office as much as the other Network Directors because of client meetings and working from home. This meant that much of the communication between the claimant and Mr Jeffcock was done by email and more so than the other Network Directors with whom verbal discussions were more common.

52. We also find that there was a fundamental disagreement about reporting the claimant's revenue against her targets. The respondent wanted Network Memberships (which was effectively all profit) shown separately from income from study tours which incurred costs. The claimant thought this under-represented her contribution to the business. We find it is a matter for the respondent to decide how they wish financial information to be presented.

<u>The allegations of direct discrimination or harassment</u>

53. <u>Allegation a</u>: – The allegation was that in March 2017 the claimant was asked to take on additional responsibility. She said was offered a salary increase of £5,000 per annum to take on responsibilities previously undertaken by her colleague Ms NH who is a British. The claimant said that Ms NH's salary was approximately £37,000 for carrying out a similar role. The claimant said in evidence that this was only relied upon as race discrimination based on nationality and was not relied upon as sex discrimination.

54. We find that the additional responsibilities had been undertaken by NH who changed roles in March 2017 NH's salary was approximately £37,000 for three days per week equating to approximately £62,000 full time equivalent. The claimant agreed to take on the additional responsibilities upon her promotion to Network Director on 1 April 2017 when her salary increased to £65,000. The respondent said and the

tribunal accepted and finds that the additional responsibilities led to a potential increase in commission for the claimant of £15,000 per annum. We find that the promotion and potential additional commission was of benefit to the claimant who was a successful sales person and likely to earn that commission. The contemporaneous email on this subject was from the claimant to Mr Jeffcock on 26 March 2017 in which she was seeking a pay rise to £70,000 or additional annual leave (page 318) and this figure was not agreed.

55. We found it hard to see how this was an act of less favourable treatment because the claimant is Romanian and even harder to see how it was an act of harassment relating to her nationality and we find it was neither. It was a reallocation of duties when Ms NH wished to take a different role and on the claimant's promotion to Network Director and there were benefits to the claimant. She did not secure the increase in salary that she wanted but her commission opportunities increased and she was a high performing sales person.

56. Allegation b: – This was that in September 2018 the respondent promoted Mr Amar Garcha from Network Director to Head of Revenue, without advertising the position internally and therefore automatically denying the claimant the opportunity to apply. The claimant accepts that other two Network Directors TH and SM did not have opportunity to apply but said it was discrimination against her because she was of the firm view that she would have been the successful candidate.

57. We find that the claimant was verbally offered the opportunity. In submissions at page 7 the claimant said: "*It is correct that myself and Mr Jeffcock had a conversation about having a sales manager and Mr Jeffcock asked if I'd be interested but I genuinely believed Winmark did not need the additional headcount considering the sales team had about 4 people at that time*". It was not the claimant's decision as to what headcount was needed at the respondent.

58. Whether the role was advertised or not, we find the claimant was given the opportunity to say she was interested and if she had done, Mr Jeffcock would have taken it forward with her. This allegation fails on its facts. In addition, in a situation where men and others of different nationalities did not have the opportunity, it was not less favourable treatment of her because of her sex or race. We can find no basis upon which it was an act of harassment related to her sex or race.

59. Allegation c: The claimant complains that on 7 December 2018 Mr Jeffcock, said to her "*You do know that I'm going to start looking for your replacement now*". Mr Jeffcock accepts that he made a comment to this effect. He said that it was as a result of the claimant regularly saying she was in receipt of offers from other employers at a better salary. The claimant accepts that she said this to Mr Jeffcock but it was "*not a regular occurrence*". She said she would not have made suggestions as to how the company could improve if she wanted to leave. Mr Jeffcock said he

did not want her to leave but was concerned that this might be her intention.

60. We saw at page 329 the claimant's own note of a meeting with Mr Jeffcock in December 2018 in which the following exchange took place:

- *CB: I feel if things don't improve, I am forced to resign as no matter what I do it never seems to be good enough*
- *JJ: You do know that I will start looking for your replacement*
- *CB: I won't have spent all this time putting together potential solutions for the company if I wanted to leave*

61. We saw an email at page where the claimant said to Mr Jeffcock (page 319):

> *"I also mentioned that my plan is to earn a basic of £80k in 2018. Considering I am getting offers with salaries more than my basic and commission combined I would like to discuss how we can make this work for both of us."*

62. We did not have a date for this email and the claimant could not tell us. It showed Mr Jeffcock that she was having discussions about salaries and receiving offers from other potential employers.

63. There was an email exchange between the claimant and Mr Jeffcock on 10 December 2018. The claimant said that she was hoping to hear more words of encouragement and Mr Jeffcock replied: *"Sorry if I was not encouraging enough today I thought you had a good day, if not a frustrating end. May be it's the nightnurse drugs. Feel the love ...".*

64. As an incentive for the claimant to stay, one of the steps Mr Jeffcock took was to compress her five day week into four days on the same pay for a trial period.

65. On 12 December 2018 Mr Garcha emailed Mr Jeffcock to the effect that he was "*concerned that she [the claimant] has one foot out of the door*" (page 333).

66. We find that Mr Jeffcock made the comment and he did so because the claimant was telling him that she was receiving job offers and that she might leave. It was a sensible move for Mr Jeffcock to look at the possibility of recruitment if he was about to lose the claimant. We find Mr Jeffcock wished to keep the claimant as she was a successful sales person.

67. This had nothing to do with the claimant's sex or race. It was not because of her sex or race or related to either of those characteristics. It was a response to her comments about possibly leaving.

68. Allegation d: The claimant complains that on 11 April 2019 Mr Jeffcock

sent her an unpleasant email in which he said: "*You are right that the communication I sent was a classic example of passive-aggressive management but I wanted to set up our conversation for when we meet*." The claimant agreed that the date was wrong because this appeared in an email of 14 May 2019 (page 336).

69. Mr Jeffcock accepts that he said this in the email to the claimant but said it was unrelated to her sex or race. It related to the setting of the claimant's targets for the following year. The claimant thought the email was unpleasant because it did not reflect their earlier meeting which she felt had gone well. Mr Jeffcock said in an earlier email of 13 May 2019 relating to her proposals and submission had been too low, representing negative growth.

70. We did not see what was unpleasant about the words relied upon in this allegation because we find that the words were apologetic in tone. It is not wrong for a manager to have conversations with employees about performance and targets. Managers often have to have conversations which the employees may not wish to hear about their performance.

71. We saw nothing in this that was because of the claimant's race or sex and it was not related to it. This was Mr Jeffcock carrying out his role as a manager, perhaps not always with the best choice of words as he acknowledged he could have handled it differently. It had nothing to do with sex or race.

72. Allegation e: This was that Mr Jeffcock unfairly criticised the claimant's work in emails dated 14 May and 30 May 2019 with no guidelines on how to improve despite the claimant requesting feedback. The email chain starting on 14 May 2019 started at page 336 and the email of 30 May was at page 347.

73. The claimant's issue was that Mr Jeffcock said that her plan was not good enough and requested an improved plan. She said she had asked him what else she would like her to include and he had said nothing else came to mind. She thought the criticism was unfair because he should have told her what she should do. She said as far as she knew nobody else had had such a conversation but we find that she does not know this for certain.

74. Mr Jeffock sent an email to the claimant on 30 May 2019 (page 347) saying: "*Your 121 notes are already done and have been for a few days. I will send you them once you have completed your improved plan which is now two weeks late*".

75. The claimant relied upon the second bullet point in an email on page 348 which said: "*Of course you have the highest sales targets in the business. You are the only Cluster with a dedicated C-Suite Programme Manager across all its networks, have a low number of renewals and therefore should have the most time to do sales. You cannot tell me that you are*

the best and then ask for low targets in the same sentence – that does not add up." The claimant felt she was being criticised and that Mr Jeffcock was not comparing like for like.

76. The claimant said her request for feedback was in her email of 30 May 2019 at 17:46 hours at page 347: "*I have asked you what else you wanted to see in addition. I have also asked you if others have submitted any other ideas I can copy. You said that nothing comes to mind."*

77. The claimant also complained about Mr Jeffcock's email of 13 May 2019 saying that he thought her "*business plan and budgets were disappointing."* She thought this was sex and race discrimination because none of her colleagues received such an email.

78. We find once again that this was an example of Mr Jeffcock acting as her line manager. No employee will be managed exactly the same because working methods and performance will differ.

79. Mr Jeffcock had already asked the claimant for a "*good and rigorous plan"* by the end of Friday and to put another *"£40K into the budget*" by Friday. She was an experienced and successful sales person who trained others in the team. His feedback was that she needed to "*harness that great sales skill of yours"* (page 823).

80. This was in the context of the respondent's business planning and budgeting process. Although the claimant may have regarded Mr Jeffcock's request as challenging or demanding, we find that he expected someone of her seniority and sales experience to be able to rise to the challenge and not require more training to do this.

81. Mr Jeffcock's oral evidence was that at this time he took all the other Network Directors aside gave them feedback on their planning and reporting. He said he told them they would be: "*embarrassed about the reports they had written when they looked at them in a year's time*". The claimant was not in the office that day which is why he covered this with her by email.

82. We find based on this evidence, which we found convincing, that Mr Jeffcock gave similar feedback to the others, perhaps even less favourable feedback, by telling them that they would be embarrassed by what they had written.

83. We find that the claimant was not "*unfairly criticised*", she was given performance feedback as were her colleagues. This was not less favourable treatment because of her sex or race and it was not harassment related to her sex or race.

84. Allegation f: This was put as Mr Jeffcock criticising the claimant's work on 19 September 2019 by saying: "*there was no cleverness in your budgets*". This was relied upon as sex discrimination only and not race

discrimination.

85. We saw the claimant's appraisal notes of the meeting on 19 September 2019 (page 418), prepared in an email to herself on 24 September 2019. The claimant recorded that Mr Jeffcock said: "*JJ: budget planning no cleverness, no unique approach, looked like I did it quickly."* Mr Jeffcock did not recall saying this but was content in evidence to accept that he did, so we find that he did.

86. The claimant said that she did not recall Mr Jeffcock saying that the other Network Directors were not very clever – although this is not what he had said - and she was of the view that she was the best performing member of the company. We have found above that in May 2019 Mr Jeffcock told the other Network Directors that they would be embarrassed by their budgets if they looked back on them in a year's time.

87. The respondent had paid for the claimant to do an on-line course with Harvard at a cost of around £2,000 which they had not funded for her male colleagues Mr Garcha or Mr SM. He expected more from her. It may not have been pleasant to hear but we find that Mr Jeffcock was expressing disappointment and this was not less favourable treatment because of her sex and it was not related to her sex.

88. We saw in the respondent's Commercial Report dated September 2019 (page 379) the quarterly reports from the clusters, prepared by the Network Directors. The reports from the other Network Directors contained more detail than the claimant's.

89. We find that Mr Jeffcock made the comment because he had expected the claimant to build on her successful track record and the training which the company had funded. The claimant only relied upon this allegation as direct sex discrimination and harassment; she did not rely upon it as race discrimination and harassment (her document sent to the tribunal on 30 September 2021 at 09:11). We find that it was not less favourable treatment because of her sex and it was not related to her sex, it was related to the work she had done, which did not meet the standards Mr Jeffcock had hoped for.

90. Allegation g: This was an allegation of cancelling a meeting scheduled between the claimant and Ms Gulliver, the new COO, due to be held on 9 July 2019 and not rescheduling it. The claimant says she was the only Network Director whom the new COO did not meet, making the claimant feel deliberately excluded.

91. The way this allegation was worded suggested that it was someone within the respondent who cancelled her meeting with Ms Gulliver. On her own evidence it was the claimant who cancelled the meeting because she had another meeting that clashed.

92. The claimant complained that the meeting was not rescheduled.

She did not tell us what steps she took to reschedule it and we find that she was perfectly capable of doing so. The claimant said she thought that Mr Jeffcock was doing everything possible to "*make her quit"* and she came to the conclusion that Mr Jeffcock had told Ms Gulliver not to meet with her because she would not be around much longer. There was no evidence to support this and we find it was not the case.

93. Mr Jeffcock said that when Ms Gulliver joined, she wanted to meet with everyone in the organisation. Mr Jeffcock said that to his knowledge the claimant and Ms Gulliver "*had a really good catch up"* on the way to a client meeting and this was not challenged by the claimant. We find that the claimant had her "*get to know you*" meeting with Ms Gulliver and it was an informal meeting.

94. This allegation fails on its facts.

95. Allegation h: The claimant's case was that on 17 July 2019 Mr Jeffcock emailed her criticising her for spending "*too much money"* on a hotel in Tel Aviv for a company trip. This was for a study tour where the claimant had booked premium flights and venues. As CEO, Mr Jeffcock was keen to keep costs down. What Mr Jeffcock said in his email of 17 July 2019 (page 372) was: "*The hotel prices seem excessive and if I remember correctly we managed to almost half the price last time. The project may be profitable but the business is not, so we need to manage this carefully and reduce costs wherever we can."* It was not an aggressive or unpleasant email and ended with the words "*Take care*".

96. The claimant replied to this email about two hours later saying:

> *"Hi John*
> *For San Francisco we actually ended up booking a hotel at a higher price and lower class than what I orginally found because we waited too long to decide. This time I reserved one as soon as I got the dates. It is the cheapest 4 / 5 star I can find with breakfast in a central location. I also asked S…. B….. who is attending and he said Carlton is a good hotel and he knows the owner. Plus 80% of hotels in Tel Aviv are already booked during the dates we will be there."*

97. We find that Mr Jeffcock queried the hotel cost with the claimant because, as he said, the project might have been profitable but the business was not. This was not about the hotel in San Francisco, it was about the study tour in Tel Aviv. The claimant had said she had already reserved the hotel and Mr Jeffcock said they needed to manage cost carefully and reduce cost where they could. He did not say, as the claimant alleges, that she was "*spending too much money*". This allegation fails on its facts.

98. We find that Mr Jeffcock was making a legitimate point as to whether they could save some cost. This was about cost saving and had nothing to do with the claimant's nationality or her gender. We find that the claimant looked only at her area of the business and did not see the wider corporate

picture. We find that this was not less favourable treatment because of her sex or race and it was not harassment related to her sex or race.

99. Allegation i: The claimant's case was that on 1 August 2019 Mr Jeffcock rejected her request to purchase some books to secure a speaker for a Network meeting. Mr Jeffcock said that his response was based on his assessment of overall company finances as opposed to the particular cluster or individual network finances. In his view it was an unnecessary spend and it is part of his remit as CEO to manage such matters. The email exchange was as follows (page 344):

> *Hi John*
> *I recently read a book called Non-Bullshit Innovation which was recommended by one of the guys at SVB. The writer is the founding editor of Wired and is asking for us to order 50 books at £14 each in order to speak next year. Are you happy for me to do this? I really want him as a speaker as he has his finger on the pulse when it comes to innovation. We will give out a copy to delegates and the rest I can send to CEO members and prospects. Thanks C"*
>
> *"Hi Corina*
> *Sounds great but not when we are £30k behind budget. Hopefully things will improve and I will then be able to say yes.*
> *Best regards*
> *John*

100. The cost of fifty books at £14 each was £700. The claimant said she was £40,000 over budget. Other parts of the business were £30,000 down and the claimant accepted this was plausible. She accepted that this may have been the correct reason.

101. We find that the request was turned down for financial reasons as Mr Jeffcock explained to her. The claimant could not see corporately beyond her own area. We could find no basis whatsoever for the suggestion that refusing this request was because of her sex or race and even less so that it was an act of harassment on any basis. It was about seeking to save cost for the business.

102. Allegation j: The claimant complains that on 13 August 2019 Mr Jeffcock removed her photograph from a draft report that related to her department and that doing so went against company custom. The report was titled "*How to become a NED"* and was created in partnership with the FT for the FT's Board Director Programme.

103. The claimant accepted Mr Jeffcock's evidence at paragraph 95 of his statement that her photo was included once she raised it. Mr Jeffcock's evidence was that they were working with a Senior Editor at the FT on their Board Director Programme and he wanted to ask her first of all about the placing of photos in the publication. Once he had spoken to the Editor, she agreed to the inclusion of the claimant's photo. The claimant's photo

appeared first, ahead of the photos of Mr Jeffcock and the FT Editor.

104. This was only relied upon as discrimination because the claimant is Romanian or an act of harassment related to her nationality. In her submissions on page 10 the claimant said: *"I was singled out for detrimental treatment because of my race. I felt like I was not good enough and insignificant because I was Romanian*". The claimant did not submit that this was because of or related to her gender and we find that it was not.

105. We find that the initial removal of the photograph was for business etiquette reasons, Mr Jeffcock took account of the position of the FT Editor and wanted to find out from her how she wished the credits to be applied. Once Mr Jeffcock had the green light from the Editor, the claimant's photograph was given top billing. There was no less favourable treatment of the claimant because of her Romanian nationality and even less so an act of harassment. It was not relied upon in submissions as sex discrimination/harassment and in any event we find that it was not.

106. Allegation k: The claimant says that on 16 September 2019 Mr Jeffcock wrote a distorted and false account of her financial performance to the Board and colleagues and that no other Network Director was subject to distorted figures. Mr Jeffcock said that the respondent has a standard way of reporting the performance of their profit centres and this had not changed over the years. He said that the claimant wished change this to show herself in a better light, but it was not a reflection of what was going on (his statement paragraph 96).

107. We were taken to page 385 of the bundle which was the CEO commentary on the claimant's cluster. This was a standard means of presentation used within the company and the format used for all the Network Directors in the September 2019 Board Report, of which this formed part.

108. One of the issues for the claimant was that there was a fundamental disagreement about reporting the her revenues against her targets. The respondent wanted Network Memberships (which was effectively all profit) shown separately from income from Study Tours which incurred significant costs. The claimant thought this under-represented her contribution to the business. This was not a "*distorted and false account*" of the claimant's financial performance, but the respondent using their chosen method of presenting the finances – a method which the claimant did not like.

109. We have also considered that although some of the figures in the table on page 385 were in red, none of them were preceded by a minus sign as was the case for other Network Directors in their sections within the report.

110. We find that this came down to the key disagreement between the parties as to the way in which the financial information was presented, the claimant wanting a method that presented her in a better light. This was a method which the respondent considered did not truly reflect the

position.

111. This was about a method of accounting and it was not less favourable treatment of the claimant because of her sex and race because the same accounting method was used for everyone. Neither was it harassment related to her sex or race.

112. Allegation l: The claimant made the next three allegations in relation to her annual appraisal meeting with Mr Jeffcock on 19 September 2019. Firstly she says he criticised her unfairly and was petty in criticising her work on an internal report.

113. We find that this goes to the same matters as allegation (f). The claimant in submissions said it was the same as allegation (k). It relates to both these issues.

114. There was a dispute of fact as to whether Mr Jeffcock told the claimant that it looked like she had "*spent 5 minutes*" working on the her cluster report for the Board. Mr Jeffcock said he thought he had told her it looked like she spent 20 minutes on it, he agreed it was definitely a short period of time.

115. Mr Jeffcock said he had given members of the team a sample report so they "*knew what good looked like*". We looked at Mr Garcha's report at page 397/398 and this contained substantially more detail than the claimant's. It had negative feedback from Mr Jeffcock such as "*no proper pipelines and no campaigns", "programmes and their management have been questionable"* and *"priority actions feel light*." On the professional cluster, there were comments such as *"needs more rigour in new member sales pipeline"* and *"the cluster shrank by £35k, so a bad start to the year".*

116. We find that the claimant was not singled out and that there were positive and negative comments made for each member of the team. There was no less favourable treatment of the claimant because of her sex or race. This was not harassment related to her sex or race.

117. Allegation m: Secondly the claimant says that at the appraisal meeting Mr Jeffcock criticised her for not having a plan for an online campaign for a new report, even though she had not been asked to provide one and it was not part of her responsibility. He said that he expected senior people in the business to write a plan for a big opportunity in their area and that it did not have to be complicated.

118. The claimant accepted that she did not have a plan for the roll out of the campaign and said in oral evidence that this was because she was not told she needed one. This was a piece of work related to the FT publication at allegation (j) above.

119. In the claimant's note of the 19 September 2019 appraisal meeting (page 418) she said: "*there was no plan around the FT guide roll-out, admitted I*

should have planned ahead on the roll-out". We find based on this sentence that the claimant knew that she should have done more planning on this roll out and therefore that it needed a written plan which did not need to be long or complicated.

120. We find it was not unfair or petty criticism and this allegation fails on its facts.

121. Allegation n: Thirdly the claimant said that at the appraisal on 19 September Mr Jeffcock threatened to remove from her remit a core area of responsibility, the CEO Network saying: "*should I take the CEO Network from your remit?"*.

122. Mr Jeffcock's evidence was that the claimant was not open to receiving constructive feedback which was intended to improve her performance in the future. The claimant says she was in tears at this comment. She said she was ahead of target and he did not make this comment to anyone else and she was recruited to look after this network.

123. We find both on the claimant's and Mr Jeffcock's evidence that appraisals took place one to one with no-one else present, so we find that she does not know what was said in the other Network Directors' appraisal meetings.

124. The claimant's own note of the meeting at page 418 said:

 JJ: need to sort out CEO Network. Study tours are not as good as membership as they are not as profitable.
Me: I prefer members as I earn revenue from them next year however if I've been trying to get lots of CEO members but didn't get as many as wanted
 JJ: CEO shrank year on year last 2 years - "do we need to re-allocate how it's resourced?"

125. This discussion was in the context of an appraisal where it is the opportunity for a frank discussion with a line manager. The claimant accepted that she had not secured as many members as she wanted and Mr Jeffcock asked her whether they needed to reallocate how it was resourced. This was a perfectly legitimate management discussion on Mr Jeffcock's part and we find as a fact, based on the claimant's own note, that it was not a "*threat*" to remove a core area of her remit, it was a question about work allocation. This allegation fails on its facts.

126. Allegation o: The claimant's case is that in all their one to one meetings since December 2018 Mr Jeffcock unfairly criticised her performance saying things like "*you have done well overall but CEO Network is not good*" and "*you are very good but no cluster is perfect!".* The claimant said she was the best performing Network Director in the business.

127. We saw an email from Mr Jeffcock to the claimant on 7 October 2019

(page 489) in which he said:

> *Your Reports*
> *I have two pieces of generic feedback*
> • *You have a tendency to only say the good stuff and the Board needs to be shown the full picture*
> • *You are the only cluster not to have written anything under 'what's not working'*
> • *You are very good but no cluster is perfect !*

128. The claimant's objection was to being told she was very good, followed by a "*but*". When asked why she thought Mr Jeffcock held these opinions the claimant said she thought it was because he thought she was "*not very smart".* When it was put to her that this was not because she was female or Romanian, she agreed.

129. The claimant did not assert in oral evidence that she thought Mr Jeffcock said this because she was female or Romanian and we find that it was not. Neither was it harassment, it was legitimate managerial feedback. As we have found above, the claimant did not react well to any feedback that was less than 100% positive and this is another such example.

130. Allegation p: This was that in September 2019 Mr Jeffcock asked the claimant's direct report Mr Michael Yeouart to take over her Networks should she be absent for a period of time. Mr Jeffcock does not deny that he asked this question of Mr Yeouart. At the time the claimant had told him that she was experiencing severe pain and he thought that she might need time off to recover. Mr Jeffcock's position was that as CEO he wanted to ensure that he had a back-up plan if she was to be absent; it was contingency planning. The claimant accepted that Mr Yeouart covered for her during her sickness absence in December 2019.

131. Mr Yeouart said in evidence that he would have been "*comfortable stepping into her shoes*" in her absence. He said that Mr Jeffcock had a conversation with him in the office to ask him whether, if the claimant had to take some time off sick, he would be able to "*take over the Network during that time*".

132. Mr Yeouart accepted that the claimant was away from the office when the conversation took place and he knew she had neck problems but said she had been picking up work from home. Mr Jeffcock said Mr Yeouart replied: "*I can run the programme, but I can't do the sales".* This was good enough for Mr Jeffcock in terms of mitigating risk if the claimant was absent.

133. The claimant accepted in evidence that if she went off sick, Mr Yeouart would know what was going on in her team. The claimant said that because Mr Yeouart is male and British, Mr Jeffcock "*must have been doing this because she was Romanian and female*".

134. By way of comparison the claimant said Mr Garcha had migraines but no-

one was asked to cover for him. Mr Jeffcock said he did not know about this and there was no evidence suggesting that he did. We find he did not know that Mr Garcha was having migraines and this is why he did not have a conversation with anyone about covering a potential sickness absence.

135. We find that Mr Jeffcock was making legitimate plans to cover a potential sickness absence. He did not have this conversation with Mr Yeouart because the claimant is a woman or because of her nationality. He had the conversation to plan for contingencies. It was not, as the claimant suggested, a question of lining Mr Yeouart up to take over from her. Mr Yeouart made it clear, in any event, that he could not cover the full role. Neither was this conversation related to the claimant's nationality or her gender.

136. Allegation q: The claimant's case is that on 22 September 2019 Mr Jeffcock demoted her by moving her line management from himself to the new Chief Commercial Officer Mr Stephen Moore. At that time Mr Jeffcock found that he had too many direct reports and the Board wanted him to be focusing on other matters. In the summer of 2019 the respondent recruited Mr Moore as CCO which meant that Mr Jeffcock could reduce the amount of his direct reports and free up his time to do other things.

137. The claimant accepted that her rate of pay, job role and level of responsibility did not change. All that changed was her reporting line.

138. Mr Jeffcock changed the reporting line for all the Network Directors not just for the claimant. He said it freed up a huge amount of his time and we find that it did.

139. The claimant agreed that she and the other Network Directors had been asking for someone to assist with Marketing. The claimant said that this was not the role they were asking for; they had not asked for a CCO, she would have liked a Marketing Executive. We find that this was not for her to decide.

140. The claimant also accepted that earlier in her employment Mr Jeffcock had offered her a sales manager role which she found "*flattering*" but declined (page 319).

141. Firstly we find that the claimant was not demoted. Her reporting line changed. Secondly, we find that she was treated the same as all the other Network Directors, so there was no less favourable treatment of her compared with anyone else. Thirdly, we could not see how this could approach the definition of harassment, particularly when it happened to all the Network Directors and had nothing to do with her sex or nationality. This allegation fails on its facts.

142. Allegation r: The claimant complained that the respondent did not advertise the CCO role and nor was she or any other Network Director given an opportunity to apply for the role. The claimant's case was that

she was the most experienced and brought in more revenue than anyone else so it would have been difficult for the respondent to justify not appointing her. Essentially her case was that she would have got the job so that is why they did not advertise it. The claimant took the view that she was more experienced than Mr Moore and more successful than the other members of the Team.

143. Mr Jeffcock's evidence was that he wanted someone from outside the business, it was a new role and it met with the business requirements. The claimant did not see that it was appropriate to recruit from outside the business. Mr Moore was previously Head of Marketing at the Law Society and had held a similar role at the Institute of Directors so he had the sort of experience that Mr Jeffcock wanted. The claimant's case is that she had very good sales experience. For Mr Jeffcock it was about more than just sales.

144. On the claimant's own case, none of the other Network Directors were given this opportunity. As such we find that it was not less favourable treatment of the claimant because of her race or gender and nor was it treatment that was related to her gender or race. We find that whatever the claimant's view of her own achievements, she is not guaranteed an appointment in competition with others. This allegation fails on its facts.

145. The practice of recruitment without open competition was not in issue for us; we had to consider whether the claimant was treated less favourably because of her sex or race, or was harassed related to her sex or race and we find that she was not.

146. Allegation s: The claimant's case is that on 23 September 2019 Mr Jeffcock emailed her stating incorrectly and without example, that she had criticised the leadership of the business. Mr Jeffcock's evidence was that the claimant had criticised the leadership of the business. He said this in an email of 23 September 2019 (page 422) asking for greater accountability, improved marketing and performance management.

147. Mr Jeffcock said that when the claimant had been asked by the Board what she considered was the biggest problem at the respondent, she had said "*the leadership"* and had asked Mr Jeffcock what he was going to do about it. The claimant said in an email to Mr Jeffcock: "*I have never criticised the leadership, I have indeed given the company detailed constructive feedback*" (page 421).

148. This exchange was in response to the claimant being told that Mr Moore was taking over her line management and she expressed "*shock"* at this. Mr Jeffcock said that he hoped it would address some of the concerns she had expressed about the leadership of the business.

149. The claimant was asked why she thought Mr Jeffcock said this. She said he had a perception that she was criticising the leadership incorrectly. She did not say that it was because she was female or it was because she was

Romanian.

150. There was a difference of opinion between the claimant and Mr Jeffcock as to whether she had criticised the leadership of the company. She accepts that she had given "*detailed constructive feedback*" which we find Mr Jeffcock perceived as criticism and took steps to address it. Mr Moore was recruited as part of the leadership team. We accept this was not the solution the claimant wanted, but this was the managerial decision made by the respondent to make the leadership team more effective.

151. We find that Mr Jeffcock was not incorrect in his comments because he interpreted the claimant's "*detailed constructive feedback"* as criticism. This allegation fails on its facts.

152. Allegation t: The claimant complained that on 26 September 2019 Mr Jeffcock criticised her by email for not having a business case for a business trip when she had not been asked to do so and such a practice was not standard. This relates to the same study tour as dealt with at allegation (h). The claimant relies upon her email replies within an email from Mr Jeffcock on 26 September 2019 (page 435).

153. Mr Jeffcock said that there was an issue around not knowing the cost of study tours until they were completed and an issue around late payments and expenses. He said they should average the costs for the San Francisco and Tel Aviv tours and come up with a "*safe number*". He went on to say:

> *"My guess is that this situation has arisen for a few reasons:*
> *There was never a proper business case for the Tel Aviv Study which would have identified this and probably other issues to come. This is something we talked about last week. Therefore a lot a assumptions may have been made before agreement was made and there may be still issues ahead. Remember commission remains discretionary."*

154. The claimant replied:

> *"Regarding the business case, I was never asked to produce this for study tours. We as a business don't have a culture of creating plans and business cases when it comes to new initiatives, the Digital C-suite workshops are just one example, however I understand that we all need to improve in this area and I will produce the necessary reports and plans as and when requested moving forward."*

155. The claimant said that Mr Jeffcock did not criticise anybody else for this, but she accepted that the Tel Aviv study tour was her responsibility. She accepted that there was no business case. The claimant said she had previously organised a study tour to San Francisco when she produced no business plan.

156. We saw an email from Mr Garcha to Mr Jeffcock dated 19 June 2018 in

respect of the study tour to San Francisco (page 1 of the additional bundle). It set out the costs and figures being the delegate costs for that tour. Mr Jeffcock also said in evidence that he did not mind if a business plan was brief and "*on one piece of paper".* This email of 19 June 2018 was copied to the claimant.

157. We have found above in relation to this study tour that Mr Jeffcock was concerned about the cost. We find that he raised with the claimant the lack of any business case for the Tel Aviv Study tour and he did so legitimately because of the business need to keep an eye on costs. It was not unreasonable for him to expect the person leading on the work, namely the claimant, to have an understanding of the costs, likely revenue and benefits and be able to communicate it.

158. The claimant said she thought the reason she was criticised was because she was Romanian. She said she did not think this was because she was female. We find that it had nothing to do with her nationality or gender and that this was Mr Jeffcock acting appropriately as a senior manager. It was not less favourable treatment because of sex or nationality and it was not harassment because of either of these characteristics.

159. Allegation u: The claimant's case is that on 7 October 2019 Mr Jeffcock unjustifiably deleted one of her slides in a firm-wide PowerPoint presentation, without informing her which she thought made her look incapable and she said it humiliated her. Mr Jeffcock said that the respondent issues a standard format to Network Directors for PowerPoint presentations. The claimant agreed with this. We had two slides at pages 477-478. The claimant said that the slide on page 477 was deleted and she thought 478 was changed.

160. The slide presentation itself was in the bundle at page 444 titled "*Firmwide October 2019*".

161. It was the claimant who had altered the format to include her historic performance. Mr Jeffcock had said he did not want to focus on historic performance at that meeting and he thought the slide misrepresented the cluster. The claimant accepted that as CEO he was entitled to focus on the matters he wanted to focus on. Mr Jeffcock said that other slides were altered for formatting purposes, as were the slides of other people and this was the usual process for company-wide meetings, where they amalgamated slides from different people.

162. The claimant was asked what was wrong with Mr Jeffcock deleting the slide and she said it was because it happened after a long series of criticisms and it made her look like she did not know what she was doing. The claimant was asked why she thought he deleted the slide and she said he wanted to humiliate her because she was Romanian and because she had recently complained about not being allowed to apply for the CCO role.

163. Mr Jeffcock's evidence, which we accepted, was that he also altered other people's slides in terms of the formatting.

164. Mr Yeouart's evidence was that when he attended this presentation he did not know that any slide prepared by the claimant had been removed. He found out afterwards because the claimant was in tears about it.

165. We find based on Mr Yeouart's evidence, that the attendees at the Firmwide presentation did not know that one of the claimant's slides had been deleted, so this did not humiliate her or make her look incapable. We find that Mr Jeffcock was entitled to keep to the format he wanted for the presentation. He did not delete the slide because the claimant was Romanian or female. He deleted it because he did not wish the historical information within it to be included in the presentation.

166. The deletion of this one slide was done with the purpose of keeping the presentation to the required format. It was not done with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it had that effect, we find that it was not reasonable for the conduct to have that effect.

167. Allegation v: The claimant complained that on 7 October 2019 Mr Jeffcock emailed her (page 494) incorrectly implying that she was not meeting financial targets and copying Mr Yeouart despite him not having any commercial responsibilities. Mr Jeffcock did not deny sending the email. He said that he regularly sent emails to Heads of profit centres stating their financial performance and asking them to fill in the gaps. He said he copied in direct reports so they could help with the process.

168. The claimant said that it was humiliating because she had been telling Mr Yeouart that their department was doing well and Mr Jeffcock's email suggested otherwise. It became apparent during the evidence that the email had not been copied to Mr Yeouart.

169. Mr Yeouart made exactly the same error at paragraph 9 of his witness statement, saying that he had been copied on this email, when he was not. Mr Yeouart said that he had received some help on his witness statement from the claimant. He said this was an error and it was the claimant who had copied the 7 October email to him.

170. The question asked in that email at page 494 was: "*Just checking out the numbers as I do. Please can you confirm the below syncs with your understanding. I am particularly interested in the split between CEO and Study Tours."* Mr Jeffcock said that he was not implying that she was not meeting her financial targets. He wanted her to record her study tours separately.

171. The claimant complained that Mr Jeffock did not ask Ms TH to keep her study tours separately. Mr Jeffcock explained that TH's study tours were quite different. They were one-day study tours that did not generally

involve an overnight stay and were in the UK. They incurred substantially less cost that the claimant's overseas study tours involving flights and hotel accommodation. We find that Ms TH's study tours involved materially different circumstances to the claimant's study tours.

172. We had understood the claimant to have withdrawn this allegation on the afternoon of day 3. On day 4 we checked with her and she said that she only withdrew the allegation that the email was copied to Mr Yeouart, when she realised it was not, but she still wished to rely on the email as acts of sex and race discrimination and harassment. The respondent had no comment to make on this so we did not treat the allegation as withdrawn – save that it was accepted it was not copied to Mr Yeouart.

173. We find that Mr Jeffcock was "*checking out the numbers"* as he said. We find that this email did not imply that she was not meeting financial targets. He asked her if it "*syncs with [her] understanding"* thereby inviting the claimant to comment upon it.

174. We find that the claimant was not humiliated by this email being copied to Mr Yeouart, because it was she who copied it to Mr Yeouart.

175. We find that this was another example of the claimant objecting to the respondent's method of accounting and presenting financial information. It was related to her wish to have the study tours included in her sales figures and not separated out. This was not less favourable treatment because of her sex or race and it was not harassment related to her sex or race. It related to the respondent's preferred accounting method.

176. Allegation w: The claimant complained that on 21 October 2019 Mr Jeffcock again emailed her incorrectly implying that she was not meeting financial targets and again copying in Mr Yeouart. The email was at page 538 from Mr Jeffcock to the claimant, copied to Mr Yeouart, Mr Garcha and Mr Moore.

177. The email started with Mr Jeffcock saying that he had summarised the position and "*Do say if I have missed something",* inviting comments from the recipients.

178. The claimant said that the figures "*did not match*" and should not have been sent to Mr Yeouart. The claimant accepts that Mr Yeouart was part of her team. She said for the first time during evidence that she had asked Mr Jeffcock not to copy Mr Yeouart because he did not have sales target responsibilities.

179. The claimant replied to the email and she herself copied Mr Yeouart. She said she did so because if she had not, he would have had the wrong impression about the performance of the department.

180. The claimant said Mr Jeffcock told her this was a standard email he sent to all Network Directors and he confirmed this in evidence saying that he

used a template. He said by email: "*A similar email was sent to all clusters mid month"* - page 536. We find firstly that this was not Mr Jeffcock implying that she was not meeting financial targets. He invited correction by saying "*Do say if I have missed something".*

181. Secondly, we find that Mr Jeffcock was entitled to copy Mr Yeouart as a member of the claimant's team with responsibility for running the programmes. It was also at a time when Mr Jeffcock was concerned that the claimant was unwell and Mr Yeouart may need to step up to cover.

182. Thirdly we accept and find that similar emails were sent to all clusters mid month as stated in Mr Jeffcock's email at page 536. It was not less favourable treatment of the claimant for any reason.

183. The claimant was asked why the email of 21 October was related to her sex and race and she said it was because Mr Yeouart was being lined up to take her job because he was male and British. We have already made our findings on the issue of Mr Yeouart being asked if he could cover if the claimant was absent on sick leave.

184. The allegation that Mr Jeffcock was incorrectly implying that the claimant was not meeting financial targets fails on its facts. We find that Mr Jeffcock had a legitimate reason for copying Mr Yeouart. We have found that other Network Directors received similar emails.

185. This was not less favourable treatment of the claimant and it had nothing to do with her sex and race and it was not related to her sex and race.

<u>The discrimination allegations against Mr Moore</u>

186. The next three allegations concerned the actions of Mr Stephen Moore. During the claimant's evidence, she was asked by the Judge how she said Mr Moore knew of her nationality. The claimant said it was "*obvious*" because she has a Romanian last name. The question was asked of Mr Moore. He said that he did not know the claimant's nationality until her grievance process was underway. The grievance was dated 10 December 2019 and post-dates the next three allegations. In terms of her last name, Mr Moore said he did not know that this meant the claimant was Romanian, he did not know and frankly did not care what her nationality was. He does not make any assumptions about a person's name and their nationality. We find that nothing he did was because of, or related to her Romanian nationality, upon which she relies, because we accept and find that he did not know her nationality.

187. We have gone on to consider whether these allegations amounted to direct sex discrimination or harassment related to sex.

188. Mr Moore joined the respondent in September 2019. He told us and we find that he took some time off at the beginning of his employment due to a bereavement so when he had the meetings and emails in question with

the claimant in allegations (x), (y) and (z), he had only been in the job for four or five weeks and was on a fact finding mission with colleagues who were relatively new to him.

189. Allegation x: The claimant said that on Thursday, 21 November 2019 at a team meeting in front of colleagues Mr Moore asked her, in a deeply unpleasant and sarcastic tone, to explain the sales funnel picture on the screen, adding "*considering you know so much about sales Corina can you explain what sales funnel is?".* This was a sales meeting led by Mr Moore during which they discussed the benefits of having a standardised sales process. On the claimant's evidence there was a maximum of 6 people in the meeting including the claimant and Mr Moore. It was the first sales meeting led by Mr Moore. Mr Moore started by clarifying terminology to ensure everyone was "*on the same page".*

190. He noticed that not everyone was in agreement on the definition of some common sales terms and when he queried it, some said they had not had sales training. A few of the attendees said that they had been trained by the claimant and she confirmed this. Mr Moore said he asked the claimant to define "*conversion"* and share with the team the benefits of measuring that and not *"sales funnels*" because they had already discussed this. The claimant does not remember being asked about conversion or measuring conversion. He denied speaking in an unpleasant or sarcastic manner. Mr Moore says he was trying to standardise the terminology within the team.

191. The claimant was asked what Mr Moore had against her? She said he did not like the fact that she was Romanian. We have made a finding on this above that he did not know her nationality. She also said she thought he said this because she was a woman.

192. We find that at that sales meeting, Mr Moore was getting to know everyone's understanding of the sales system and finding out how they were applying it. He wanted to know how they were using the sales funnel and making conversions. The claimant was a highly experienced sales person and had trained some of the team. We find that there was nothing wrong with Mr Moore asking her to explain some terminology when he was not sure that everyone was "*on the same page*". This was certainly not said with the purpose of with the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it had that effect, we find that it was not reasonable for the conduct to have that effect.

193. We find that the claimant was not happy at the appointment of Mr Moore and she was uncomfortable with his introduction into the management team. On his part, Mr Moore had some concerns about whether systems were being used effectively to follow up on sales leads.

194. We find on a balance of probabilities that the discussion concerned both sales funnels and conversions. This was not said because the claimant

was a woman, it was said in the context of seeking to ensure that the team were all working together, using best practice and sharing knowledge. Mr Moore considered the previous management style to be somewhat "*laid back*" and he was seeking to build up on this.

195. We find that nothing that Mr Moore said to the claimant about sales funnels or conversion was because of her sex, it was for the reasons set out. Neither was it related to her sex or race.

196. Allegation y: The allegation was that claimant said that at the same meeting on 21 November 2019 Mr Moore aggressively and angrily told her to "*Stop copying John into emails – I'm your line manager, John doesn't want to know*" and said "*You seem to have an aversion to writing the Tel Aviv delegation report. I emailed you twice about it. If I ever have to write you an email twice about the same thing it's not good*" which she found humiliating and upsetting. The claimant said in evidence that everyone else had left and Mr Moore said this in a meeting between the two of them. The claimant said that his tone of voice was aggressive; she said he was not shouting but she said it was not a neutral tone of voice.

197. The parties agreed that the conversation stemmed from an email chain on the 19 November 2019 starting at 4:11pm on page 533. It was about whether an international study tour should be run in 2020 and whether it could be justified. The claimant copied Mr Jeffcock on this correspondence when the original correspondence had just been between Mr Moore, herself and Mr Garcha.

198. The claimant said she had a legitimate reason to copy Mr Jeffcock to find out if a 2020 study tour was to go ahead. Mr Moore said that he told her that she only needed to email himself and not Mr Jeffcock on operational matters and that his tone was certainly not aggressive. Mr Moore had asked the claimant and Mr Garcha for more planning in relation to a study tour, which was appropriate in his new role.

199. The claimant said in oral evidence that she thought he made these two comments towards her to make her so frustrated that she would quit. She went on to say that she thought he did not like the fact she was "*a confident woman*".

200. We find that Mr Moore was legitimately explaining to the claimant that he was now her line manager and it was not necessary for her to copy Mr Jeffcock. We are supported in this finding by the rationale for the appointment of Mr Moore and Mr Jeffcock's wish to spend less time managing staff and more time concentrating on strategic matters. We find that the claimant reacted badly to Mr Moore's comments, which she wrongly interpreted as aggressive, because she resented Mr Moore's introduction as her manager and his more systematic management style. We find that Mr Moore was not aggressive in his tone but he was firm in what he said.

201. We find that Mr Moore did not make the comments with the purpose of with the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. If it had that effect, we find that it was not reasonable for the conduct to have that effect. He did not make the comments because she was a woman or a confident woman. He was reminding the claimant that he was now her manager and not Mr Jeffcock and he legitimately wanted more visibility and understanding on the study tours.

202. Allegation z: The claimant's case is that on Friday, 22 November 2019 Mr Moore said that a follow-up email did not reflect the face-to-face conversation the two had on 21 November. She said that the email was intimidating, belittling and gave totally unreasonable deadlines. The email was at page 540 titled "*Notes from our meeting"*.

203. The email covered Commission from a Tel Aviv Study tour, working hours and general performance. The claimant said it was intimidating because of the time deadlines set. There were two deadlines set in this email of 22 November for Monday 25 November and it was sent to her at 4pm on her day off. The claimant also said the brevity of it and the way Mr Jeffcock constructed the sentences was intimidating and the suggestion that others in the team were generating ideas and she was not.

204. By way of example one of the three action points was:

> *"1. Commission – Tel Aviv study tour You informed me that you were only made aware of the changes to the scheme and of the Silicon Valley calculation error on the 27th of September, but by then you had already completed all of your sales. I had mentioned that overpayment can occur in a number of ways and that your 2018 payment was a genuine miscalculation and that Winmark honoured this payment, contrary to provisions within the commission policy. Action: You to share with me copies of email/comms around miscalculation & me to review previous commission policy. DUE: 25th November. In meantime, you agreed that we should continue to process the commission payment communicated to you by G…."*.

205. The only two things the claimant was asked to do by 25 November was to forward some emails that she already had. The claimant accepted that there was nothing wrong with Mr Moore giving her these instructions but "*it was the way in which the sentence was formulated*". The emails Mr Moore had asked for, related to matters she herself had raised with him at their meeting on 21 November and he wanted the information so he could take things forward.

206. The claimant's case was that Mr Moore did not send such emails to anyone else. She showed us by way of example, a text message she had with her colleague Mr SM, in which she was seeking to find out if this was the case. She asked Mr SM: "*Sorry to bother you. Please can you let me know if you've received any emails from Stephen asking you to provide*

evidence for your activity levels?" SM replied: "*I don't have such an email, no. But he's asked for some of my email comms and proposals last month. I know Stephen is focusing on activity levels across sales. He will be asking me for sure at our 1-2-1 next week."*

207. We have found above that the claimant often worked from home and this meant that managers had to email her more often than her colleagues who were in the office and with whom they could have impromptu conversations. Mr SM's message shows us and we find that Mr Moore was acting in a similar manner with the other Network Directors. He was focusing on activity levels across sales. We find that this was not less favourable treatment of the claimant because she is female as Mr Moore was managing Mr SM in the same way and it was not harassment related to her sex.

The lodging of the grievance

208. The claimant went off sick on Monday 25 November 2019 and lodged her grievance on 10 December 2019 (page 655), whilst off sick. She expressly complained about sex and race discrimination and mentioned the Equality Act 2010 and the respondent accepted that this was a protected act.

The redundancy situation

209. Early in 2020 the respondent began considering making changes to their business because their financial position was declining. They began to consider moving to what they described as a "digital pivot" which we understood to mean moving to a more online method of conducting their business. These discussions began before the pandemic took hold. Events moved into sharper focus in March 2020 with the onset of the pandemic.

210. A Board Meeting was held on 16 March 2020, a few days before the first national lockdown. The minutes were at page 1426. The CFO Mr Honeyman Brown presented the financial situation. He said:

> *"The company continues to be able to meet its liabilities as they fall due at the moment, and has sufficient receivable balances and bank facilities for the immediate future, subject to the points above about incoming cash flow. If the position deteriorates in March the company will go into next year using its bank facilities to capacity and facing a period of some 6-9 months of trading losses (and net cash outflow) without any reserves and dependent on obtaining additional finance.*
>
> *Effective plans are urgently needed to cut cost, maximise invoiced sales and incoming cash, and find access to additional cash resources; however the current economic climate means that these objectives (other than cutting cost) may be difficult to achieve."*

211. At that Board Meeting Mr Jeffcock submitted a proposal to the Board

recommending that the business "*pivot*" from being mainly an events focussed company to a digital business with immediate effect. He put it as (page 1429):

> *Vision*
> *Current = To be the World's most popular C-Suite network, treasured by our members, clients, partners and people in equal value.*
> *Future = To be the World's leading C-Suite platform*

212. The Board envisaged that the business could be resourced by "*a relatively small number of people*" Mr Jeffcock's email of 16 March 2020 – page 1429. We find that a reduction in employee numbers was under consideration.

213. The respondent has no HR Director. Their HR Manager is Ms Marta Adamus who followed advice, templates and guidance from the Forum of Private Businesses for the redundancy process.

214. On 17 March 2020 the respondent began the restructure process and nine employees were put at risk of redundancy, not including the claimant. Network Directors were not included within this process. They were alerted to new roles and invited to apply by 7 April 2020.

215. The first national lockdown happened on 24 March 2020.

216. The respondent considered that the measures under consideration would not be sufficient to deal with the financial problems they were facing and especially with the onset of the pandemic. The claimant and the other Network Directors were all put at risk of redundancy.

217. On 30 March 2020 an "*at risk*" letter was sent to the claimant inviting her to a consultation meeting on 3 April 2020 to be held with the CFO Mr Christopher Honeyman Brown. This very detailed letter said, amongst other things, "*Revenues have all but dried up and there is no evidence that they are going to return … unless we significantly change our offering to members … the move to a digital offering is likely to mean a reduced need for face to face sales capability. The Network Directors are the highest paid team in Winmark and the cost saving … by making these roles redundant is significant. These savings could be used in part to fund a more digital offering. It is therefore proposed that the face to face sales team, all four Network Directors, are put at risk of redundancy…*" (page 876).

218. The letter said (page 878) that the respondent had considered furlough as an alternative, but that, ".. *whilst it would result in a temporary cost saving, our current view is that we would not have the right roles or structure in place to give our members what they want in the future (a digital offering). Our understanding of the government furlough scheme is that it is intended to be used to furlough employees whose roles would otherwise be made redundant as a result of the COVID-19 pandemic. We do not*

consider this to be the case here; whilst COVID-19 has obviously impacted on our revenue, this proposal is more about ensuring that we have the right structure going forward to enable Winmark's survival than about temporarily saving costs."

219. Later on 30 March 2020 Mr Jeffcock spoke on the phone with all the Network Directors save for the claimant who was on annual leave. He spoke to her on her first day back on 1 April 2020. In those conversations he explained the respondent's proposal to become a digital business and explained how it would affect the role of the Network Directors. The claimant and the three other Network Directors were all placed at risk of redundancy at the same time.

220. From Mr Jeffcock's point of view there were pressing business reasons for making this change. One of the key reasons was that in the pandemic their members wanted digital meetings because they could no longer meet face to face. The respondent company had been underperforming and the pandemic had a profound effect on their business, their clients, members and partners.

221. The claimant complained that Mr Moore was not included in the pool for selection. We find that he held a different and more senior role. The respondent considered that his role was required to support the new business model. We find that in those circumstances the decision not to include Mr Moore in the selection pool was reasonable.

222. At the end of March 2020 Mr Jeffcock's view was that in person meetings were unlikely to resume until the autumn. They cancelled and postponed all meetings until at least 1 May. They knew they would have to be 100% digital for the foreseeable future.

223. Mr Jeffcock's rationale for the redundancy situation was as follows: They we were projecting substantially under-budget sales for the financial year ending on 31 March 2020 even before the pandemic. Revenues for the first quarter of 2020 were down on the previous year and the were struggling to break even. Changing to a digital business was their proposal for addressing this. They had to reduce costs substantially for the business to survive.

224. The claimant accepted that the business was losing money due to the pandemic but her issue was the speed at which the second round of redundancy was decided upon. We find that the business was under pressure before the pandemic, but the pandemic acted to speed the process significantly and gave rise to the need for the second round.

225. On 1 April 2020 Mr Jeffcock sent the claimant the draft business case and proposed redundancy process and asked for her "*feedback and ideas*". The claimant accepted that she had this shortly before her first consultation meeting on 3 April 2020.

226. Also on 1 April 2020 Ms Adamus sent the claimant the Job Descriptions for the new roles within the company and the proposed organisational structure. The claimant was asked to submit a covering letter if she wished to apply for one of the new roles explaining why she was the right candidate. A timeline of consultation meetings was set out as follows (page 880):

    - *First consultation meetings: Friday, 3rd April*
    - *Further consultation meeting: 3rd-16th April*
    - *Application: Tuesday, 7th April, by COB*
    - *Interviews: Thursday, 9th April*
    - *Final meetings: Thursday, 16th April*

227. The claimant was asked what was wrong with that proposed timeline. She initially said she could not see anything wrong with it. After a mid-morning break she said the problem was that the final consultation meeting was the final meeting.

228. On 1 April 2020 Ms Adamus sent the claimant Job Descriptions for new roles which were available (page 880). The 6 new roles offered were: Chief Knowledge Officer (just below the CEO and level with the Chief Commercial Officer and CFO); Head of Partnerships and Marketing Executive, both reporting to the CCO; C-Suite Manager and Head of Digital at the next level down and an Events Executive being the most junior of the roles on offer (page 896). Ms Adamus set a deadline for expressions of interest for these roles of 7 April 2020. The claimant confirmed in evidence that she was aware of this deadline.

229. The claimant was offered a first consultation meeting via Teams on 3 April 2020 with Mr Honeyman-Brown and Ms Adamus which she attended, having seen the business case (page 930) with the proposed new organisational chart. The proposed new organisation showed the removal of all four Network Directors and the creation of a role of C-Suite manager. The claimant said that this role was at a much reduced salary to her own of Network Director and did not include a commission structure.

230. Ms Adamus sent the claimant an email after the meeting (page 937) thanking her for her professional and constructive approach and asking for any feedback or suggestions by 6 April.

231. The claimant set out a list of 34 questions and stated her position in an email of 6 April 2020 (page 938) to which we find she received full answers (page 941) as part of the consultation process. One of those questions was why Mr Stephen Moore as the CCO had not been put at risk of redundancy (her question no. 19 on page 944). The claimant was told in a written answer: "*The CCO was formally the Director of Sales and Marketing at The Law Society and his Winmark role includes Marketing which as stated in the Business Case is a key element to the success of the digital pivot*." He held a more senior role to the claimant and the respondent wished to retain his skills.

232. At page 1456 we saw a chart prepared by the respondent setting out the comments made by the four Network Directors during the consultation process. We find that Mr Jeffcock presented those comments to the Board.

233. A deadline was given of 7 April 2020 to apply for any of the new roles. The claimant did not apply for any of the roles.

234. On 9 April 2020 the respondent produced a Furlough Policy (page 950). This was an updated version of the policy and made furlough available to the claimant and the other Network Directors, as an alternative to redundancy. The Policy said:

> *"All members of staff who are made redundant by way of the consultation process, where the redundancy is caused by the Covid-19 pandemic, will be offered the Furlough option as an alternative to immediate redundancy. They then have two options:*
>
> - ***Accept Furlough** – go into Furlough until 1 June 2020 (or longer, if the scheme remains available and employees are eligible for continued Furlough leave), then serve their notice period and get their redundancy pay. However, the situation will be reviewed at the end of the Furlough leave period to see if any viable alternatives to the redundancy proposal have arisen in the meantime which mean that we no longer have to make the role redundant.*
> - ***Not Accept Furlough** – serve their notice period and get their redundancy pay."*

235. The furlough scheme was an evolving concept and the respondent did its best to keep up with its provisions, which changed a number of times. The respondent initially thought that they could not make furlough available when they had been considering a restructure prior to the introduction of the furlough scheme, but after making further enquiries they understood that they could offer this to the claimant and the other Network Directors.

236. On 14 April 2020 there was a Board Meeting at which feedback from the Network Directors was reviewed and discussed (page 1436). The Board agreed some changes in the strategy, confirmed existing and new roles and appointments to roles which had been confirmed. They also discussed the offer of the furlough scheme.

237. On 14 April 2020 the claimant was sent an invitation to the final consultation meeting (page 956). The claimant was told in that letter "*If you are made redundant and offered the Furlough option, you will be given until Monday 20th April to decide on whether you want to proceed with Furlough or not.*"

238. The final consultation meeting took place with the claimant on 16 April 2020 with Mr Honeyman Brown and Ms Adamus, again remotely. The

notes of the meeting was at page 958. The claimant asked if the role of Head of Partnerships had been appointed to. She was told that this would be confirmed and in an email at 14:55 hours on the same day, she was told that it had been filled. We draw no adverse conclusion from this. The claimant had been told clearly that the deadline for applications was 7 April and she did not apply or even express any interest. Ms NH was appointed to that role. The claimant complains that changes were made to that role but we find that if she had been interested, it was open to her to have made enquiries about it by the deadline. Changes can be made in negotiations with the individual who is appointed.

239. The claimant was given the opportunity to apply for the role of C-Suite manager. She was also offered furlough. The only other option was to be made redundant. After that meeting the claimant was given the Job Description for the C-Suite role, the respondent's furlough agreement and information on redundancy pay and notice. This was sent by email from Ms Adamus (page 960). At the claimant's request the deadline for applying for the role was extended to 17 April. The claimant was told that if she decided not to apply for the role or to be furloughed, her employment would be terminated by reason of redundancy.

240. The claimant complained that the meeting on 16 April was not in reality a consultation meeting and that the respondent had chosen to cut the consultation period short. We saw Mr Honeyman-Brown's notes of the consultation meeting at page 958-959. There was a discussion between them about the furlough scheme and the alternative roles, noting that the claimant had not applied for any of them. We are satisfied and find that this was a genuine consultation meeting based on the matters discussed and the claimant had a proper opportunity to participate.

241. The claimant was given some extensions of time to apply for the role of C-Suite manager but she chose not to take advantage of this and she did apply.

242. On 17 April Mr Jeffcock sent the following email (page 981):

> *"Hi Corina*
> *I am sorry you decided not to apply for a role and we will miss you.*
> *As a consequence I now need to ask you to do your handover and with this in mind please find the attached handover document. It has a number of actions on it and should not take more than a couple of hours to complete. If you find it in anyway confusing I would be happy to talk you through it or answer any queries you may have.*
> *Many thanks in advance for our work on this and with a good handover we will hopefully be able to build on your legacy."*

243. The claimant complained about this email saying that if the furlough offer was genuine, Mr Jeffcock would not have sent this email because she would still be employed by the respondent and would have been able to take part in training or socialising whilst on furlough (her statement

paragraph 19). A such she would not be "*missed"* because she would still be there. She said this showed that a decision to make her redundant had been made prior to the commencement of the consultation process.

244. We find based on the Judgment of Employment Judge Brown of 28 July 2021, that the same email was sent to Mr Garcha who argued the same point. We find on a balance of probabilities that all the Network Directors at risk of redundancy received the same email. Judge Brown found (judgment paragraph 54) that the claimant in that case misinterpreted Mr Jeffcock's email which Judge Brown found to be an attempt to be humane to that claimant. Mr Garcha was either going to be made redundant or would be on furlough so would not be present in the company so would be "*missed*". We saw no suggestion from that time in April 2020 that there were any plans for training or socialising amongst the members of staff organised by the business, rather than between themselves. The claimant also said that there was mention of her legacy.

245. We find that Mr Jeffcock was being pleasant to the claimant and the other Network Directors and we find nothing in this email that suggests that it was a predetermined decision. If it had been a predetermined decision we find that he would not have sent the email referred to in the next paragraph.

246. Mr Jeffcock gave the claimant a further extension of time for a decision, to 12 noon on Sunday 19 April 2020 to "*get her on the system for Monday*". He told the claimant that if they did not hear from her, she would by default receive a redundancy letter. The deadline was similarly extended to choose the furlough option.

247. Mr Jeffcock sent the following email at 11am on Monday 20 April 2020 (page 991) attaching the redundancy dismissal letter. The termination date was 20 June 2020 with the two month notice period and the claimant was given a right of appeal:

> *Hi Corina*
> *I hope you had a good weekend.*
> *As we have not heard from you, we have to assume you have not opted for Furlough and as a result please find the attached letter confirming your redundancy.*
> *Many thanks for looking at this.*
> *Best regards*
> *John*

248. The claimant did not choose the furlough option. She complains, as did Mr Garcha in his case, that when she rejected furlough she was placed on garden leave and locked out of the respondent's systems. She complains, as did Mr Garcha, that garden leave had not been mentioned in her final consultation meeting or in any documentation. Judge Brown dealt with this at paragraph 139 of her judgment. She found that this did not indicate that a decision to dismiss was predetermined and that the decision to put

Mr Garcha on garden leave was not relevant to the decision to dismiss, because it happened during notice. Mr Yeouart's evidence was that Network Director TH was also placed on garden leave (his statement paragraph 17). He was the claimant's witness and he was not challenged on it so we find that Ms TH was also placed on garden leave. We find nothing unusual in this and no unfairness in it.

249. The claimant appealed against her dismissal on 27 April 2010 (page 1011). She was invited to an appeal hearing on 5 May 2020 held by the respondent's Chair Ms Kerry Ghize on Microsoft Teams. The claimant was given her statutory right to be accompanied (page 1017). Ms Adamus attended as the notetaker.

250. On 3 June 2020 Ms Ghize gave the claimant the appeal outcome. The appeal against dismissal was not upheld.

251. The claimant's dismissal took effect from 20 June 2020 and she was paid her redundancy pay.

252. Mr Jeffcock said that he was not aware at the time of the redundancy consultation that the claimant was setting up a new business in a similar field. We saw in the bundle entries from Companies House showing that a company called Corporate Innovation Partnership LLP was incorporated on 1 July 2020 with the claimant and Mr Garcha appointed as its directors on that date. The domain name of The Innovation Partnership was registered on 13 December 2019, the same week as the claimant lodged her grievance (bundle page 668). The claimant told the tribunal that it was Mr Garcha who obtained the domain name.

253. The date of incorporation of the company was the same day as the claimant received her redundancy payment. In her response to the respondent's application for a Deposit Order (bundle page 179 – point 1) she stated that she was paid her redundancy pay on 1 July 2020 and complains that it was 5 days late.

254. We find that the reason the claimant did not apply for any of the offers of alternative employment was because she and Mr Garcha planned to go into business together. We find on a balance of probabilities that people who set up in business together, take some time to plan it before incorporating a company. Mr Garcha had obtained the domain name about 6 months earlier. We are aware from the tribunal's findings in his case, that Mr Garcha similarly did not apply for any alternative employment.

<u>The victimisation claim</u>

255. We have considered whether the claimant was dismissed because she did the protected act of raising her grievance of 10 December 2019. The claimant said that two other women raised grievances and were "*exited*" from the business with settlement agreements. We could not attach any

evidential weight to this. Firstly we did not see their grievances to know whether they amounted to protected acts. Secondly, if there were settlement agreements, upon which we make no finding due to a lack of evidence, this indicates that the reason for the termination of employment was an agreement. This is not the same as the reason for the claimant's dismissal.

256. We have found that the reason for the claimant's dismissal was redundancy.

257. The claimant complained that the people who supported her in her grievance were also made redundant. These individuals were involved in the same redundancy exercise: Mr Garcha and Ms TH. A different tribunal has ruled that Mr Garcha was fairly dismissed for redundancy. Ms TH was involved in the same exercise. The claimant said that Mr SM did not support her in her grievance and was not dismissed. We find that he was not dismissed because he accepted alternative employment and this was also open to the claimant and the other Network Directors. We find no connection between the dismissal of any other individual and their support of her grievance.

258. The issue for us was not the reason for the termination of employment of anyone else, but whether the claimant was dismissed for doing the protected act of raising her grievance four months earlier on 10 December 2019. We find that the claimant was not dismissed for raising that grievance. The reason for her dismissal was redundancy.

<u>The equal pay claim</u>

259. The claimant worked as a Network Director. She compares herself with Mr Garcha. We saw the email negotiations between Mr Garcha and Mr Jeffcock leading to Mr Garcha's employment in 2018.

260. On 2 February 2018 Mr Jeffcock offered Mr Garcha the role of "Client Director" reporting to Mr Jeffcock. The offer was on a base salary of £65,000 + commission. On 12 February 2018 Mr Jeffcock offered Mr Garcha the role of "Commercial Director" on a base salary of £65,000 for three months moving to £75,000 on promotion to Commercial Director. Mr Garcha responded two hours later suggesting an initial salary of £70,000 rising to £75,000 (page 149). Mr Garcha did not want to drop below his existing salary of £70,000.

261. Mr Garcha's contract was at page 187. The salary was at clause 9.1 at £70,000 rising to £75,000 "*on promotion to Commercial Director".* This was a pay strategy the respondent had previously adopted with the claimant who joined on a salary of £45,000 rising to £50,000 on promotion based on their initial email correspondence in December 2015 (page 205). The claimant negotiated higher figures as we saw from the contract at page 294, she joined on £55,000 as Head of Network rising to £60,000 after three months' probation. On 1 April 2017 she became Network

Director and her salary was increased to £65,000.

262. Neither side gave us any evidence as to the day to day duties performed by the claimant and her comparator during the period of comparison, so we had to make our findings based on the documents and limited oral evidence before us.

263. The claimant confirmed in evidence on day 4 that her equal pay claim related only to the period prior to Mr Garcha becoming Head of Revenue. The equal pay claim covered the 7 month period from 1 March to October 2018.

264. The claimant and Mr Garcha are and were very good friends, she described him in her submissions at page 7 as her "*best friend*". It was the claimant who introduced Mr Garcha to the respondent. They now work together in the business they set up upon being made redundant from the respondent.

265. We had an email at page 186 dated 31 January 2021 from Mr Garcha to the claimant headed: "*To whom it may concern"* saying:

> *"I can confirm that during my employment at Winmark between 1st March 2018 – 3rd October 2018 my job title was Network Director and my salary was £70,000 per year. During this time I was performing exactly the same roles and responsibilities as the other Network Directors at Winmark including Corina Balaneanu.*
>
> *The promotion to Commercial Director which is stated in my contract was not guaranteed and never materialised. I was however promoted to Head of Revenue on 3rd October 2018 but I refused a salary increase at that time because I knew Corina Balaneanu was paid less than me whilst we were previously doing the same job as Network Directors and because the company at that time was not performing well financially."*

266. There was no witness statement from Mr Garcha and the claimant did not call him to give evidence. Mr Garcha's email was not tested in evidence and we attach little or no weight to it. We found it unpersuasive.

267. Mr Jeffcock's evidence was that Mr Garcha's role involved significantly greater responsibility than the claimant's role of Network Director. Mr Jeffcock said that Mr Garcha was required to take the lead on account allocation and management, leading on the acquisition of new Networks and strategic partners and the team leadership and supervision of others.

268. Mr Garcha was recruited specifically to become the Head of Revenue. Mr Jeffcock's intention was that as soon as Mr Garcha had completed his probationary period they would announce him as Head of Revenue. Mr Jeffcock offered the claimant the role and had this conversation with her "*a couple of times*". She accepted in her submissions, at page 7, that he asked her if she was interested. We find based on Mr Jeffcock's evidence

that she told him she was happy where she was and she introduced Mr Garcha.

269. The claimant was paid the same as the other male Network Director SM and she made no comparison with him during this hearing.

270. Our finding is that both with the claimant and her comparator, the respondent operated a recruitment exercise of taking them on at a slightly lower salary whilst they learned and went through probation with a view to promotion, in the claimant's case after 3 months and in Mr Garcha's case for a more senior role, after 7 months. We find that the reason for the differential in pay was that Mr Garcha was recruited to a more senior role which was to be on £75,000 and that he earned £5,000 less whilst he was training and learning the more senior role. We find that the claimant and Mr Garcha were not employed on like work, Mr Garcha was employed to take on a more senior role and was learning the role and in probation prior to 3 October 2018.

271. We are supported in this finding by the fact that the other male Network Director Mr SM was paid the same as the claimant and they were employed on like work.

272. The equal pay claim fails and is dismissed.

<u>The claim for unlawful deductions from wages</u>

273. There are three parts to the claim for unlawful deductions (i) commission on sales (ii) for a "bonus" or a "prize" for having won a sales competition and (iii) a voucher for a meal for two.

<u>The sales commission for the Tel Aviv Study Tour</u>

274. The claimant made five sales for the Tel Aviv Study tour. We have anonymised the names of the respondent's clients for their confidentiality. The details below were taken from the claimant's witness statement.

- A - £7,000 (closed in April 2019)
- B - £7,000 (closed in May 2019)
- C - £7,000 (closed in July 2019)
- D - £7,000 (closed in September 2019)
- E - £7,000 (closed in September 2019)

275. We saw two Commission policies. The first was at page 323 and was expressly stated as the policy for the 2018/2019 Financial Year. It said: "*The Policy will be effective for all commission payments made after 31st March 2018".* The calculation of commission was set out in this policy in the Schedule which was at page 328. In the Schedule it said: "*This 2018 policy will be implemented from 1st April 2018. All commission will only become due when cash has been received for a valid invoice."*

 On all new revenue, whether membership, Technical Partnership, or projects for Research and/or Academies or any other revenue a commission of 10%.

OTHER COMMISSION EARNING OPPORTUNITIES
Significant revenue referrals
In all cases the total commission will be 10% of the revenue, net of external delivery costs where appropriate. Commission sharing must be agreed as described above.

276. A new policy was published in November 2019 - page 550. The revision history states that it was updated in November 2019 by Ms Gulliver. The precise date in November was not stated. It introduced a new section dealing expressly with study tours, including payment of commission by instalments when the related sales invoice had been paid by the client. It also stated that: "*in all cases the total commission will be 10% of revenue net of direct costs where appropriate".*

277. The claimant's evidence in her witness statement on this issue at paragraph 2 was: "*For each of these sales I was supposed to receive 10% commission which is a total of £3,500. I only received £1,750 in November pay check. Therefore I am owed £1,750".*

278. We saw an email from the claimant to Ms GF in the Accounts Department, dated 26 September 2019 (page 441) where the claimant said: "*Furthermore some of the Tel Aviv delegates have paid their invoices ([A] 28 June and B on 30 July). Please can you let me know when I will receive the commission for these as I should have received it the following month after payment date according to our policy".*

279. Under the terms of the policy and based on the claimant's own evidence we find that the payment for client A was due in the July 2019 payroll and for client B in the August 2019 payroll.

280. We find that the relevant policy was the policy for the Financial Year 2018/2019 and not the November 2019 policy. The earlier policy applied because it was the policy in force when the commission was earned.

281. The respondent submitted that the commission was discretionary. We find it was not. The policy gave a right to the Board to adjust the policy from time to time at the discretion of the Board. Unless or until it was adjusted, the earlier policy applied.

282. The claimant was aware that this commission was due in July and August 2019 because she said as much in her email to Ms GF in accounts.

283. We had no evidence from either party as to when clients C, D and E paid their invoices. We have therefore made a finding on a balance of probabilities. Based on the time frame for clients A and B, we find that client C paid in September and payment was due to the claimant in the

October payroll.

284. On that formula clients D and E would have paid in November. However, we find on a balance of probabilities that the respondent expected payment up front from the client and they would not have been permitted to attend the study tour without payment, so we find that the latest date for their payment to be received was October 2019, so that payment fell due in November 2019.

285. The claimant was paid commission of £1,750 in November which was 5% of all of the totals. The respondent said that they had taken out the costs before paying £1,750. That basis of calculation was only made clear in the November 2019 policy which we find was not the applicable policy.

286. It was not disputed that "pay day" was 28th of the month. We find that any commission payment due to the claimant that fell due prior to the November 2019 pay day is out of time. This applies to the payments for clients A, B and C because the commission on our finding fell due in July, August and October 2019 on the 28th of each month.

287. These commission payments are out of time, as the primary time limit expired in respect of the last of them by 27 January 2020. They are not assisted by Early Conciliation which commenced on 14 February 2020. The claim was presented on 8 April 2020 and is about 2.5 months out of time for the October commission and even further out of time for the July and August commission.

288. We had no evidence from the claimant as to why it was not reasonably practicable for her to present the claim within time and the burden is on her to satisfy the tribunal as to this. We find that claim for the commission for clients A, B and C is out of time.

289. We find that the commission claim for clients D and E is within time and is due at the rate of 10% and not subject to the change of rules in the November 2019 policy as to the stripping out of costs. Credit is to be given for sums paid.

<u>The sales competition</u>

290. The claimant's case was that there was a competition running from August 2019 to March 2020 is outlined in an email from Mr Garcha dated 19 August 2019 with the following prizes (page 768): It was Mr Garcha who initiated this competition, in his role as Head of Revenue. Every month the person who generated the most new business was to win a prize:

- *The overall winner of the competition will win £1000.*
- *Second place will get £500*
- *Third place will get £250*
- *Fourth place will £50*

291. The claimant said she chased for the results of the competition but was never given the results. She estimated that she won the £200 prize at least three occasions and as she said she was generating the highest amount of new business sales. She also estimated that she won the overall prize of £1,000 and claims £1,600.

292. We had evidence from Mr Moore that he thought Ms TH "*came out on top*" in the competition but he could not remember with any certainty. Mr Moore said that he passed it to Mr Jeffcock and Mr Honeyman Brown to deal with.

293. Mr Jeffcock's evidence was that the company did not proceed with the competition and nobody in the company received a prize at all. No competition results were ever announced and this is supported by the fact that the claimant was chasing for this.

294. In Mr Garcha's email announcing this competition he said (page 768) *"John did confirm last week that he is happy with the prizes. Stupidly, I did not get it in writing but a verbal contract is binding in the state of New York! Ah $h1t, we are in London town!"*

295. Mr Garcha said that both he and Ms TH were in the competition yet they were going to make the draw. We find that this was all very informal and it did not amount to a contractual entitlement. It was a staff led initiative that had not been confirmed by Mr Jeffcock. Ultimately the competition was not run, no results were announced and no prizes were awarded.

296. We find that there is such a lack of contractual certainty that we are unable to find that the respondent made an unlawful deduction from the claimant's wages in failing to award her a competition prize.

<u>The meal voucher</u>

297. The claimant also claimed for a competition bonus announced by Mr Moore in an email of 11 February 2020 (page 767) with a subtitle "*Incentives for business closed this week"*. The incentives were for relatively low value vouchers and in some cases some leave from work. The claimant took the view that she won a voucher for a meal for two.

298. Mr Moore's evidence was that the claimant was entitled to a voucher for a meal for two valued at £100. He said it was a "*bit of a nightmare*" to get the voucher organised so he told the claimant to put it on expenses. We asked if the claimant did so, and he said "*I don't know, she was entitled to that"*.

299. Based on Mr Moore's evidence that the claimant was entitled to this we find that she was entitled to it and she is due to be paid £100. This claim is within time.

The relevant law

300. Under Section 94 of the Employment Rights Act 1996 (ERA) an employee has the right not to be unfairly dismissed by his employer. Section 98 that it is it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under section 98(2) ERA or some other substantial reason. Redundancy is a potentially fair reason for dismissal.

301. Redundancy is defined in section 139 ERA. So far as relevant, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

> *(b) the fact that the requirements of that business—*
>
> *(i) for employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish."*

302. If the employer satisfies the Tribunal that the reason for dismissal was for a potentially fair reason, then it goes on to consider whether the dismissal was fair under section 98(4) ERA. This has a neutral burden of proof.

303. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

304. The leading case of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** sets out principles which guide tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are a fair selection of pool, fair selection criteria, fair application of the criteria, seeking suitable alternative employment and consultation on these matters.

305. The requirement is to act reasonably and within a band of reasonable responses open to the employer.

306. In ***Taymech Ltd v Ryan 1994 EAT/663/94*** Mummery P said: "*There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem.*"

Direct discrimination

307. Direct discrimination is defined in section 13(1) of the Equality Act 2010 which provides that 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.

308. Section 23 Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case

Victimisation

309. Section 27 Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

310. 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.*

Harassment

311. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(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.*
>
> *(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;*
>
> *(b) the other circumstances of the case;*

(c) whether it is reasonable for the conduct to have that effect.

312. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

313. In ***Grant v HM Land Registry 2011 IRLR 748*** the CA (Elias LJ) said:

> *Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. (paragraph 47)*
>
> and
>
> *I do not think that a tribunal is entitled to equate an uncomfortable reaction to humiliation. (paragraph 51)*

<u>Equal pay</u>

314. Section 65 of the Equality Act deals with equal pay for equal work. It provides that A's work is equal to that of B if it is like B's work. A's work is like B's work if it is the same or broadly similar and such differences as there are between their work are not of practical importance in relation to the terms of their work. It is necessary for the tribunal to have regard to the frequency with which differences between their work occur in practice, and the nature and extent of the differences.

315. In comparing the, the tribunal must look at what the claimant and the comparator did in practice. It is irrelevant that the nature of their work is defined differently in their contracts of employment or job descriptions if the difference is not reflected in what they actually did.

316. Section 66 Equality Act provides for the sex equality clause in contracts of employment:

> *If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.*
>
> *(2) A sex equality clause is a provision that has the following effect—*

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term

Time limits – equal pay claims

317. Section 129 Equality Act deals with the time limit in an equal pay case. Section 129(2) says that the proceedings may not be brought after the end of the qualifying period. Subsection (3) sets out a table in relation to the qualifying period.

318. In a standard case it is the period of 6 months beginning with the last day of the employment and in a stable work case it is the period of 6 months beginning with the day on which the stable working relationship ended.

Time limits for discrimination claims other than equal pay claims

319. Section 123 of the Equality Act 2010 provides that:

(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

320. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

321. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed" (paragraph 52).

322. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs

covered by the concept of an act extending over a period.

The burden of proof

323. Section 136 of the Equality Act deals with the burden of proof and provides that 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.

324. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

325. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

326. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

327. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination"

328. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

329. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage***. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to

establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination

330. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Unlawful deductions from wages

331. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

332. Section 23(2) of the ERA provides that subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. Subsection (4) provides that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Conclusions

Direct sex and race discrimination and harassment related to sex and race

333. We have made detailed findings above that the claims for direct discrimination and harassment claims fail and are dismissed.

334. As these claims failed, it was not necessary for us to consider any time limitation point.

Unfair dismissal

335. We find that there was a genuine redundancy situation. There is no doubt in our minds that even prior to the pandemic the respondent was in a difficult financial situation and was considering changes to the way in which it delivered services to its clients. The situation became more pressing with the start of the national lockdown. We find that the requirements for the business for employees to carry out work of a particular kind including face to face sales as carried out by the Network Directors, had greatly diminished and was expected to diminish further. The size of the company decreased considerably 23 to 14. They decided they could run their business with fewer employees. We are in no doubt that there was a genuine redundancy situation and that the reason for the claimant’s dismissal was redundancy.

336. Based on our findings above, we find that there was a fair process and that dismissal fell within the band of reasonable responses. There was fair selection for redundancy and we did not accept the claimant's argument that Mr Moore should have been included in the pool. We find that there was sufficient consultation with the claimant and we have found that she was not interested in suitable alternative employment because of her plan to set up her own business. Nevertheless we find that the respondent acted reasonably in offering suitable alternative employment and in addition offered the option of the furlough scheme.

337. In making our findings on unfair dismissal on the redundancy issue we noted the decision of Employment Judge Brown in case number 2204021/2020 between Mr A Garcha and this respondent. That decision was sent to the parties on 28 July 2021 and appeared in the bundle.

338. The unfair dismissal claim fails and is dismissed.

Victimisation

339. We have found that the reason for dismissal was redundancy. It was not because the claimant did a protected act. The claim for victimisation fails and is dismissed.

The equal pay claim

340. The respondent accepted that the equal pay claim is within time having been brought within six months of the termination of employment.

341. The equal pay claim fails because we have found that the claimant and her comparator were not employed on like work in the comparison period from 1 March 2018 and 3 October 2018.

342. We saw in the claimant's Schedule of Loss at page 1302 that she claimed equal pay back to her start date in January 2016. Mr Garcha did not join until 1 March 2018 and for the benefit of the claimant we make clear that for an equal pay claim an actual comparator is needed and not a hypothetical comparator.

343. For these reasons the equal pay claim fails and is dismissed.

Unlawful deductions from wages

344. The claim for commission is out of time in respect of clients A, B and C and within time for clients D and E.

345. The claim in relation to the sales competition fails for the reasons set out.

346. The claim for £100 for a meal for two succeeds based on Mr Moore's evidence that the claimant was entitled to it.

347. The claim for unlawful deductions on the commission for clients D and E falls to be considered at a remedy hearing and credit is to be given for sums already paid by way of commission for the five clients in question. The claimant is additionally entitled to the sum of £100.

348. The parties are encouraged to agree the figures for remedy and are to inform the tribunal if a remedy hearing is required.

_____

Employment Judge Elliott
Date: 11 October 2021

Judgment sent to the parties and entered in the Register on: 11/10/2021
_____ for the Tribunal