EMPLOYMENT TRIBUNALS

Claimant: **Miss D Tripathi**

Respondents: **(1) Hennik Group Limited**
(2) Mrs V Hussey

Heard at: **London South Hearing Centre**

On **22/11/21**

Before: **Employment Judge McLaren**
Members: **Ms. B.C Leverton**
Mrs. N Beeston

Representation
Claimant: Ms. C Urquhart, Counsel
Respondent: Mr. D Matovu, Counsel

JUDGMENT

The unanimous decision of the tribunal is that: -

1.The Claimant was unfairly dismissed by the First Respondent .
2. The claim for wrongful dismissal succeeds against the First Respondent.
3. Neither the First or Second Respondents had contravened s13, s26 or s27 of The Equality Act 2010 and all complaints of discrimination in relation to each and all of the protected characteristics do not succeed.

REASONS

Background

1. We heard evidence from the claimant on her own account and from Frederick Tongue, Business Development Executive as well as reading a written statement from Aneesha Qazi, Business Development Manager. The

witnesses for the respondent were Nick Hussey, CEO, Victoria Hussey, Finance and HR manager and Grace Gilling, Managing Director

2. We were provided with a bundle of 788 pages. In reaching our decision we took account of the pages to which we were referred, the witness evidence and the parties' helpful submissions.

Application to amend and to remove the second and third respondents

3. At a case management hearing in January 2021, EJ Wright had set out a draft list of issues, ordered the parties to agree these and given the claimant permission to provide further particulars, but strictly by reference to the claim form.

4. On 12.2.21 the claimant applied to amend her claim form and provided further particulars in a 21-page document. The respondent served amended grounds of resistance on 5.3.21 and objected to some parts of the document as an amendment extending the claim. The issues had not been agreed by the parties because of the dispute as to the extent of the claims brought.

5. The application to amend was not addressed by the tribunal prior to this hearing and we therefore dealt with it as a preliminary matter at the outset of this hearing. Counsel for the respondent also made an application that the claims against the second and third respondents be dismissed.

Relevant law

6. In support of the application to dismiss the second and third respondents, Counsel for the respondent submitted that no recognisable claim within the jurisdiction of the tribunal had been raised by the claimant against the second respondent, and any claim raised by the claimant against the third respondent had no real substance and was out of time by several months as it related to an email of 29th July 2019.

7. The respondent's counsel referred us to Baker v the Commissioner of Police of the Metropolis 2010 UKEAT/0201/09 as authority that the technical approach to the question of whether a particular claim is raised in the ET1 is inappropriate, it must be read as a whole and the ET1 must contain recognisable legal claims which the claimant wishes to pursue. Ticking a box is not sufficient without setting out particulars of a particular claim or case.

8. We were also referred to Harden v Wootlif and anor 2015UKEAT/0448/14 which confirms that if it is considered just and equitable to extend time, then that discretion must be exercised in respect of each respondent separately and therefore the third respondent's position must be considered separately from the first and second respondent.

9. We reminded ourselves of Chandhok v Tirkey [2015] ICR 527, in which an issue as to the scope of the claim arose. The EAT said:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is

otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond".

10. We were referred to, and also considered Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT That provides that in determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.

11. In Selkent, Mr Justice Mummery, explained that relevant factors would include:

(a) The nature of the amendment

Applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to, on the other hand, the making of entirely new factual allegations that change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

(b) Applicability of time limits

If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended

(c) Timing and manner of the application

An application should not be refused solely because there has been a delay in making it, as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor.

12. In the context of the discretion to allow a proposed amendment, the first key factor identified was the nature of the proposed amendment. Selkent made it clear that this should be considered first, before any time limitation issues are brought into the equation, as it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from 'relabelling' the existing claim. If it is purely a relabelling exercise, then it does not matter whether the amendment is brought within the timeframe for that particular claim or not.

Submissions

13. It was noted that the written application made by the claimant's representatives to the employment tribunal when the document was submitted, referred to paragraphs 3.10 and 3.11 as amendments. The letter of application also stated that if any other matters were deemed by the tribunal to be more than additional particulars, an application to amend was

made in respect of all these paragraphs. In submissions before us on behalf of the claimant Ms Urquhart submitted that the details given in the 21-page document were all in fact further and better particulars and did not amount to an amendment. If, however, we were not with her on that, then she also asked for permission to be granted to include all the points made in this document as an amended claim.

14. She went through the history of the matter between the parties and identified that in the original response the respondent had taken issue with only four parts of the particulars of claim document and that this also appeared to be resolved as the parties had agreed an issues list, save ,for one point, but that point did not concern these amendments. The claimant had thought the matter had been resolved until the morning of the hearing.

15. We agreed that the actions of the parties and whether they had or had not agreed this amendment cannot bind this tribunal. We must consider whether the matters pleaded in the document are new matters, in which case amendment must be considered or are already allowed for within the scope of the pleadings.

16. The respondent submitted that if one looks at the claim form at page 17 of the bundle and the attached letter, which begins on page 25 of the bundle, the thrust of the paragraphs of the claim form are all about dismissal. Paragraphs 6 and 7 refer to discrimination but link that to dismissal. Paragraph 14 refers to announcements not being appropriate and potentially libellous, but that is not a claim for which the tribunal has jurisdiction. There is a reference in paragraph 11 to an appeal process which references “Indian”. There is the use of the word stigma. In counsel’s submissions the claim form itself makes very little reference to discrimination, other than in relation to the dismissal.

17. Turning to the attached letter again, the complaints are in effect about the dismissal. There is reference at the end of the section headed “libellous email” to the claimant having been treated less favourably than other staff in relation to her pay, being seen as the Asian salesperson and then it states, “we consider that the email further constitutes discrimination, harassment and victimisation of her”. There is then one other reference to discrimination at paragraph 2.7 of this letter which states that she is repeatedly being treated less favourably and discriminated against because of her age, gender and ethnicity and then gives examples of this as the pay issue and then being passed on leads because the client was Indian.

18. It was Mr Matovu’s submission that neither victimisation nor harassment are drawn out in the claim form and that the claim is essentially a complaint of unfair dismissal discrimination in relation to that dismissal and pay issues. That is the limit of the ET3. If one then turns to the amended claim form it now sets out what he submitted were new claims of harassment and victimisation in relation to 3 protected characteristics. The reference to the mispronunciation of the claimant’s name is entirely new, as is the reference to her being excluded. The references to the libellous email do not amount to a claim for which we have jurisdiction.

19. Counsel submitted that there was no suggestion that these matters had just been uncovered. They were within the claimant's knowledge at the date of the dismissal and there is no reason why she could not have made her application to amend much earlier. She did so in February 2021 after the preliminary hearing order, but no reason was put forward as to why it was not in the claim form. In allowing these amendments, the balance of prejudice is borne by the respondent who would be faced with responding to a much-expanded claim, while the claimant would continue to have a number of substantial claims. For those reasons he submitted the tribunal should not exercise its discretion in the claimant's favour.

20. The claimant's representative submitted that harassment and victimisation were included in the claim form and had been accepted in this way by Employment Judge Wright. If one looked at the claim form paragraphs 7 and 11, there is talk about discriminatory conduct, and then at paragraph 2 of the letter examples are given of such conduct. Reference is made in the claim form to vindictive and to stigma, which would be understood to be linked to victimisation.

21. Counsel for the claimant repeated that the respondent had only recently objected to these matters and went through the specific objections made by the respondent in their written response to the written application. The reference to the mispronunciation of the claimant's name was an example of discrimination and was not raising a new course of action. Again paragraphs 3.20, 4.17 and 5.17 puts the same actions in the alternative as harassment. This head of claim had been identified on the claim form. It was in effect giving information and particulars for existing claims. The exclusion again is an example of the course of discriminatory conduct complained of in the claim form.

22. Counsel submitted that if we were treating these matters as an amendment, then the balance is in the claimant's favour. The respondent is prepared to meet this case and there is no surprise. They had already prepared a draft list of issues which was almost agreed, and which covered these matters. There were statements and documents prepared to include these matters. They were not new causes of action, but examples only.

23. Counsel for the claimant further submitted that the amendment was submitted promptly after the order of Employment Judge Wright. The respondent had eight months knowledge of this matter. There is sufficient time before the tribunal to hear all these matters and therefore it is in the interests of justice and the overriding objective to allow the claimant to put forward her full case.

Conclusion on amendment application

24. We considered the claim form, including the letter which accompanied it carefully to determine what we considered to have been pleaded. In doing so we considered the case management orders and preliminary hearing of Employment Judge Wright on the 22 January 2021. We are not bound by her view but have considered it and we note that her reading of the claim forms was that there was a harassment claim related to race in relation to

pay. She also considered there was a victimisation claim but was unable to determine from the pleadings what this related to.

25. It is our conclusion that on the face of the pleadings there is a clear complaint of discriminatory conduct against the claimant due to her age, race and gender. That is set out at paragraph 7 of the claim form. We understand, looking at the claim form, that complaint of discriminatory conduct to be the dismissal and pay issues in relation to these three protected characteristics. We note that the claim for equal pay cannot be brought as a claim for sex discrimination, so accept this as brought on grounds of race and age only.

26. When we then look at the appeal grievance letter before action, which forms part of the claim form, we conclude that again this repeats that the claimant has been discriminated against due to her age and ethnicity in relation to pay. Looking at the last paragraph under the heading "libellous email", we find again the claimant is raising a complaint that she is discriminated against in relation to her pay. It is unclear in this paragraph what protected characteristics are relied on, but we are satisfied that she has already raised the issue of pay on the grounds of three protected characteristics, albeit one cannot be brought in that way. In this paragraph she also raises a complaint that she is seen as the Asian salesperson and therefore put forward to deal with clients who were Indian or Asian. We were directed in particular to an email of 29 July 2019. We find that this is a complaint of discrimination on the protected characteristic of race only.

27. The paragraph concludes with the sentence "we consider that the email further constitutes discrimination, harassment and victimisation". We conclude that giving the sentence its natural meaning, the reference is to the libellous email and not to the email sent by Mr Hussey. We are satisfied that it is a concluding sentence dealing with the substantive matters of this paragraph, that is the email of 31 March 2020. We conclude therefore that the claimant has raised the sending of this email, not only as a complaint of direct discrimination, but also of harassment and victimisation. We also find that the reference to harassment and victimisation, because of the word "further" in the sentence, is intended to encompass dismissal, which is set out in the claim form, pay which is set out in the claim form and this letter, and being seen as the Asian salesperson, an example of which is the email of 29 July 2019 which is referenced only in this letter.

28. We are satisfied that the claimant has therefore pleaded as acts of harassment and victimisation these things, dismissal, sending the email of 31st March 2020, the lower pay rate and being seen as the Asian salesperson. We have already concluded that the last of these is brought on the grounds of the protected characteristic of race only. We concluded that the claims in relation to dismissal and pay are pleaded in relation to 3 protected characteristics, although pay can only be brought on 2 grounds as a matter of law.

29. On balance we conclude that the email of 31 March 2020 is also pleaded on the grounds of all three protected characteristics. It is linked to dismissal, which is said to be because of all characteristics and is referred to in a paragraph that includes another claim which is brought on all three

characteristics. While one matter referred to in the paragraph on page 25 is limited to race only, that is implicit in the way it is set out. We find that there is no such limiting reference in the description of what is described as the libellous email and so on balance, conclude that it is pleaded widely.

30. Having satisfied ourselves as to what matters were pleaded. We have then considered those parts of the amended claim form that are not pleaded and which we must consider as part of an amendment application. We conclude that paragraphs 3.10, 3.11, 3.17, 4.8 and 5.7 are not pleaded. We also consider that any allegations of harassment or victimisation in relation to the protected characteristics of race, gender and age are limited to complaints about unfair dismissal, pay and to the email of 31 March 2020. A complaint of victimisation or harassment in relation to the email 29 July 2019 is brought on the protected characteristic of race only.

31. We conclude that these proposed amendments are more than mere clerical issues and more than the addition of new facts and circumstances and are substantial amendments. We conclude that the claimant was fully aware of all these matters at the date of the dismissal and did not seek to make an application to amend until eight months later. No explanation has been given for this.

32. We have considered the balance of justice and the comparative hardship to either party should we allow or refuse this amendment. These amendments substantially expand the scope of the claim that the respondent thought it had to meet. While it may be that the respondent's witnesses could do so, adding these matters will potentially extend the time needed to deal with this case. The claimant is still able to pursue a substantial number of claims. Taking all things into account, in the round we therefore conclude that the balance of hardship would fall more heavily on the respondent in allowing these amendments and the application is refused.

33. We consider that paragraph 3.22 is not an amendment but a legitimate response to the order to provide particulars and it stands.

Dismissal of the second and third respondents

34. Counsel for the respondent made a further application that both the second and third respondent be dismissed. In relation to the third respondent, one allegation was made against him, that is the sent email in March 2019. It was submitted that this email offered a new account lead for the claimant's benefit, and it is difficult therefore to see how it supports any allegation that she was passed over for leads. In addition, the complaint is made out of time. No explanation has been given as to why it had taken over a year to issue a claim on this one email. The balance of justice is on the respondent. The claimant can still pursue a number of other claims.

35. Counsel for the claimant submitted that this was a course of conduct and that the third respondent as a senior number of the team was able to create a culture of discrimination. It was noted that the respondent's witnesses also identified the third respondent as the directing mind behind

31 March 2020 email. It was therefore within time, and it had been accepted that this had been pleaded.

36. The claim against the second respondent is also limited to one document that is 31 March 2020. While counsel for the respondent accepted that that claim was made in time, he submitted that it should be struck out as having no reasonable prospects of success. In his submission it was not pleaded as victimisation, nor could any harassment be made out as it was not linked to any protected characteristic.

37. Once we had made our decision on the amendment, Counsel for the respondent also submitted that it was not the case that because we had found harassment/victimisation pleaded on three protected characteristics against the first respondent, we could assume that it was also pleaded in this way against the second respondent. He submitted that it was not pleaded in this way. In the interests of time counsel agreed that we would continue with this as an issue, and he would make submissions at the end of the hearing.

Conclusion on removal of respondents

38. Based on our conclusions as to what has been pleaded, we find that the email of 31 March 2020 was pleaded as harassment in relation to 3 protected characteristics. The respondent's application to remove the second respondent does not succeed. An in-time claim has been pleaded and its merits are best determined by hearing the evidence.

39. We agree that the claim against the third respondent is brought out of time. We do not find that this is a continuing act that can be linked with the sending of the email of 31 March 2020.

40. No explanation is given as to why the claim is made out of time. We therefore do not find it is just and equitable to extend the time limit. The tribunal has no jurisdiction to hear this claim against the third respondent and the claims against the third respondent are accordingly dismissed.

Application by the respondent to admit an additional document

41. During the course of the hearing reference was made by the claimant in her evidence to a client account and the task she said she was given to carry out. This had not been set out previously in her witness evidence. The respondent sought permission to put before the tribunal a document which it was submitted evidenced that the claimant had not been asked to carry out the particular task she suggested.

42. We refused the respondent's request. Considering the document, it refers to a different time period and did not in our view assist the Tribunal. The contentious point could be as easily put to the witnesses without the document, which the claimant had not had an opportunity to see. The claimant was in the middle of cross-examination at the point the application was made, and we considered that it would unnecessarily disrupt the flow of proceedings to put a document into the bundle which would not assist the Tribunal in any event.

Application by the claimant to exclude the respondent's witnesses during the evidence of each witness.

43. We were asked by the claimant's representative to exercise our power under rule 43 to exclude the respondent's witnesses. It was put to us that each was involved in an interlocking and overlapping way in the disciplinary appeal and grievance matters, or was involved in the same chain of emails, and their exclusion was necessary in order to avoid the risk of tainting evidence and to prevent giving an unfair advantage with one witness having the benefit of knowing the cross-examination that is coming.

44. The respondent objected on the basis that this is not normal procedure, and there were no grounds to do so on this occasion. One of the witnesses is a respondent in their own right and therefore has the right to be present.

45. We refused the claimant's application. We understand that rule 43 gives us the power to exclude witnesses where it is in the interest of justice to do so and that there is no reason in principle why a tribunal in England and Wales cannot exercise its power where witnesses are giving evidence on the same contested factual issue and there is a risk of tainting evidence and/or giving an unfair advantage in knowing the line of cross-examination that is coming. On the facts of this case there is nothing that persuades us that it is in the interests of justice to exercise this power. There is nothing that distinguishes the interlocking overlapping nature of these witnesses' evidence from that of witnesses in many other employment tribunal hearings. We are not persuaded that there is any reason for us to deviate from standard practice and do not consider it is in the interests of justice to do so when weighed against the prejudice to the respondents.

Issues

46. The issues in this matter were disputed between the parties. The decision on amendments clarified matters somewhat but still left open the question of which comparators had been named. The claimant's representative submitted that in addition to the three individuals who were expressly named in the pleadings, namely Mr Hartley and Ms Qazi in relation to pay and Mrs Hussey in relation to disciplinary proceedings, the further particulars had given sufficient generic description to include other specific individuals. She suggested that reference to the claimant's predecessors and sales managers who are white British and other department heads who are white British having a higher basic salary than the claimant, put the respondent on notice of three individuals as express comparators, Mr Biddle, Mr Aspill and Mr Kapur. She also submitted that the reference to the claimant's older colleagues not being subjected to disciplinary action was sufficient to put the claimant on notice that Mr Tongue and Mr Hartley were appropriate comparators.

47. The respondent's counsel submitted that this was not the case. It was important that the respondent had the opportunity to demonstrate that any named comparator was not an appropriate one. To do so it needed details of who these individuals were. The claimant had been ordered at the

preliminary hearing to provide appropriate details and, despite having legal advice which had led to a detailed 21-page document a further particulars, had failed to name these individuals.

48. We considered the matter and agree with the respondent's position. The claimant clearly understood what she needed to do, that is provide express comparators; she had legal advice but failed to do so. The respondent would be prejudiced if these comparators were now allowed to be brought as it had insufficient time to prepare or meet this case.

49. Counsel for the claimant prepared a draft list of issues which we went through in the hearing, and we were able to agree the following as the issues list

Jurisdiction

i. When did the acts of discrimination, harassment and victimisation complained of take place?

ii. Was the Claimant's claim presented within three months of the date(s) of the acts complained of (allowing for ACAS Early Conciliation under s18A Employment Tribunals Act 1996)?

iii. Do the acts complained of form conduct extending over a period, pursuant to s123(3)(a) Equality Act 2010, and if so is the end of that period in time?

iv. If the acts are out of time, would it be just and equitable for the Tribunal to extend time under s123(1)(b) Equality Act 2010?

1. Unfair dismissal

1.1 Was the Claimant dismissed? [This is not in dispute.]

1.2 What was the reason or principal reason for dismissal? R1 says the reason was conduct. The Tribunal will need to decide whether R1 genuinely believed the Claimant had committed gross misconduct.

1.3 If the reason was misconduct, did R1 act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.3.1 there were reasonable grounds for that belief;

1.3.2 at the time the belief was formed R1 had carried out a reasonable investigation;

1.3.3 R1 otherwise acted in a procedurally fair manner having regard to the disciplinary process as a whole including both the disciplinary and appeal processes; and

1.3.4 dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1 What financial losses has the dismissal caused the Claimant?

2.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3 If not, for what period of loss should the Claimant be compensated?

2.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.1.5 If so, should the Claimant's compensation be reduced? By how much?

2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.1.7 Did the R1 unreasonably fail to comply with it by: not conducting a reasonable, formal or fair disciplinary and appeal process for the reasons set out in the FBPs.

2.1.8 If so is it just and equitable to increase any award payable to the Claimant? By what proportion, up to 25%?

2.1.9 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

2.1.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

2.1.11 Does the statutory cap of fifty-two weeks' pay apply?

2.2 What basic award is payable to the Claimant, if any?

2.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal / Notice pay

3.1 The Claimant's notice period was five weeks. She was not paid for that notice period.

3.2 Was the Claimant guilty of gross misconduct?

4. Direct discrimination (Equality Act 2010 section 13)

4.1 The Claimant is female. She compares herself to hypothetical male employees.

4.2 The Claimant's age group is 25-30 and she compares herself with actual and hypothetical employees in the age groups 35 plus, including R2 (in relation to missing invoices), Neil Hartley and Aneesha Qazi.

4.3 The Claimant is not white. She compares herself to actual or hypothetical white employees including R2 (in relation to the action taken for missing invoices),

4.4 The Claimant is of Asian ethnicity. She compares herself to hypothetical and actual British employees including R2 (in relation to the action taken for missing invoices),

4.5 Did R1 do the following things:

4.5.1 Pay her less than other employees in particular Neil Hartley and Aneesha Qazi?

4.5.2 Send the email to staff on 31 March 2020, before the claimant's appeal?

4.5.3 Subject the Claimant to disciplinary action and dismiss her?

4.6 Did R1 send the email of 29 July 2019?

4.7 Did R1 and/or R2 do the following things: -

Send the email to staff on 31 March 2020, before the Claimant's appeal?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

4.8 If so, was it because of age or sex or race? The claim regarding equal pay at 4.5.1 above is advanced only on the grounds of race and age, not sex. The claim at 4.6 is only on the basis of race.

4.9 Did the treatment amount to a detriment?

4.10 In relation to the claims of age discrimination, was the treatment a proportionate means of achieving a legitimate aim? R1 contends that the Claimant was offered a suitable remuneration package including enhanced commission entitlement plus additional annual leave with due regard to her role, skill set, the level of her management responsibilities to lead and develop the sales function and her experience.

4.11 The Tribunal will decide in particular:

4.11.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.11.2 could something less discriminatory have been done instead;

4.11.3 how should the needs of the Claimant and R1 be balanced?

5. Harassment related to race, (Equality Act 2010 section 26)

5.1 Did R1 do the things listed in paragraphs 4.5.1 to 4.5.3, 4.6 and 4.7.1 above?

5.2 Did R2 do the thing listed in paragraphs 4.7.1 above?

5.3 If so, were they unwanted conduct?

5.4 Did they relate to race?

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

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

6. Victimisation (Equality Act 2010 section 27) (related to race)

6.1 Did the Claimant do a protected act as follows:

6.1.1 raising concerns about her unequal pay with James Smith in April 2019

6.1.2 raising concerns about her unequal pay with Grace Gilling in April 2019

6.1.3 raising further concerns about her unequal pay with Grace Gilling in late 2019 and January 2020

6.1.4 raising concerns about unequal pay with Jane Nordhuis in January 2020?

6.2 Did the Respondents know or believe that the Claimant had done or might do a protected act or intended to do a protected act?

6.3 Did R1:do the things listed in paragraphs 4.5.1 to 4.5.3, 4.6 and 4.7.1 above?

6.4 Did R2 do the things listed in paragraphs 4.7.1 – 4.7.3 above?

6.5 By doing so, did they subject the claimant to detriment?

6.6 If so, was it because the claimant did a protected act?

6.7 Was it because the Respondents believed the claimant had done, or might do, a protected act?

7. Remedy for discrimination or victimisation

7.1 Should the Tribunal make a recommendation that the Respondents take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8. Unpaid Redundancy Pay (section 135 ERA)

8.1 Was the Claimant made redundant?

8.2 What is the statutory redundancy pay to which the Claimant was entitled, it being accepted that she wasn't paid it?

Finding of facts

Background and Early Employment History

50. The first respondent organises business conferences and exhibitions and publishes magazines. The claimant was employed by the first respondent on 15 September 2014 until her employment ended on 31 March 2020.

51. The claimant's role with the first respondent was her first "proper job" after graduation. She had some previous experience in a sales commission role in retail and work experience with publishing houses. When she was first employed, she was happy with her salary and package describing it as "decent" given her lack of experience.

52. In May 2017 the claimant's salary was increased from £24,000 per annum to £30,000 per annum. She confirmed that she made no allegations or complaints about her pay and discrimination at this point.

Complaints about pay

53. In her witness statement the claimant said that in 2017 Sean Aspill was recruited on a basic salary of £50,000. He was given the title Sales Director. She believed he had no manufacturing sales experience. In 2019 when Mr Aspill resigned, the role was given to Stuart Biddle on a salary of £50,000 and a performance related bonus of £10,000. The claimant believed he also had limited sales experience. In her witness statement the claimant said that she was upset about not being considered for this role and it was that which made her realise it was time to move on from the first respondent. She therefore began to apply for jobs.

54. In August 2018, in an effort to stay with the first respondent, the claimant had a conversation with Grace Gilling and Stuart Biddle in which she expressed her desire for greater responsibility and opportunities to learn. There was an initial offer made to her which the claimant did not feel met her needs and she therefore decided to resign. The resignation letter at page 171 described having had an amazing four years with the company. Having received the resignation letter, Grace Gilling had a face-to-face

meeting with the claimant, and as a result of that conversation the claimant was offered an increased salary of £40,000 per annum together with 30 days leave. The claimant was happy with that result and her promotion to Sales Manager. She weighed up this offer against the possibility of a job elsewhere and decided that this was a good option, which she consequently accepted.

55. In her witness statement the claimant gave details of this face-to-face meeting and said that she expressed her concerns to Grace Gilling that men were being paid more than her for doing the same role. Her witness statement does not suggest that she raised a complaint of discrimination, other than making this statement, or that she suggested that the differential was on any grounds other than gender.

56. On 4 June 2019, almost a year after her promotion, the claimant sent an email to Grace Gilling raising the question of what was described as a percentage override and a bonus. This email said that she had carried out research and believed that other sales managers in other businesses were entitled to a percentage of the sales made by all members of the team together with a bonus if this sales team met its targets.

57. The claimant said that she had a conversation with Grace Gilling about this and told her that she was aware that all prior sales managers were granted a commission based on the team's earnings as well as bonuses. The claimant said that she had been expressly told that by Sean Aspill that he had such an arrangement in place. The claimant said that the two individuals who had held the position of Sales Director prior to Mr Aspill had also had these arrangements in place. The claimant accepted that she was a sales manager while Mr Aspinall and his predecessors had a different title, that of Sales Director. The claimant said she carried out the same duties and took on what was the same role but was not offered the same pay package.

58. We find that the roles of Sales Manager and Sales Director are not the same. We accept that the claimant was operating at a more junior level than director and was given more support and training as a sales manager. The claimant accepted that she did not raise any issue of discrimination in those terms, but did complain both to Grace Gilling and to Jane Noordhuis, her line manager, about her pay.

59. In March 2019 the first respondent recruited Neil Hartley who joined the sales team and was managed by the claimant. He was offered a salary of £40,000 per annum and, according to the claimant, the same terms on commission as her. The claimant says that she spoke to James Smith, Head of Events at the first respondent, as well as to Grace Gilling about this as it was unfair to pay her junior ie. Neil Hartley that package, when the claimant had additional responsibilities. The claimant recalled that Ms Gilling told her that Neil Hartley had been given this package because of his age and experience. We were taken to page 181/183 of the bundle which is an exchange with Neil Hartley about his remuneration. While this does reference experience, he is given a target of £500,000 per annum along with the basic £40,000. That is a different target from the claimant. We find that the 2 were not on the same remuneration package.

60. In January 2020 Jane Noordihus joined the business and the claimant's weekly management meetings were now with Grace and Jane. The claimant said that she spoke to Jane and told her that she felt demotivated due to unfairness in pay because two individuals (one an older white British man and the other an older woman) were being paid the same basic salary and the same commission, despite the fact that the claimant was their line manager. The claimant's witness statement says that she also set out to Jane that she was paid less than older white male heads of sales and other team members.

61. On the claimant's evidence, Jane agreed that the commission was not good enough and told her that she would speak to Grace and come back to the claimant the following week. The claimant says that as a result of this conversation she was given a revised package. Her annual target was increased by 150% and the company target by 120%. There was no increase in the base salary, but there was a change to the commission structure. She was told that if the team achieved £4 million of sales in 2022, she would get 1% of any sales made above that. The claimant considered that this was unachievable, and it coincided with the beginning of uncertainty around Covid 19. We find that from this point, however hard to achieve, the claimant was on a different commission structure than her team and stood to benefit from the efforts of those she managed.

62. At the end of February 2020, the claimant returned from holiday and was told that Aneesha Qazi would be returning to the business and working in her team. The claimant became aware that Aneesha was on the same package as she was. This was not in fact the case as the claimant also had the override bonus set out above. As a result, the claimant said that she had a meeting with Grace and Jane and told them she wanted to step down as sales manager and revert back to a business development manager role. The claimant's witness evidence was that she told them that another reason for this decision was that her pay was not reflective of her responsibilities, and she wanted to earn a decent wage, the same as the white, older, and British staff. This was disputed by Grace Gilling.

63. The claimant stepped down from the more senior role in March 2020. She agrees this was entirely voluntary and it took effect from the week of 9 March 2020.

64. The claimant said that the respondent operated an open-door policy and that she raised it to her line manager at the time, but they took no action. She accepted she had not raised this as a grievance, but only verbally. The claimant confirmed she was aware of the existence of the staff handbook and that she could have looked at that online to identify how to raise a complaint or grievance. Mrs Hussey confirmed that no complaints were ever raised to her but confirmed that the correct process for any grievance was to raise it with the line manager and then with their line manager. HR would be involved only after that. The claimant did complain to the appropriate people.

65. We find that the claimant had conversations about her pay with her line manager and their line manager in April 2019, June/July 2019 and January 2020. We do not find that she raised any issues in late 2019. No such issues

are described in her witness statement. We find that on no occasion did she raise this as an allegation of discrimination about pay, nor did she raise any formal grievance or complaint beyond that. We find that the claimant was not specific about the nature of her complaints in these terms and while she had complained about pay, had not raised this as a discrimination issue. We conclude this because at the point the claimant raises the issue of an override bonus, she does not refer to discrimination issues, nor does Jane refer to this when the new scheme is set out. We consider Jane would have made some reference to this had it been raised with her. We find that the respondent was, therefore, unaware that the claimant had any concerns of discrimination in relation to her pay and that this was not how the claimant raised it.

66. We find that the roles of sales director and sales manager are not the same. Any differential in pay reflects a different job title and seniority. We have found that Mr Hartley was not paid the same as the claimant. In respect of Ms Qazi, at the time that the negotiations for her remuneration package were ongoing, the claimant was granted the override bonus and was therefore potentially earning more than all the staff that she managed. We find that while there were differences in pay between the claimant and others in the organisation, these are not because of any of the protected characteristics of age or race. Where there are differences and some staff are paid more, they arise from differences in roles. There is no differential treatment on a comparative basis.

67. We find that the respondent did not know or believe that the claimant had or might or intended to raise a complaint of discrimination about her pay.

Bosch email July 2019.

68. Page 190 of the bundle was a short email from Nick Hussey. This states “these look like Indian contacts – better if you take it??”. Page 191 is a printout of Hubspot, the respondent’s internal client management system, which states that Bosch has been assigned to the claimant.

69. The claimant explained that being assigned a client on Hubspot did not mean that she was being given this as a lead to develop that business as her own client. Had that been the case Hubspot would have recorded her as the owner of the client, and it did not do so. The claimant’s account was that the word assigned meant either ownership being transferred (which would then be specified as set out above) or being given a discrete task to do on that client. In this case the latter applied.

70. She recollected that Nick Hussey had a conversation with her in the open plan area and told her that this was now a lapsed client. The company had moved to India and the respondent was struggling to get payment. He asked her to chase a particular individual as he was of Indian origin to see if she could get the debt paid. The claimant recollected that she tried to call this individual, but was unable to do so and took no further action. She also believed that Mr Hussey continued to be the owner of the client, although she had no direct knowledge of that; she simply knew she was not the client owner.

71. She believes that Mr Hussey had asked her to carry out this task, which was extremely unusual for a sales manager to do, because the contact's name to chase the debt was Indian and she was also Indian. She felt she was given this task to do outside her normal remit because of her cultural background and for no other reason.

72. In her oral evidence before this tribunal the claimant explained that she did not think of this as being given a lead. She was merely being asked to chase a debt on a client. In the letter attached to the ET1, which was drafted by lawyers, reference is made to being passed on leads because the client was Indian. The claimant confirmed that this referred to the Bosch email. She explained that at the time she may have thought this was a lead, but she no longer did so.

73. Mr Tongue gave evidence on this point. He recalled the claimant showing him the email sent by Mr Hussey and described it as being asked to take over an Indian client account once the first respondent was chasing payment.

74. The claimant did not refer to this being limited to chasing a debt in her pleaded case or in her witness statement. It is characterised as being passed a lead and this is also how Mr Tongue described it. We find that Mr Tongue's evidence as to what the claimant was asked to do is consistent with that given by Mr Hussey and is consistent with the pleaded case and for that reason prefer this evidence to that of the claimant on this point. We find she was not being asked to chase a debt but being passed a potential client. This is a positive act.

75. Mr Hussey agreed that he had passed this lead to the claimant because of her background and they had joked about her being able to wow them with her west London version of Gujarati. We find he did not do so on merit grounds, but because he considered a shared heritage could create an empathetic relationship. On the balance of probabilities, we find that the claimant would not find being passed a lead an unwanted act but would have received the opportunity to develop a client such as this, a positive one. We note that in his evidence Mr Tongue, when he refers to the incident, does not suggest that the claimant was offended by this comment.

Impact of the Global Pandemic

76. In December 2019 pages 210 – 214 are emails in which the respondent is setting out that there was a great deal of uncertainty about where the company would be financially at the end of the year and asking for a summary for each sales rep to be prepared.

77. The claimant described January 2020 as the worst month she had ever experienced, with nothing converting to sales. She also agreed that the sales team were told to convert all sales in 2020 that they could. She believed that this was standard sales pressure but was aware that sales pressure was very acute in 2020 as customers were becoming concerned about the effect of covid. She understood this was impacting the business.

78. On 23 March 2020, on the same day as lockdown when staff were told to work from home, all staff were sent an email explaining that because of

the global pandemic, the business was having to downsize. Staff would either be redundant or would be offered a very different remuneration package to continue working. For sales staff this would be no basic pay and commission only.

79. The claimant was invited to a 1-1 meeting with Grace and Nick on 24 March in order to "….discuss the current redundancy proposals. At this meeting we can consider if there are any other options available – potentially through revisions to you (sic) role and your existing contract that may, at least for the time being, make it possible to continue your employment."

80. Page 281 was the transcript of what was said at the meeting which was agreed by the claimant as an accurate account. The claimant agreed that a proposed commission scheme was suggested from 1 April 2020. The scheme in place in January 2020 was such that if she met her annual target, she would be entitled to commission. Commission was weighted over each quarter and in quarter one, provided she met a minimum threshold, which she believed was around £60-£80,000, she would get some commission.

81. We were directed to page 221 which set out the commission scheme. This showed that the claimant's annual target was £600,000 and was divided so that the quarter one target was £240,000 and for each of the remaining three quarters was £120,000. The document also explained that she was paid commission on sales from 25% to 50% of the target, but no commission was paid on the value of sales for the first 25% of the target. It was agreed that if the claimant had not hit her target in any quarter, then the sales for that quarter and the target were rolled over to the next quarter.

82. The new scheme, which applied from 1 April 2020 for those who accepted it, meant that there would be no threshold and no basic salary. Instead, sales staff would be paid 10% of the total value of the contract, although payment would be staggered. The claimant accepted that in this meeting she was told that she would need to "fully and meticulously" service deals and if they were not serviced, then the company reserved the right "just to terminate the contract and say someone else can sit in that seat and do that job". She believed this referred to the future arrangement. While she understood that she needed to do her best to produce revenue for the first quarter of the year, her evidence was that the ability to terminate in the terms described by Nick applied to the new arrangement.

83. The transcript shows that in this meeting the claimant asked about redundancy and Nick confirmed that she could be offered redundancy as an alternative, but that they would prefer her to stay. While the claimant's witness statement said she felt from this meeting they wanted her out of the company because of who she was and because she had complained, she accepted the transcript showed the opposite and she accepted this was not the case in this meeting. We find there is no evidence that at this point the respondent wanted the claimant to leave the business. It is the claimant who raises redundancy, the respondents' focus is on the new terms.

84. At page 297 the claimant sent a follow-up email asking questions about the redundancy package and for clarity on the position on commission on redundancy. She understood that normal salary would be paid in the month

and commission would also be paid in the normal way up to 1 April. This exchange also confirmed that while commission achieved in quarter one of 2020 would be paid as normal over the next three months, the claimant's invoiced sales to date did not hit the minimum threshold target to claim commission. She was not, therefore, going to earn commission before she left.

85. The Claimant questions the potential unfairness of the new commission only scheme with regard to the final 25% pay-out in an email to Mr Hussey on 24 March at 20:30. Mr Hussey replies to her on at 8.37 the following day 25 March stating that they were unprepared to change this. Mrs Hussey sends the claimant an email at 10.12 on 25th March which sets out the calculation of redundancy pay. The claimant queried this at 10.59 questioning whether or not the package was the redundancy +5 weeks salary and any holiday, and also asked for clarity on commission on sales earned during her notice period. This is responded to at 12.01 when the claimant is told that her remaining holiday days would be taken during her notice period. It also says if she is made redundant, she would remain on the existing commission structure.

86. At 12.19 on 25 March the claimant asked Mrs Hussey if there is any chance that the notice period "(that I will still work)" could be included in the redundancy package. She says, "I need to make this last payment last as long as possible, so any chance to save on the tax would help me with this". We find that the claimant's reference to needing to make this last payment last as long as possible is a strong indicator that she has at this point decided that she will be leaving the business and the redundancy notice pay will be her last payment. The outstanding question is only whether or not the respondent can help with tax. This is answered at 13.09 on 26 March when she is told that because of PAYE, they could not pay her working notice as redundancy pay. At 15.30 the claimant sends an email thanking all for clarifying the points and asks to schedule a call to finalise the terms of her redundancy and notice period.

87. We find that applying a normal construction to this sentence and considering the chain of emails, at this point the claimant had all the questions that she asked answered and had therefore made a final decision that she wanted to meet to finalise the terms of her redundancy and notice. We find that it was her intention to decide before the 26th and the time of the board meeting and this is apparent from the chain and her final email is therefore properly seen as that decision.

88. The evidence from Grace Gilling and Vicky Hussey was that they understood that she was "likely" to go for the redundancy option. Mr Hussey told us it was not so clear cut and that he understood the claimant was still thinking about it and wanted to finalise terms to see if it was for her. We prefer the claimant's evidence on this point and find that Mr Hussey's reading of the email chain is not supported by the chain itself. At the point she asks for a meeting all terms have been questioned and confirmed, there is nothing left for the claimant to consider. We conclude that her departure on the terms set out in the emails was a settled decision in the claimant's mind and this is clear from the emails. She was leaving rather than continue working for no base pay.

89. Mr Hussey told us that, in fact, the business was not hit as badly as they had first feared and at the end of the discussions with staff, 7 out of 29 left as redundant, the remainder accepted a pay cut. Some staff were put on furlough, this included at least one member of the sales team. The company did not in fact pursue the commission only basic salary as this was not acceptable to any staff. Ms Qazi in particular stayed on for a number of months and Mr Hussey confirmed that they continue to need sales staff and are still recruiting for salespeople now. We find that, had the claimant not been dismissed, while she had decided to take redundancy rather than no basic pay, she may subsequently have been offered a different option that was more attractive to her, and it was possible that she could have stayed with the respondent for some period of time had they offered her better terms to stay.

Activity with Harford and Access client accounts

90. The claimant accepted that on 23 March 2020 – page 267 – she was sent an email from her line manager. It refers to a summary for March and says anything they can do to get all outstanding sales closed down they must do; all contacts must be pushed as hard as they can now. It concludes by saying "let's do this – seven days". We find that while this email is urging effort, it is asking them to do this for the end of the quarter, that is within the next seven days.

91. Two particular clients were the focus of the disciplinary proceedings taken against the claimant. One of these was Harford Control. We were taken to page 203 of the bundle which has a contract with this client for the 29 October 2019 and it was accepted that this client had to provide the respondent with a purchase order in order for an invoice to be raised. In 2019 the purchase order was completed by the client within the body of the contract.

92. As Harford Control had taken space at the exhibition centre in 2019, the claimant continued to contact them to see if she could sell them space in 2020. The claimant was dealing with the individual called Will Amhof. Page 330 of the bundle is the beginning of an email chain from the claimant, and is dated 19 November. The heading of the email is The Smart Factory Expo. Post event follow-up. The email chain says the claimant is discussing with Will the stand that he might sign up for in 2020, clarifying prices and answering his queries. On 9 March Will emails the claimant and the heading of the email has changed to "booking confirmation 2020". In the email of 9 March, however, the client has not sent back a signed contract. The claimant replies, using the same heading, half an hour after the email from Will, also on 9 March.

93. On 19 March, again under the same heading, the claimant chases Will about the contract. On 24 March Will replies using the same heading and tells the claimant that he is waiting for the MD to decide. He asked another question about cancellation. On 25 March, still using the same email heading, the claimant sent him the Covid 19 terms. On 25 March, again using the same heading, Will replies that the MD is happy to go ahead, and he will sort out the form. The form, that is the completed contract, is then sent back at 15.39 on the 25 March with the same heading "booking

confirmation 2020". It is only at that point that a signed contract with a PO number has been received by the claimant and that the heading reflects a booked order.

94. Access controls, the second client who is the subject of the dismissal, was also an existing client of the claimant. On 24 March (page 280 bundle) the claimant sent an email to her contact, Steve Norman, with the heading "External Outstanding PO". She says she has accepted the call for tomorrow but also wants to discuss the outstanding PO's that are needed for this quarter's activity. She asked him to advise when she could expect to receive them. Steve Norman replies the same day (24 March) to say "PO''s raised and will be with you by the end of the week".

95. Steve Norman was interested in pursuing an opportunity in relation to providing free software to contacts to help with the NHS need for ventilators. The claimant had discussed this proposition with other colleagues internally and arranged a telephone meeting to discuss this with Mr Norman. This is the meeting referred to in an email of 24th of March and it took place on 25 March. It was scheduled for 30 minutes from 4 o'clock to 4:30 the claimant recollects that it took 45 minutes as it ran late. We find that the call therefore finished at 4.45 on 25 March.

Events leading up to dismissal

96. Miss Gilling told us that following the announcement made on 23 March the following morning somebody had gone into all the social media accounts and had changed the passwords. This raised concern about potential staff actions. She then became concerned at what she saw as the lack of activity within the sales team and as a result on 24 March requested and was granted access to various staff inboxes. She believed this was for key staff, but it certainly included the claimant's inbox. She had these monitored staff inboxes open on her own screen and checked them twice a day.

97. We were taken to pages 288 – 291 of the bundle. They show that on 24 March the claimant made 11 calls, on 25 March she made six calls and on 26 March she made 37 calls. The claimant said that this did not reflect calls on her mobile. The respondent accepted that calls made from the mobile would not necessarily be shown in any call log. We find that the call log is not therefore an accurate summary of all calls made by the claimant. Miss Gilling's concern about activity was based only on these call logs and not on all of the claimant's activity.

98. Miss Gilling explained that when she looked at the claimant's inbox on the afternoon of 25 March, she thought that the claimant's email activity seemed low. She also noticed that the inbox contained two sales orders. Page 291 is a screenshot from the claimant's inbox of 25 and 26th of March. This shows that on 25 March she received an email at 13.00 titled POs for Hinnek (sic). This is from Access. The next email she received was at 15.04 and it was from Aneel Baqhar with the heading The Manufacturer-Insight Report. At 15.38 there is then an email from Will, for her client Harford Control, with the heading Smart factory Expo – booking confirmation 2020.

99. Miss Gilling believed the subject headings clearly showed that sales orders had been confirmed by the Access Group and Harford Controls, but the claimant had not shared this information with anybody. In her view the subject header of the emails is clear; one refers to booking confirmation 2020, that is Harford Control and the other said PO's for Hennik, that is the Access Group email. She was unaware and took no steps to check if the heading reflected an ongoing thread or was the first time that heading had been used. In the case of Harford Controls we find the heading was not a clear indicator the contract was signed, and the booking confirmed as that same heading had been used to cover an exchange of queries.

100. Miss Gilling's evidence, and that of Mr Hussey is that the claimant would always celebrate sales and it was extremely unusual for her not to make the sales known to anybody straight away. This was particularly the case given the situation around Covid and the fact that the claimant knew that she needed to invoice immediately. To the extent Miss Gilling relies on the email from Jane Noordhuis of 23rd of March at page 267, we have found that this in fact gave the sales team seven days to complete their sales and to log in on the system. It did not necessarily require immediate action.

101. Ms Gilling raised her concerns about what she described as the claimant's unusual behaviour with Jane, the claimant's line manager. Jane was also not aware of these sales and the claimant had not told her about them. It was agreed that Jane would therefore raise it the next morning at the sales meeting if the claimant did not update the group on this news in that meeting.

102. We were taken to a transcript of the sales meeting which took place at 9.36 on the morning of 26 March. The claimant said this was recorded without her knowledge or consent. Miss Gilling was not sure but thought that once the parties have clicked to join any such meeting, a box pops up to say it is being recorded, and they can leave the meeting if they do not agree. On the balance of probabilities, we find that the meeting was recorded without the claimant's knowledge or her consent.

103. It is not disputed that in this meeting the claimant gives an update and volunteers that in relation to Harford Controls she was emailed the previous day, that is 24 March, saying they were waiting for the MD to sign and was also asked for clarity on Covid terms, which she sent. She says that she thought she should have the contract in the next couple of days. The claimant does not mention Access and Jane asks her whether or not they have the PO yet from Access Group. The claimant replies that the client said to expect it at the end of the week. She says she had a call with Access the previous day, but the client did not mention anything, but she would double check with him again. We find that the history the claimant gave in this meeting in relation to both clients is an accurate one of her exchanges with these clients prior to the emails sent on 25 March at 13.40 and 15.38. We also find that it does not reflect the content of these latest emails. The claimant is updating on activity as it was before these were sent. The claimant accepted that she did not, as she had said in this meeting she would do, chase up Access.

104. While Jane does prompt the claimant around Access, she does not raise the issue of the two emails having been seen in the claimant's inbox. She gives no indication that the respondent is aware that these emails have been received at this point and that she believes that the claimant is aware and has deliberately not updated on these.

105. Ms Gilling explained that Jane spoke to her after the meeting and was concerned the claimant had been dishonest. On Miss Gilling's evidence Jane based this view in part on the claimant's body language. Jane was concerned that the information she gave in the meeting was not consistent with the emails in her inbox, a point she had not raised with the claimant. As there were only 11 emails, it was felt that even on a rushed cursory glance they caught the eye and could not reasonably have been missed.

106. We were taken to pages 302 and 304 of the bundle which were emails that were sent on the dates in the current period of the screenshot. These emails are not visible on the screenshot. We find that the screenshot is not therefore an accurate depiction of all the email activity coming into the claimant's inbox on the dates in question.

107. Again, both Ms Gilling and Jane considered that it was unusual behaviour for the claimant not to have reacted quickly to these client emails. Ms Gilling noted that the claimant had replied to all other emails in her inbox other than the ones from these clients. In particular she had replied to the email from Aneel at 16.11 on 25 March, that is the email directly in between the emails from Access and Harford.

108. Miss Gilling's evidence states that they therefore decided to carry out a further immediate investigation. Their concern was the claimant was deliberately withholding the truth on the basis that if she was employed under the new commission scheme, these deals would have guaranteed her a commission payment. Miss Gilling's written witness statement suggests that this concern was in their minds at this time. We do not have any direct evidence as to what was in the mind of the decision maker on whether the claimant had decided to opt for redundancy or was still considering the position, but on the balance of probabilities we find that it was understood by the decision maker that the claimant had communicated this as her intention. It is our view that, as set out above, the email exchanges make that clear when considered as part of the chain.

109. This further investigation took the form of sending an email to all staff asking them to update Hubspot – the first respondent's CRM system – within the next hour. The claimant replies "sure" but does not do so. Jane and Ms Gilling then continue to "investigate" and it was at this point that the snapshot of the claimant's inbox was taken.

110. This screenshot also captures activity on 26 March. That shows that at 10.06 the claimant then does see the email from Harford controls as she emails Will asking for a PO number. In fact, the PO number had already been completed by the client and within the body of the contract which had been attached to the prior email. We find this email is consistent with the claimant's account that she had not seen the email the day before. Her response is consistent with a lack of attention in missing the email at first

and then not reading it properly when she does so. It was suggested that in some way this action is the claimant covering her tracks, but at this point she is unaware that anyone is watching her inbox and so is not aware of any need to cover herself. We accept the claimant's account as the more likely one and find she had not seen the first email and did not properly read it when she noticed it the next morning after the sales meeting, particularly given the frantic atmosphere as a result of Covid and her distraction as a result of her impending redundancy.

111. Ms Gilling confirmed in her evidence that she took care to make sure that she had not clicked on the emails which could have then resulted in them showing as read and on her evidence they had not been. She confirmed that she had viewed the title emails only and had not gone into their content or reviewed any attachments. Miss Gilling and Jane then watched the video recording of the meeting back to double check what the claimant had said and both concluded that, given what she said, and her body language she was being dishonest. They also considered that it was reasonable for the claimant to be prepared for the meeting and she should have read, seen, processed and reported on the events of 25 March in the sales meeting.

112. There was no formal agenda for these meetings. While it was understood by all staff that they were an update, we accept the claimant's evidence that she did not take particular steps to prepare for the daily update meetings. She took more pains to prepare for the meetings when they were weekly and for a weekly meeting would have reviewed her emails but was not necessarily doing so to prepare for daily meetings.

113. Miss Gilling's evidence was that despite the view they had formed, they decided to give the claimant another chance. At 15.36 Jane sent a further reminder via the Teams sales channel with a request to everyone to update the sales tracking document. It particularly asks the claimant to do so. The claimant replies if there are no updates should she remove them. Again, Miss Gilling in her witness evidence considers that the claimant's actions are connected to her desire to receive additional commission on the post 1st of April terms.

114. The document that is to be updated is at page 377 of the bundle, and was accessed and updated at 16.26 saying that Harford Controls and Access group are both expected by the end of the week. This shows that the update is by an anonymous user. We were also taken to page 382 which is an update of this sheet prepared at 3.46 on 26 March. This entry in relation to Harford controls says chased Friday 27th. On a calendar basis Friday the 27th must be Friday, 27 March. That is after the claimant's access has been removed. This update cannot therefore have been made by the claimant. Whoever made the update is therefore at that point reporting information the respondent knows to be incorrect.

115. We find that the forecast commitment sheets are not a reliable source of evidence. They are clearly open to amendment where the identity of the person amending is not tracked and certainly the document at page 382 shows entirely inaccurate information in relation to one of the clients involved in the claimant's dismissal allegation. In any event this was not

included in the disciplinary pack of documents and so not put to the claimant as part of the disciplinary process. We have not therefore taken it into account in considering the fairness of the dismissal.

116. Ms Gilling tells us that the decision was therefore taken that the claimant should be suspended. This was in part her decision and she explained that she did so because she believed that the claimant was fully aware of the importance of preparing for meetings and the sole point of the sales meeting on 26 March was to update the team on the progress of all sales. The claimant knew what was to be discussed. She was aware that the Harford contract was imminent, and it was incomprehensible why she would not check the emails again. Harford Controls had a history of including POs in their signed contracts and the claimant would have been aware of that. No notes were made of the conversations between Ms Gilling and Jane or indeed between Ms Gilling and anybody else as to the reasons for this decision or the respondent's thinking at this point. This pre-consideration did not therefore form part of the disciplinary material that was shown to the claimant.

117. It was decided that Jane, who had been involved throughout in what the respondent characterises as its investigation, would chair the disciplinary hearing. She had already discussed and agreed with Ms Gilling that she had concerns about the claimant's dishonesty, and we find that she had ready concluded this had occurred before she met with the claimant. She went into the disciplinary process with a belief that the claimant was guilty of gross misconduct.

118. Preparations for the suspension/disciplinary meeting were being put in place with Mrs Hussey taking advice from an external organisation on the point before 1 o'clock that day. She prepared a draft of the suspension/invitation letter just before 3 o'clock on 26 March. The claimant was suspended at 16.44, that is before the end of the working day which would usually conclude at 5.30, and one and a quarter hours after the claimant had asked to schedule a call to finalise the terms of her redundancy. Her access to systems was suspended.

The disciplinary process

119. The suspension letter also invited the claimant to a disciplinary meeting to take place the following afternoon. It sets out three matters that would be considered.

- Falsely stating signed contract for Harford controls had not been received.
- Falsely stating PO from Access Group had not been received.
- Withholding invoicing on received PO which is to the detriment of the first respondents cash flow and in turn its survival during this current economic downturn.

120. It advised the claimant that the company may consider dismissal without notice. The claimant is entitled to be accompanied by another work colleague or trade union representative. It enclosed what it described as the

relevant investigation documentation the company wished to rely on and that was the email from Will Amhof at 15.39 on 25 March, the email from Will on 26 March and the email from Access Group on 25 March. It did not provide anything else.

121. The claimant suggested that disciplinary action was started against her because of her protected characteristics. She also suggested that the dismissal process may have been started and concluded in order to avoid paying her redundancy and notice pay. We accept that the respondent's reasons for starting the procedure were not based on the claimant's protected characteristics. We make this finding because there is no evidence the claimant ever raised any complaints on this basis and so the respondent was unaware of any complaints of discrimination being raised by the claimant. We have found that during her employment the claimant was clearly valued, and we have found that at the consultation meeting the respondent was keen to retain her. There is no reason why the respondent would then act on the basis of protected characteristics when they had not done so previously.

122. The claimant attended the disciplinary meeting via video conference and was accompanied by a companion. The meeting took around 15 minutes. In this meeting the claimant explained that she had simply not noticed the two emails. Her failure to see the emails was simply human error. She explained that there was an awful lot going on that week mentally and that she was all over the place because of it. This was, of course, the week in which the staff had been told the business was likely to make significant redundancies or put staff on deals with no basic pay and the claimant had been involved in a redundancy consultation meeting and a series of emails trying to understand what her options and package were.

123. The claimant said that she certainly intended to invoice Harford controls once she appreciated that they had signed the contract and it contained the PO number. She explained that the intention was to process this invoice at the end of the working day on the 26th. However, she had been suspended before she had the opportunity to do so. During that day she had carried out many outbound calls, was making a lot of proposals and this task was on her list to do for close of play, when she would normally do her complex admin.

124. In this meeting the claimant raised as part of her defence that there would be no benefit to her holding back invoices. She explained that she was not going to benefit from any commission by doing so as they would not contribute sufficiently as she was nowhere close to meeting the threshold. The claimant makes the point that this issue had escalated extremely quickly; it could have been solved over email or a phone call. She felt that it was an opportunity simply to avoid having to pay her notice period and to dismiss her without that or her redundancy pay.

125. Jane Noordhuis, the decision-maker, comments that there was no other course of action open to the company other than to have a disciplinary meeting. She says she will look at everything including her tenure with the company. She confirmed that in her view taking disciplinary action was the right thing to do. She explained that the company would feedback the

outcome on the Monday and the claimant would have the right to make a formal complaint which was set out in writing. We find that this also suggests the decision had been made at this point and there would be no further consideration.

126. The decision maker did not give evidence. The dismissal letter was signed by Mrs Hussey, but she merely put her name to the letter which reflected the decision made by Jane. Jane was the sole decision-maker, although the board ratified her decision. There are no notes of the board discussion or what, if anything, Jane put forward to the board. There are no notes of Jane's decision-making process. We base our findings on the evidence given by Miss Gilling as to what was discussed prior to the meeting and on the outcome letter.

127. The decision letter was at pages 421-422. It opens by reciting the same three matters which are set out in the suspension/disclaimer invitation letter. It then states that they have considered the circumstances, evidence and responses and gives particulars of three matters that fall within this consideration. These are said to be the wide-ranging economic impact of the global pandemic on the company's revenues and very survival. The claimant's failure to report sales, because sales invoiced after 1 April had a greater personal value to her. This is said to provide a persuasive, possible reason why the claimant failed to report these invoices, and thirdly she dismissed the possibility of a simple error as a likely reason for her failing to report invoice resales.

128. The substantive decision part of the letter states "we believe you have deliberately suppressed information that a sale which otherwise would have been included in sales under the old, less favourable commission regime.… We have concluded that your behaviour in respect of the above constitutes gross misconduct that you have sought by your actions to gain a financial advantage at the expense of the company and, by denying invoicing about orders, further impaired the company's financial condition".

129. As we have noted, we find that the outcome was prejudged as Jane, the investigator, was also the decision maker and had reached a view on the claimant's dishonesty prior to the meeting based on what was regarded as 3 occasions of failure to action emails. There was no investigation meeting with the claimant or any report as the disciplinary procedure suggests should happen. The "investigation" consists of a series of tests to see if the claimant would admit to having the emails – action which is predicated on her deliberately concealing them. An assumption of guilt underlies the respondent's actions.

130. The claimant was dismissed on an extended remit that was not part of the allegations put to her and which introduced accusations of dishonesty. We find that the issue of personal financial advantage was not raised in the invitation letter and was not raised by the respondent in the disciplinary hearing. It is volunteered by the claimant and is then used by the respondent to make an allegation of dishonesty. We find that in adding this to the decision the respondent is extending the disciplinary allegations.

131. We reach this conclusion because we find that there is a significant difference between actions of not closing down invoices which can damage cash flow and the allegation that one is actively seeking personal financial advantage in taking those actions.

132. While we accept that Jane did believe the claimant was acting dishonestly, we find there were no reasonable grounds for that belief. We have already found from the email chain that taking redundancy was a settled decision in the claimant's mind. There is no evidence that Jane saw this email trail or any evidence as to how she reached this conclusion based on the email chain. Any reasonable investigation would have included a review of this exchange and we find that Jane had not carried out a reasonable investigation at the time she formed this belief. We find she took no steps whatsoever to investigate this significant allegation which was put in the decision letter as one of the main issues.

133. We also conclude that the respondent did not give any consideration to redundancy circumstances. The disciplinary meeting states that redundancy is not being considered and we find that the investigation/decision excludes all thoughts of the pressure that the claimant would have been under, given the potential and imminent job loss that she was facing. A reasonable investigation would have included this as a consideration rather than exclude it and we find that in not doing so Jane had failed to carry out a reasonable investigation at the time her belief in the claimant's guilt was formed.

<u>The email of 31 March 2020</u>

134. Following the claimant's dismissal on 31 March, Mrs Hussey sent an email to all staff to inform them that the claimant was no longer employed. It included the sentence "we have concluded that she was consciously misleading the business around receipt of PO's and invoices related to two existing clients. I cannot express how disappointed and saddened we are… ".

135. The claimant was distressed at the contents of this email which was sent on to her by friends at the business. It was her evidence, which the respondent accepted, that the departure of all other employees had always been described in entirely neutral terms. There was even the case of an individual whose employment had been terminated as a result of allegations of sexual harassment. The respondent said this was out of concern for the victim.

136. The claimant described this email as nasty and considered that the only reason that she was treated differently and having the reason for her dismissal spelt out in such clear terms was because of one or more of her protected characteristics. She felt that as a young Asian woman who still lived at home the respondent thought she would be easy to get rid of.

137. This complaint is brought against the first respondent and expressly against the second respondent, Mrs Hussey. We accept the respondent's evidence that in fact Miss Gilling and Mr Hussey were behind the wording of the email. We are satisfied that Mrs Hussey, although her signature was on the email, was directed to send this email by Mr Hussey and was not responsible for its content.

138. Mr Hussey, although he now accepts that sending this email was a poor choice, explained that they had been made aware by colleagues of the claimant that she was spreading rumours regarding why she was dismissed and predicting the imminent end of the business. These were damaging the relationship with other team members, and management felt they needed to portray the true version of events as quickly as possible. They wanted to make it clear that this was an act of gross misconduct in order to ensure that their version of events was presented to the team.

139. While we agree with Mr Hussey's evidence that sending this email was a poor choice, we accept that the motives he set out in his witness statement were his true motives. This was to get the company's position in front of staff and was not therefore because the claimant is a young Asian woman. The email is unrelated to her protected characteristics. The respondent would have done the same to anyone in like circumstances.

The Appeal process

140. In the dismissal letter the claimant was advised that she had five days to lodge an appeal. She duly did so and on 21 May 2020 at page 437/439 of bundle Mrs Hussey sent her an invitation to an appeal hearing and grievance hearing to take place on 28 May. This was to deal with the seven points of appeal that she had raised, as well as the grievance she raised in respect of the sending of 31 March email and the conduct of the discipline process. It was felt that because the matters were inextricably linked, they would be considered together.

141. There had been some correspondence between the claimant's solicitors and the respondent as to the appropriate person to chair the appeal, but it was agreed that Mr Graham would be appointed as an independent appeal chair. He was described as an independent third-party employee relations expert.

142. The invitation to the appeal enclosed 27 pieces of documentation. These were matters the respondent was to rely on and documents the claimant had requested also be considered. It was explained that the appeal hearing would be a full rehearing.

143. The meeting took place on 28th of May and the transcript of that meeting is at page 443 - 452. The claimant confirmed that it is an accurate summary of the meeting. The transcript shows that the chair goes through the points of appeal that the claimant had raised. The claimant again explains that she had genuinely missed the Access email about the PO order. In relation to Harford controls that had been a lot of emails exchanged. She explained that on that day, being 25th of March she had had to deal with calls from clients worried about the pandemic when the company position was unclear, and had to make calls and had proposals to get out. It was a crazy week. The 26 March was a heavy day of sales calls. It was her practice to do admin at the end of the working day in the last hour and ½, and on 26 March she was behind with her admin. She had not held anything back. She repeated there could not be any financial benefit to her because she was taking redundancy.

144. The appeal outcome letter is at pages 475 – 481 of the bundle. It is dated 2 June 2020. The appeal decision maker concludes that the respondent did not conduct an appropriate investigation before it held the disciplinary meeting. We

have already found that to be the case and agree with this conclusion. The appeal chair criticised the disciplinary procedure as the allegations were not made clear to her at the time, she was not provided with the disciplinary procedures, the role of the companion was not made clear, and he felt that the duration of the hearing was inadequate in order to properly explain the allegations, go through the evidence and listen to her case. We accept these are his findings and agree with them.

145. The appeal chair did, however, conclude that dismissal was appropriate in the circumstances. The appeal chair concluded that the option of accepting the new commission scheme was still on the table, the claimant understood it was important to keep an eye on things and he concluded that she was aware that the emails had been received. He stated that she had a decision to make about her future. In one of those choices, the commission only role, these sales would provide her with guaranteed commission if she withheld the sales for a few days and he states that he believed that she did withhold them for that reason. In the circumstances he concluded that dismissal was an appropriate sanction.

146. We find that the appeal chair had a genuine belief in the claimant's guilt. The majority view is that he did not have reasonable grounds for his belief that the claimant had a financial motive. This is because we have concluded that the claimant's intention to take redundancy had been spelt out very clearly before she was suspended. The majority view is that no reasonable interpretation of this chain would lead to the conclusion that the claimant was still considering staying on.

147. The minority view is that the appeal chair did consider and review the chain of email about redundancy, and while he reached a different view as to their meaning, that was a view that could reasonably be held and to conclude otherwise is substituting our reading of the email chain for that of the appeal chair. The minority view is that the appeal chair had reasonable grounds for his belief in the claimant's financial motive.

148. The unanimous finding is that the appeal chair had not carried out a reasonable investigation. The outcome letter makes it clear that the appeal chair has had conversations with Jane, Mr Hussey and Mrs Hussey. The contents of the conversations with Jane and Mrs Hussey were not shared with the claimant, nor was she made aware during the appeal process that these conversations had taken place. The claimant had no opportunity to counter any points made by these respondents' witnesses.

149. The conversation with Mr Hussey is shared with the claimant to a limited extent via email questions and answers which refer to Mr Hussey's recollection of conversations around the 1 April date. Despite her request, the full details of this conversation are not shared with her, nor are any notes of it provided, yet the appeal chair's decision letter makes a critical finding on two points against the claimant based on this conversation. Taking it in the round ,we find that the chair reached his conclusion without the claimant's side of things being properly and reasonably considered in response and that there was a failure to carry out a reasonable investigation.

<u>Discrimination and Comparators</u>

150. As part of the appeal the claimant also raised a grievance and in that referred to what she said was the different disciplinary treatment meted out to Mr Tongue and to Mrs Hussey. She explained that Mr Tongue had repeatedly broken or ignored invoicing processes. We were referred to an email from Mrs Hussey of 20 September 2019 remonstrating with him and Mr Hartley about numerous invoices that have not been appropriately on boarded. Mr Tongue was called to a meeting about this in November 2019 and it is evident that he was given a formal warning. He was not dismissed.

151. The claimant explained that while she was on annual leave in February 2020, she believed that she had asked Mrs Hussey to conclude a contract for her. The correspondence was at page 233 – 237. On her return, the claimant realised this had not happened and did it herself. Mrs Hussey explained that she had not understood that she was expected to do this invoice.

152. The claimant complained to the appeal chair that both these matters were examples of different and more favourable treatment. These two individuals receiving either no or an informal warning for failing to invoice clients promptly while she was dismissed.

153. We do not find that these are appropriate comparators. The respondent dismissed the claimant on allegations of dishonesty. This is entirely different from a failure to deal with invoices.

154. We find that the respondent dismissed the claimant because it believed, however unreasonably, that she had acted dishonestly. We find it would have treated any one in the same way in the same circumstances.

Impact of 31 March email on the appeal process

155. The claimant considered that she could not have a fair appeal once this email had been sent to staff. It was put that it was highly unlikely that Mr Hussey or any other senior members of the respondent staff would wish to publicly change their mind and send a different email to staff saying they had got it wrong. Mr Hussey and Mrs Hussey gave evidence on this point and said that if they had got it wrong, they would have apologised and corrected this.

156. We have no reason to doubt the independence of the appeal chair. He freely criticised the respondent's disciplinary process. We find that he would have been able to make a different decision and overturn the dismissal, even if that meant that the respondents' senior staff had to send an email out to staff correcting the position.

Wrongful dismissal

157. Having considered the evidence before us, we accept that the claimant did not see the emails in the inbox at the relevant time. We do not find there was any element of dishonesty in her failing to report these at the sales meeting as we find that she was genuinely unaware of them at that time. We find what she reported at the meeting and her subsequent request for a PO number are consistent with human error and oversight. We also accept that she would have processed those invoices at the end of the working day. She explained to us that the respondents encourage staff to do substantive client facing work at certain times of the day leaving admin tasks to be done outside these power hours.

158. While we accept that the claimant did do some admin on 26 March at around lunchtime, this did not include processing invoices and we accept her explanation on this point. We find that completing invoices is a more complex admin task than filing or sending follow-up emails. We believe that she did intend to put these invoices through at the end of the day but was prevented from doing so because access to the system was suspended before working hours were over. We are satisfied that there was no question of financial advantage accruing to her as we have found that she had made it clear she was leaving by way of redundancy and therefore could not benefit from the sales being rolled over to 1 April.

159. We accept the respondent's evidence that in a normal week, sales would be celebrated promptly and often repeatedly. We also accept that the claimant customarily celebrated sales in the same way that all staff did. We understand that the respondents' suspicion of the claimant initially arose because she did not draw the sales to anybody's attention when they would expect her to do so which they felt was out of character. Not only were they suspicious because she acted, as they saw it, out of character, but also because she, as all staff were, were aware of the circumstance that the company was facing and of the need to bring in money and have certainty as to cash flow. However, we find that this was an extraordinary week. Lockdown had just been announced. Methods of working entirely changed with the claimant and her colleagues being home-based. The claimant was in the middle of redundancy consultation and was dealing with the inevitable stress that imminent job loss is likely to cause against a background of a national lockdown and concerns about health issues. On the balance of probabilities, we find that this is a reasonable explanation as to why the claimant did not see these emails and so did not call out the sales as she normally would.

160. We conclude that the respondent could have simply asked the claimant about the emails they were aware of in her inbox and the matter could have been resolved simply, avoiding the dismissal entirely.

161. We find that the claimant did not breach the implied term of trust and confidence and that she was instead dismissed in breach of contract. Our attention was drawn to the fact the staff handbook which contains the policies is in fact contractual. The respondent did not follow these policies, for example by not having an investigation and to the extent any claim for breach of contract is brought in relation to that, we find that the respondent did indeed breach the contract in that respect.

162. We have preferred the claimant's evidence in this regard because the respondents reasoning for its suspicion was based on out of character behaviour for which we have found a reasonable explanation, namely the extraordinary circumstances of that week, and a financial motive. However, that financial motive is one which we have found did not exist at the date of dismissal.

Relevant Law/Submissions

Unfair dismissal

163. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the

parties agree that the reason was conduct and it was the respondents' position that the conduct included dishonesty.

164. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

> "... 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.

165. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23, tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Contributory conduct

166. The basic award may be reduced where the tribunal 'considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent...'. In respect of other awards 'where the tribunal finds that the [act] was to any extent caused or contributed to by any action of the complainant, [the tribunal] shall reduce the amount of the compensatory award by such proportion as it considers just and equitable...'.

167. To fall into this category, the claimant's conduct must be 'culpable or blameworthy'. Save in respect of the basic award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness. Such conduct need not amount to gross misconduct.

168. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was. The conduct is for the employment tribunal to establish and subsequently evaluate. The tribunal is not constrained when evaluating culpability by the employer's view of the wrongfulness of the conduct.

Polkey

169. A 'Polkey' deduction is the phrase used in unfair dismissal cases to describe the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event.

170. The tribunal must assess any Polkey deduction in two respects:1) If a fair process had occurred, would it have affected when the claimant would have been dismissed? and 2) What is the percentage chance that a fair process would still have resulted in the claimant's dismissal?

171. Where there is a significant overlap between the factors considered in making a Polkey deduction and when making a deduction for contributory conduct, the ET should consider expressly, whether in the light of that overlap, it is just and equitable to make a finding of contributory conduct, and, if so, what its amount should be. This is to avoid the risk of penalizing the claimant twice for the same conduct.

Wrongful Dismissal

98. An action for wrongful dismissal is a common law action based on breach of contract. The reasonableness or otherwise of an employer's actions is irrelevant, all the court has to consider is whether the employment contract has been breached. The tribunal is concerned with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

Direct Discrimination

172. The claims include direct sex and age discrimination. S13 of the Equality Act ("EqA") provides "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.".

173. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.

174. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. For this purpose, S.23(1) stipulates that there must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator.

175. The unfavourable treatment must be "because of" the protected characteristic. The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

Justification

176. Unlike other strands of discrimination .S.13(2) EqA states that: 'If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.' The Supreme Court in Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704, SC, has made it clear that, 'to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so'. The legitimate aim need not have been articulated or even realised at the time the measure was first adopted.

177. The Supreme Court in Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC, held that direct discrimination can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. The employer must then go on to show that it is legitimate in the particular circumstances of the employment concerned.

Indirect discrimination

178. S.19(1) of the EqA states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's.

A PCP has this effect if the following four criteria are met:

- A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a))
- the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic (S.19(2)(b))
- the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and
- A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

Victimisation

179. This is defined as follows: -

> (1)A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a)B does a protected act, or
>
> (b)A believes that B has done, or may do, a protected act.
>
> (2)Each of the following is a protected act—
>
> (a)bringing proceedings under this Act;
>
> (b)giving evidence or information in connection with proceedings under this Act;
>
> (c)doing any other thing for the purposes of or in connection with this Act;

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

The employee needs to be able to establish a link between any detriment suffered and the doing of the 'protected act'.

Harassment

180. Harassment is defined at s 26 EqA as:-

(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.

(5) The relevant protected characteristics are—

age; disability; gender reassignment; race; religion or belief; sex, sexual orientation.

181. Harassment has 3 essential elements, unwanted conduct which has the prescribed effect, and which relates to a protected characteristic. It must be reasonable for the conduct to have that effect and in deciding this there is both a subjective and objective element. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the complainant. The claimant must actually have felt or perceived his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions, the tribunal must consider whether it was reasonable for him to do so. This requires the tribunal to ask itself whether it was reasonable for the claimant to claim that the alleged harassers conduct had that effect.

Burden of proof in discrimination

182. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

183. The Supreme Court in Royal Mail Group v Efobi, considering s136(2) of the Equality Act confirmed that at the first stage of the two-stage test, all the evidence should be considered, not only evidence from the claimant.

184. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage. There still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Conclusion

185. Applying the relevant law as we have set it out to our findings of fact we conclude as follows in relation to the issues we were asked to detemine.

Unfair Dismissal

a. What was the reason or principal reason for dismissal? R1 says the reason was conduct. The Tribunal will need to decide whether R1 genuinely believed the Claimant had committed gross misconduct.

b. If the reason was misconduct, did R1 act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

    i. there were reasonable grounds for that belief;

    ii. at the time the belief was formed R1 had carried out a reasonable investigation;

    iii. R1 otherwise acted in a procedurally fair manner having regard to the disciplinary process as a whole including both the disciplinary and appeal processes; and

    iv. dismissal was within the range of reasonable responses.

186. It is accepted that the claimant was dismissed. We have found that the initial disciplinary chair had a genuine belief that the claimant had committed

gross misconduct. We have found, however, that there were no reasonable grounds for that belief.The disciplinary chair had not carried out a reasonable investigation at the time the belief was formed.The decsion was substantively infair.

187. We have found that the investigator was also the decision maker. The allegations were not made clear at the outset and the reason that the claimant was dismissed was not one that was set out in the disciplinary allegation. There was no investigation. The claimant was not given a copy of the disciplinary procedures, the role of the companion was not made clear, and the duration of the hearing was inadequate to properly explain the allegations go through the evidence and listen to her case. We conclude that in all the circumstances and taking account the size and resources of this respondent, the disciplinary process was procedurally unfair.

188. We have found that the appeal was by way of a complete rehearing and therefore could eradicate these flaws and make the decision a fair one both substantively and procedurally. We have found, however, that the appeal decision maker did not have a reasonable belief in the claimant's guilt based on a reasonable investigation. We have also found that the procedure adopted by the appeal chair was flawed as he did not share with the claimant what potentially was critical evidence from three of the respondents' senior staff.

189. We have found therefore that both the initial disciplinary hearing and the appeal hearing were unfair. The majority view is that neither decision-maker nor the appeal chair had a reasonable belief in the claimant's guilt at the time they made the decision. The panel's unanimous view is that neither had carried out a reasonable investigation at the time they formed this view, and both procedures fail to meet appropriate standards of fairness.

190. The disciplinary procedure breached the ACAS code as there was no investigation, the claimant was not properly informed of the allegations.The claimant did not have an adequate opportunity to put her case and the companion role was not properly addressed.

191. The appeal as a rehearing also breached the code as it did not give the claimant a proper chance to address matters. She was not shown or allowed to comment on evidence gathered by the appeal chair from 3 witnesses.

Remedy for unfair dismissal

192. The hearing dealt with liability only and not remedy which is left for another day. We were, however, addressed on the question of contributory conduct and on any Polkey reduction.

193. Based on our findings of fact, we have concluded that the claimant made a human error in all the circumstances of what was a truly terrible week for many people. We have found that had the claimant not been suspended, she would have processed the sales. The dismissal was for dishonesty, and we have found that there was no reasonable belief in such dishonesty, and we therefore conclude that the claimant's human error in initially missing emails, which she

would have corrected had she been allowed the time to do so, is not culpable behaviour so as to be contributory conduct.

194. We have made a finding of fact that, had she stayed then , in common with other sales staff, the claimant would have been offered terms that included basic pay as well as commission, which was not the proposition initially put to the claimant when she decided to take redundancy. We have found that if the claimant had not been unfairly dismissed, she may have stayed on with the respondent for a period of time. The percentage likelihood of this and the possible time period will be considered at the remedy hearing.

Wrongful dismissal

a. The Claimant's notice period was five weeks. She was not paid for that notice period.

b. Was the Claimant guilty of gross misconduct?

195. We have found that the claimant was not guilty of gross misconduct and had not breached the implied term of trust and confidence. She is therefore entitled to be paid her five weeks notice.

Direct Discrimination.

196. The claimant has brought claims of direct discrimination, relating to pay issues, the email sent to staff on 31st of March 2020 and subjecting the claimant to disciplinary action and dismissal.

197. We have found that she was not treated less favourably in relation to any of these acts than any actual or hypothetical comparator. The claimant was not paid less than others in the same role, either actual or hypothetical comparators. Disciplinary action was taken on a genuine belief of misconduct. We have found that the claimant was not treated less favourably and, further, none of these acts were related to any one or more of the claimant's protected characteristics. The claimant has not proved facts from which the tribunal could infer any act of discrimination.

198. The claimant also complains of the email of 29 July 2019 as direct discrimination. While we found that offering the claimant the lead on a client was related to a protected characteristic, we have found that it was a positive act, and we conclude that it was not less favourable treatment, and therefore no claim for direct discrimination can arise.

Harassment

199. The same matters, pay, sending the email of 31.3.20, subjecting her to disciplinary action and dismissing her and the email of 29.7.19. are raised as harassment related to race. We were asked to determine

a. If so, were they unwanted conduct?

b. Did they relate to race?

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

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

200. Based on our findings of fact, we have found that, except for the email of 29th July 2019, the conduct the claimant complains of was not because of her race. In the case of the pay differential, there was none. The disciplinary action, dismissal and the pre appeal email were based on a genuine belief in misconduct having occurred and not was not related to a protected characteristic. They cannot therefore amount to harassment.

201. We have found that in relation to the email of 29th July, this action was taken because of a protected characteristic and could amount to harassment but was not unwanted at the time.

202. The claimant has not proved facts from which the tribunal could infer any act of discrimination

Victimisation

203. The issues were these

e. Did the Claimant do a protected act as follows:

i. raising concerns about her unequal pay with James Smith in April 2019

ii. raising concerns about her unequal pay with Grace Gilling in April 2019

iii. raising further concerns about her unequal pay with Grace Gilling in late 2019 and January 2020

iv. raising concerns about unequal pay with Jane Nordhuis in January 2020?

f. Did the Respondents know or believe that the Claimant had done or might do a protected act or intended to do a protected act?

g. Did R1:do the things listed in paragraphs 4.5.1 to 4.5.3, 4.6 and 4.7.1 above?

h. Did R2 do the things listed in paragraphs 4.7.1 – 4.7.3 above?

i. By doing so, did they subject the claimant to detriment?

j. If so, was it because the claimant did a protected act?

k. Was it because the Respondents believed the claimant had done, or might do, a protected act?

204. We have found that while the claimant raised complaints about her pay at various times as we have described in our findings of fact, she did not raise these allegations of discrimination. We have found that the respondent was unaware that she had done or might do or intended to raise complaints of discrimination in relation to her pay. We conclude that there was no protected act. No claim for victimisation can therefore arise.

Unpaid redundancy pay

205. We have concluded that the claimant was unfairly dismissed but the reason was not redundancy. No claim for redundancy pay therefore arises.

206. For these reasons we have upheld the claimant's claim of unfair and wrongful dismissal but do not uphold the complaints of discrimination or unpaid redundancy pay. Remedy will be addressed at a separate hearing.

Employment Judge McLaren
Date: 07.12.21