Case Number: 3303861/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms C Rhodes	v	(1) Roller Strategies Limited (2) Mr Z Hassan (3) Mr L Eisenstadt (5) Ms A Pugh

Heard at: Watford

On: 17-20, 23-24, 26 and 27 August, 8, 9 and (in private) 10-12 November 2021

Before: Employment Judge Hyams

Members: Mr T Maclean
Mr C Surrey

Appearances:

For the claimant: In person (except on 26 and 27 August and 8 and 9 November 2021, when she did not attend and was not represented)

For the respondents: Ms Caroline Jennings, of counsel

UNANIMOUS RESERVED JUDGMENT

1. By agreement, the claim against the first respondent is dismissed.

2. Accordingly, the claimant's claims of indirect discrimination within the meaning of section 19 of the Equality Act 2010 ("EqA 2010"), contrary to section 39 of that Act, are by agreement dismissed.

3. The claimant's claims of harassment within the meaning of section 26 of the EqA 2010 do not succeed and are dismissed.

4. The claimant's claims of direct discrimination because of her sex within the meaning of section 13 of the EqA 2010 do not succeed and are dismissed.

5. The claimant's claims of direct discrimination within the meaning of section 13 of the EqA 2010 because of a disability within the meaning of section 6 of that Act do not succeed and are dismissed.

6. The claimant's claims of victimisation within the meaning of section 27 of the EqA 2010 do not succeed and are dismissed.

7. The claimant's claims of detrimental treatment within the meaning of section 47B of the Employment Rights Act 1996 for making one or more disclosures within the meaning of section 43A of that Act do not succeed and are dismissed.

REASONS

Introduction; the claim and the parties

1 By a claim form presented on 4 February 2018, the claimant claimed (1) that she had been dismissed unfairly, (2) direct discrimination because of disability, (3) direct discrimination because of sex, (4) indirect sex discrimination, (5) sexual harassment and (6) victimisation. She also claimed notice pay and arrears of pay, and made a claim of "Personal injury (psychiatric- PTSD and depression)".

2 The claim was originally made against five respondents. Before the hearing before us, the claim against the fourth respondent (Ms C Caldwell) was settled, and in fact the fourth respondent gave evidence for the claimant at the hearing before us. By the time of the hearing before us, the first respondent had been dissolved by reason of insolvency (in the circumstances which we describe in paragraph 157 below). As we record in paragraph 21 below, the claimant agreed on 18 August 2021 that the claims against the first respondent (which necessarily included her claim of indirect discrimination because of sex) should as a result be dismissed. Thus, by the time that we started to hear evidence, the claim was pressed against only three respondents.

3 Those respondents and the claimant were anonymised until "both liability and remedy" had been determined, by reason of two orders made under rule 50 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules") by Employment Judge ("EJ") Manley on 29 January 2019 of which there were copies at pages 206-207 of the hearing bundle. (Any reference below to a page is, unless otherwise stated, a reference to a page of the hearing bundle.)

The content of this document

4 In what follows, we first (in paragraphs 5-46) describe the claims' long procedural history, in the course of which we state why on 8 November 2021 we rejected an application made by the claimant in writing for the recusal of EJ Hyams. We then (in paragraphs 47-53) refer to the evidence before us, including the expert evidence before us about the claimant's health, after which (in paragraphs 54-55) we refer to the effect of the law relating to time limits as far as the claims made in the claim form were concerned and the law relating to extensions of time where claims of the sort made here are made outside the primary time limit. We then make findings of fact concerning the events which did not consist of things that

were written in either a WhatsApp conversation or other written communication. We do that in paragraphs 56-159. We then (in paragraphs 160-180) refer to the relevant law relating to liability. Finally, as from paragraph 181 onwards, we state our conclusions on the claims made to us.

The procedural history

5 On 20 December 2018, there was a preliminary hearing in private before EJ Manley, after which she made the orders referred to in paragraph 3 above. Those orders were made on the application of the respondents and were objected to by the claimant. EJ Manley listed the case for a 2-day preliminary hearing in public on 30 and 31 July 2019 to determine a number of things, including the question of territorial jurisdiction given that the claimant lived in Canada when she worked for the respondent (in fact the claimant at the date of the hearing before us continued to live in Canada) and the status of the claimant: whether she was employed within the meaning of section 83(2)(a) of the Equality Act 2010 ("EqA 2010"). The claimant did not have sufficient continuous service to claim unfair dismissal, as she was employed by the respondent under a written contract for just short of three months: from 3 July to 30 September 2017, so a claim of unfair dismissal within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996") was clearly outside the jurisdiction of the tribunal, although if the claimant was an employee then a claim under section 103A of that Act of automatically unfair dismissal for "whistleblowing", was within the jurisdiction of the tribunal.

6 On 11 July 2019, EJ Manley held a further private preliminary hearing, by telephone, and added a day for deliberation in private by the judge who conducted the preliminary hearing listed to take place at the end of that month, despite the slight reduction in the scope of the issues to be decided at that hearing recorded at pages 219-220.

7 On 30 July 2019, EJ Hawksworth commenced that hearing. The claimant did not attend, as EJ Hawksworth recorded in the case management summary at pages 222-226. EJ Hawksworth decided to postpone the hearing that was before her to 25-27 November 2019 and to list a second public preliminary hearing to take place on 20, 21 and 22 April 2020. EJ Hawksworth also listed the final merits hearing to take place on 14-25 September 2020. In paragraph 18 on page 224, EJ Hawksworth said this:

> "In the light of the claimant's indication in her email of 30 July 2019 that she was unable to attend the preliminary hearing by video link because of health/stress reasons, and the difficulties she refers to in her letter of 29 July 2019, I have concluded that it would be helpful for the tribunal to have medical evidence as to the claimant's fitness to participate in employment tribunal proceedings. An order for the claimant to provide a medical report is set out below."

8 The postponed hearing proceeded on 25 November 2019. EJ Hawksworth determined in the claimant's favour the issue of territorial jurisdiction but decided that the claimant was "not an employee in the sense required to bring complaints of automatic unfair dismissal under the Employment Rights Act 1996 and breach of contract under the Employment Tribunals (Jurisdiction of Employment) Order 1994, so those two complaints are dismissed" (as recorded at page 229). In addition, EJ Hawksworth rejected the claimant's application for "the rule 50 orders made on 18 January 2019 to be revoked".

9 However, in paragraph 172 on page 258, EJ Hawksworth said this:

> "I have not made any findings as to whether there has been any breach of the rule 50 order. This will be considered at the full hearing."

10 That was said against the background which was recorded by EJ Hawksworth in paragraphs 58-61 of her reserved judgment, at page 238, in the following manner (which was, we were able to see from the evidence before us, an accurate description of the factual background):

> "58. The claimant's claim was presented on 4 February 2018. The claimant's claim includes allegations of serious sexual harassment and assault by Mr D [i.e., Mr Hassan]. The respondent's case is that the incidents are consensual sexual activity between two adults. In paragraph 28 of her claim, the claimant said that a female colleague of hers who worked for the first respondent at the same time as her had told her that she was worried about Mr D's behaviour, he had behaved inappropriately towards her (page 23).
>
> 59. Prior to making the claim the claimant told the respondents that if they were unwilling to resolve the issues with her, she would make the issue public (page 735). On 3 November 2017 she said in an email to the respondents: '*Next week I will move forward with making this situation public – including to your clients, potential clients, supporters and professional networks*'.
>
> 60. After making the claim, the claimant sent emails setting out her complaint to clients of the first respondent on 15 February 2018 (page 741) and 16 February 2018 (page 745) and to an advisor of the first respondent on 5 March 2018 (page 746). On 16 September 2018 the claimant sent a copy of her ET1 to an investor in the first respondent (page 751).
>
> 61. On 12 and 17 October 2018 the claimant published two blogs on an online publishing platform in which she included details of her allegations and the names of all of the respondents (page 756 (titled 'An Open Letter') and page 768). The claimant also sent a series of tweets about her allegations (pages 777 to 804). These two blogs have not been removed from the online publishing platform."

11 The first national lockdown imposed because of the Covid-19 pandemic was in place on 20 April 2020, when the second preliminary hearing listed by EJ Hawksworth was due to start. As a result, the hearing was replaced by a telephone hearing which was held by EJ Hyams. He listed a further telephone hearing, to take place on 24 August 2020, with the issues to be decided as recorded in his case management summary at pages 264-274. In that document, among other things, EJ Hyams recorded in paragraph 10 that he had said to the claimant during the telephone hearing of 20 April 2020 that "the maxim 'less is more' can frequently be applied helpfully in litigation" and that, as he had said on 20 April 2020, "it is frequently best not to plead every possible claim that might conceivably be said to be arguable". During the hearing of 20 April 2020, EJ Hyams also pointed out that from his reading of the single-line-spaced Grounds of Complaint (at pages 14-48) and the Grounds of Resistance (at pages 64-73), it appeared that a crucial issue was whether or not the claimant had given any indication to Mr Hassan before their first physical sexual encounter (which took place, it was by then clear the parties agreed, during the night of 10-11 July 2017) that she did not want such an encounter. He asked the claimant whether or not she had given any such indication. The claimant then became upset and EJ Hyams therefore adjourned the hearing for half an hour to enable her to recover her composure. After the hearing, in paragraphs 20-22 of the case management summary at pages 264-274, EJ Hyams discussed the issues to be determined by the full tribunal. In paragraph 21, he said this:

> '21. The claimant's draft list of issues may on a close examination be seen to ask the same question in different ways. It may also ask some inapt questions, such as for example those to which I now turn.
>
> 21.1 One question (3.13) assumes that the conferring of professional benefit could be "quid pro quo harassment". That does not seem apt to me.
>
> 21.2 Another question that seems to me to be inapt for inclusion in the list of issues is 3.22. That question is whether "If R2 and C were in a consensual [sexual and/or romantic] relationship, was it a non-abusive relationship? (Also considering emotional and/or psychological abuse.)" I struggle to see how the answer to that question could assist the tribunal hearing the case. That aspect of the case will fall to be determined purely by reference to the terms of section 26 of the EqA 2010 and relevant case law concerning that section.
>
> 21.3 A further question that seems to me to be inapt is 3.23. Again, the terms of section 26 will be determinative: not whether or not "consent to sexual activity [was] possible in the context of the power dynamic between R2 and C".'

12 As recorded on page 266, EJ Hyams also listed the full hearing to start on 17 August 2021 with a time estimate of 10 days.

13 On 18 May 2020, the claimant sent the tribunal the letter at pages 276-290, seeking permission to amend her claim by the addition of claims of detrimental treatment for the making of a protected disclosure within the meaning of section 43A of the ERA 1996 and/or victimisation within the meaning of section 27 of the EqA 2010, including in respect of events which post-dated the claim form, the latest of which was (see paragraph 156 below) one of January 2019. The respondents, through their solicitors, responded to that application in their letter dated 12 June 2020 together with its appendices at pages 291-345. In so far as any application to amend to add a new claim was made outside the primary time limit for making the claim, the application was objected to precisely because it was outside the primary time limit for making the claim in the circumstance that there was no justification for making the claim out of time.

14 On 24 August 2020, EJ Hyams held a preliminary hearing in public via CVP (and not by telephone) to decide whether or not the claimant should be permitted to amend her claim by the addition of claims concerning events that post-dated her claim which were possibly covered by without prejudice privilege, and (via a private CVP hearing) whether or not the claimant should otherwise be permitted to amend her claim in the manner which she sought in her letter at pages 276-290. In his judgment dated 25 September 2020 and sent to the parties on 9 October 2020 (at pages 346-353), EJ Hyams decided (as recorded on page 346) that the "documents and events on which the claimant seeks to rely which were written or as the case may be occurred in the course of settlement negotiations between the parties are subject to without prejudice privilege in that they do not conceal unambiguous impropriety within the meaning of the applicable case law, including *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2004] 1 WLR 667".

15 In a case management summary signed on 25 September 2020 and sent to the parties at pages 354-360, EJ Hyams recorded (in paragraph 2 on page 355) that "the claimant's application to amend her claim by adding to it complaints about what happened after she had made her claim to this tribunal" (by which, it was clear from paragraph 3 on page 355, he meant complaints about things which were covered by the cloak of without prejudice privilege) could not succeed and was accordingly dismissed. As for the application to amend the claim otherwise, EJ Hyams concluded that the application to amend the details of the claim by making claims based on the claimant's new allegations of fact which the respondents had not already accepted amounted in substance to a re-labelling of an existing claim should be refused unless the new allegation of fact in question

15.1 was based only on documentary (i.e. and not oral) evidence emanating from one or more of the respondents, and

15.2 was made in support of a recognisable claim about conduct of one or more of the respondents which might be within the jurisdiction of the tribunal.

16 EJ Hyams then decided (as stated in paragraph 7 of the case management summary, at page 356) that of the claimant's 50 proposed amendments, permission should be given only for 7 of those proposed amendments but "without making any decision on the question whether it was just and equitable to permit the claimant to advance the claim in question", by which he plainly meant without making any decision on the question whether time should be extended for making a claim that was made outside the primary time limit for making it so that, applying the decision of the Employment Appeal Tribunal ("EAT") in *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634, the jurisdictional question whether time should be extended remained to be decided by the tribunal which heard the claims. In paragraph 8 of that document, on the same page, EJ Hyams said this:

> "The parties had helpfully co-operated before the hearing of 24 August 2020 by creating the document at pages 389-408 of the hearing bundle. Ms Jennings told me that if the claimant's claims were agreed to be as stated in that document then there was a satisfactory list of issues for the liability hearing. I now agree with that analysis. If that document can be supplemented by the addition of the references in appropriate terms to the amendments for the making of which I have given permission in paragraph 7 above, then that amended document will be an apt statement of the issues for determination by the tribunal at or after the liability hearing."

What happened at the hearing before us which started on 17 August 2021 and the issues which we determined

17 Unfortunately, while the document at pages 389-408 of the bundle for the hearing of 24 August 2020 was an apt statement of the issues as agreed by the parties, the factual issues as stated in the updated document put before us on 17 August 2021 numbered (we were told by Ms Jennings in her opening note) 124, although in some respects there was repetition and overlap. By co-incidence, the full merits hearing was listed to be heard by EJ Hyams, sitting with Mr Maclean and Mr Surrey. However, as we told the parties at the start of the hearing on 17 August 2021, one of us could not be present on 25 August 2021, so we were not going to sit on that day.

18 At the start of the hearing on 17 August 2021, Ms Jennings said that (1) the issue of whether or not the claimant was disabled was conceded, but (2) the issue of knowledge that the claimant was disabled was not conceded. Ms Jennings' opening note contained this paragraph:

> "The heart of the matter concerns the relationship between the Claimant and the Second Respondent. The Claimant's claims allege that she was sexually assaulted and harassed by the Second Respondent. The Second Respondent

asserts that there was a consensual romantic and sexual relationship between them. There are a number of other claims which revolve around the breakdown of this relationship following a pay dispute and the organisational fallout from the same."

19 EJ Hyams, having looked at the list of issues as they then stood, had a discussion with the claimant about the number of issues on the list and sought to focus the claim on the core issues as they appeared from the pleadings. EJ Hyams then again asked the claimant whether or not she had given any indication to the second respondent, Mr Hassan, that she did not want the sexual contact that had occurred. The claimant then said that on 20 April 2020, when EJ Hyams had first asked her that question and she had become upset, she had injured herself. EJ Hyams said that that was irrelevant in that the question needed to be answered and that the case needed to be focused on the legal issues which arose, which, here, in regard to this aspect of the claim, meant in the application of section 26 of the EqA 2010. The foundation of that part of the claim was that the conduct about which complaint was made was unwanted, so that if no indication that the conduct was not wanted was given by the complainant then that was highly material to the application of the section (the relevant part of which we have set out in paragraph 160 below). EJ Hyams also invited the claimant to review the whistleblowing element of the claim in so far as it overlapped with the victimisation claim as the former was a harder claim to win than the latter, and the claimant would not get compensation for injury to feelings caused by whistleblowing if she got such compensation for victimisation, since a claimant would be entitled to compensation only once for injury to feelings.

20 The claimant challenged EJ Hyams for asking whether or not she had given any indication to Mr Hassan that she would not consent to sexual contact (assuming that it was initiated by Mr Hassan), by asking him why he was asking her that question before reading her witness statement and the documents in the bundle. EJ Hyams said that it was because she was going to have time to consider the matter while the tribunal read the voluminous witness statements (the claimant's witness statement was 154 pages long and consisted of 646 single-line-spaced paragraphs; the rest of the witness statements were on another 101 pages, so that the witness statement bundle was 254 pages long excluding its index) before it started to hear oral evidence, and because in his experience, litigants who are encouraged to review their cases in the light of initial comments by a judge often do then decide not to press the parts of their cases that are questioned by the judge. EJ Hyams then referred to one aspect in particular of the claim of harassment, which was stated in paragraph 28 of the Grounds of Complaint (at page 23), that it was harassment within the meaning of section 26 of the EqA 2010 for Mr Hassan in a meeting at which the claimant was not present, to massage the shoulders of a female colleague, and suggested that it was hard to see how such a claim could in practice succeed. EJ Hyams also spent some time describing to the claimant the purpose of cross-examination, and what it involved, or should involve, and what it should not involve. Thus, he made it clear that if it were to be said to the tribunal that a witness's account of something was not correct then it

was necessary to put to that witness the version of events which the cross-examiner said was correct and that if that did not occur then the tribunal would not (or at least might not) be able fairly conclude that the witness's account was not true.

21 We then, at 11:35, adjourned until 2pm on the next day, 18 August 2021, when we had a further discussion about the issues with the parties. Ms Jennings said that the list was primarily the claimant's in that while the claimant had agreed to some modifications of the list that she had proposed as the final version, she had agreed to only a relatively small number of such modifications. The claimant was not willing to drop any part of her claim, but she agreed that the claim against the first respondent should be dismissed. The agreed list of issues as it stood then did not change as far as the parties were concerned (except that the issues listed as numbers 2.1.1 and 2.1.2 were not pursued by the claimant because of the dissolution of the first respondent and because those issues concerned the acts of persons who were not themselves respondents), and for the sake of brevity and simplicity, instead of incorporating the list in these reasons, we have simply stated the issues in the headings to the sections below where we deal with the issues which required determination by us (so that we do not consider any of the issues in the agreed list of issues which were, after 18 August 2021, no longer "live").

22 Returning to what happened at the hearing, after our discussion with the parties about the issues, at 2:50pm we had a 15-minute break and at 3:05pm we started to hear oral evidence from the claimant. She was cross-examined from 15:14 onwards for the rest of that day and for the whole of the following two days, i.e. Thursday 19 and Friday 20 August 2021. At that start of Monday 23 August 2021, we heard oral evidence from Mr Nathan Heinz via CVP. We then heard oral evidence from Ms Caldwell in person on behalf of the claimant. We then heard oral evidence from Mr Hassan, in person, who was cross-examined from 14:38 onwards on 23 August 2021 until the end of that day.

23 The claimant first asked Mr Hassan a series of questions the answers to which were of no relevance to the issues before us. EJ Hyams after (Mr Maclean's notes showed) 28 two-way interactions between the claimant and Mr Hassan (not all of which took the form of a question and an answer), said to the claimant that the questions that she was asking were about matters that were not relevant to the issues before us. By way of illustration, one question asked was in what year Mr Hassan met his wife. At that point EJ Hyams gently reminded the claimant of the need to keep relevance in mind when asking her questions in cross-examination.

24 At the start of the next day, 24 August 2021, EJ Hyams said that he had been working on the issues as stated in the parties' agreed list, and that he had produced a written analysis of it with a view to making the task of the parties and the tribunal easier when it came to the parties' submissions and the tribunal's deliberation and determination of the claims. He then sent that written analysis (which was in the form of a restatement of the issues, but by reference to the parties' agreed list of issues) to the parties by email for them to consider it

overnight. EJ Hyams also said that the claimant had so far got nowhere near the key issues in the case and on which Mr Hassan would need to be cross-examined if the claimant's case was to be put to him. EJ Hyams then asked the claimant whether she would be happy for him to ask Mr Hassan the questions that he thought needed to be asked if Mr Hassan's account was to be challenged, and the claimant said that she would be happy for that to happen, but that she wanted to continue asking her questions until lunchtime. EJ Hyams then asked one question, after which the claimant continued for the rest of the morning to cross-examine Mr Hassan. The one question which EJ Hyams asked (which he put in two ways) was what Mr Hassan knew about Post-Traumatic Stress Disorder ("PTSD") and the claimant's ability to give effective consent to conduct towards her. Mr Hassan's answer to that question is recorded in paragraph 83 below.

25 After lunch on 24 August 2017, between 14:02 to 15:10, EJ Hyams asked Mr Hassan questions, after which we had a short break. EJ Hyams first asked Mr Hassan about the events of 10-11 July 2017. At the end of doing so, EJ Hyams said to the claimant that she could of course cross-examine Mr Hassan about what he had just said, either now or later, when he, EJ Hyams, had finished asking his questions. The claimant said that it was "fine", that she did not want to ask questions at that point, and that what EJ Hyams was doing was "helpful". EJ Hyams then continued to ask Mr Hassan questions, continuing until (as we say at the start of this paragraph) 15:10.

26 After the break to which we refer in the first sentence of the preceding paragraph above, the claimant continued to ask questions of Mr Hassan which were of peripheral relevance only. She then asked him a series of questions which were designed to show the truth of what she herself had written and posted on the internet about him, i.e. the document at pages 2989-2999. By way of example, the claimant put it to Mr Hassan that his now former wife had accused him of sexual assault. He said that that was not true. EJ Hyams said that the answer to that question was unlikely to assist the tribunal in determining the claimant's claims and that if that question was to be pursued then it should be put to Mr Hassan's former wife, who was giving evidence in support of the respondents, including Mr Hassan. EJ Hyams reminded the claimant of the need to ask only relevant questions and pointed out that the tribunal had to act in accordance with Mr Hassan's right to respect for his private life. The claimant then put it to Mr Hassan that there was "a cover-up" of what had happened in 2016 when, she claimed, Mr Hassan had said that he had assaulted Ms Pugh. He denied that. The claimant then put the exchange at pages 903-904 to Mr Hassan, which was the source of her allegation that he had assaulted Ms Pugh. Mr Hassan gave an answer to the question which the claimant asked, saying that he had not in fact assaulted Ms Pugh (and in fact it was Ms Pugh's witness statement evidence that he had not done so; she said this in paragraph 52 of that statement: "I was not aware of nor did I deliberately conceal any acts of alleged abusive behaviour or sexual harassment by the Second Respondent as alleged by the Claimant."). EJ Hyams then said that if that question was to be pursued then it should be put to Ms Pugh and not Mr Hassan and again asked the claimant to stick to relevant questions

and not to ask irrelevant questions. The claimant then asked another question which was relevant only to the accuracy of her posted document at pages 2989-2999, and EJ Hyams again said to her that the case was not about what she had done but about what Mr Hassan had done (it being clear that he meant whether Mr Hassan had done what the claimant claimed Mr Hassan had done to her), and the claimant again asked a question about Mr Hassan's treatment of his wife.

27 EJ Hyams then said that he was fed up with the claimant not taking his direction and continuing to ask and repeat questions the answers to which were not going to assist the tribunal and which were unfair to Mr Hassan. The claimant then went into a tirade, saying that she felt that she was speaking into a void, swearing a number of times, including by saying to EJ Hyams "You don't know what the fuck you are doing", and exited the hearing room. That was at about 4pm.

28 We waited until we heard from a member of the tribunal's staff that the claimant had said that she was not coming back into the hearing room, so we adjourned the hearing to the next hearing day, i.e. 26 August 2021. At 09:16 on 25 August 2021, when, as we say in paragraph 17 above, we were not sitting, the claimant emailed the tribunal and the respondents' solicitor in the following terms:

> 'Dear all
>
> Given that has now happened exactly what I said would happen– that if the manner I was being treated persisted, my health would be derailed and the hearing would have to be postponed– what do you propose doing?
>
> Yesterday I had a full blown panic attack as I left the hearing room.
>
> And this is not the first panic attack I've had at a hearing with Judge Hyams, as I have brought up repeatedly, as well as explaining what triggers that, then asking him repeatedly to stop.
>
> Or maybe it is the case that Judge Hyams did not hear anything or have any suggestion from me at all for saying NO or STOP, or that his behaviour was unwanted, or that I wasnt in a position or had any recourse to stop him? I suppose he will look and think back and let me know, and then think about how that applies to his entire inability to understand this case.
>
> Since Judge Hyams has helpfully told me this is "not a Special Needs tribunal", in response to my question for the outrageous accommodation of a little patience, then someone better suggest what the options are for proceeding.
>
> I would also suggest everyone reading my Disability Impact Statement included in the hearing bundle.

If anyone is outraged by the injustice of my stating the truth of their actions in this email, I'm sure Mr. D will helpfully supply instructions for how to report me to the police.

I will need an additional day to recover and can hopefully appear at 10am on Friday, though I'm having respiratory symptoms so that may mean it will have to be by CVP.'

29 EJ Hyams then, on 25 August 2021 caused a letter including the following passage to be included in it to be sent to the parties (which it was, at 12:35, by email):

"The claimant has misunderstood my reference to the tribunal not being a special needs tribunal. That reference was made in the context of not permitting even those in a special needs tribunal to ask irrelevant questions; the patience that the claimant asked for, as I understood the situation at the time, and as I continue to understand it, was an indulgence in the form of permitting her to ask irrelevant questions while she eventually got to the relevant ones. Rather, I insisted that the claimant ask only relevant questions and I gave the claimant time at her request to reconsider her planned line of questioning.

I understand that the claimant is now asking for the postponement of the hearing tomorrow. The tribunal needed to hear from the respondents in that regard, and I see that they have, through Ms Jennings, responded to that request by writing to me directly.

I agree with Ms Jennings' proposal to resume the hearing via CVP at least in the first instance tomorrow. It is convenient that the tribunal is not sitting today. That means that the claimant now has some time to recover her composure. We the tribunal will be completely content for the claimant to attend only via CVP from now on, and for the rest of the hearing to be conducted only via CVP if that is what she wants. I suggest to the claimant that that will enable her to attend knowing that if she is in need of a break then she can have it at any time and in a less stressful situation than that of an in-person hearing.

I add, however, that my colleagues and I discussed the situation at length last night, after we had adjourned the hearing, and after a careful reconsideration of the situation, we remained of the view that the claimant's cross-examination questions which I had, for the third time, directed her to stop asking were inappropriate as they were seeking responses which had no evidential relevance to her case. While we are acutely aware of the claimant's difficulties, we can act only in accordance with what we perceive to be the interests of justice."

30 Later on that day, the claimant sent the tribunal and the respondents' solicitor an email in these terms:

"Dear Sir/Madam,

I will not be able to attend the hearing tomorrow as I'm not well. This also means I cannot prepare properly and I do not think it is fair to expect me to continue under these conditions.

If I am able to attend Friday, please ask the Judge that I am provided detailed information on options available going forward.

For example:

-Can I apply to the ET for financial relief given I have paid around $10,000 to attend and now will have additional medical costs

-how do I apply for a copy of the transcript of proceedings

-when can the case be relisted given I am re-starting school in Sept and in school until end of April 2022

-will the hearing be relisted in full

-if it is possible to have a support person attend with me on Friday

-will Judge Hyams be recusing himself from any further involvement with this case,

And if not,

-what is the procedure for applying for him to be removed or disqualified. (And would that also trigger a review of his previous judgment)."

31 We then resumed the hearing at 10:00 on 26 August 2021 with only the respondents and Ms Jennings present. We recorded what we decided that day in a case management summary that was sent to the parties at 16:31 on that day. Among other things, we said this:

"As for relisting the hearing, we understood that the information sought by the claimant was based on the proposition that EJ Hyams could lawfully, and should, recuse himself. As EJ Hyams said during the hearing on 26 August 2021, that is a question which is determinable by reference to the applicable case law. That case law shows that an application to recuse cannot lawfully be granted except in relatively limited circumstances. The most helpful case law in that regard is the decision of the Court of Appeal in *Ansar v Lloyds TSB Bank PLC* [2007) IRLR 211, [2006) EWCA Civ 1462. That case is available on the https://www.bailii.org/ website. That case shows that a tribunal has a duty to continue a hear a case where there are in law no grounds for recusal. There is no discretion to be exercised in the matter."

32 We also said this:

> "If the claimant makes an application for the tribunal to recuse itself, and that application is refused, then the case will continue. As discussed during the hearing of 26 August 2021, we would be glad to assist the claimant (as Ms F [i.e. Ms Caldwell] suggested on behalf of the claimant) by EJ Hyams asking questions of the respondents and their witnesses to ensure that the claimant's case was put to the respondents and their witnesses, as he had done already in relation to Mr D. EJ Hyams would be happy to do that in the same way that he had done it in relation to Mr D, i.e. by asking those questions which he (EJ Hyams) saw as needing to be put. If the claimant had any particular questions that she wanted asked then they could be sent to EJ Hyams and the respondents in advance of the resumption of the hearing, although EJ Hyams would ask only those questions which he believed were about relevant matters."

33 Early in the morning of the next day, Friday 27 August 2021, EJ Hyams sent the parties a revised version of his document commenting on the issues in the parties' agreed list with a view to assisting the parties and the tribunal as described at the start of paragraph 24 above. In the email enclosing that document, he said this: "All of the content of the enclosed document is open to discussion and reconsideration."

34 At 10:00 precisely on 27 August 2021, the claimant sent a long (7-page) letter to the tribunal, copying it to the second, third and fifth respondents and their solicitor, at the start of which the claimant said this:

> "To whom it may concern,
>
> I write in response to Judge Hyams' letter of Aug 26, 2021.
>
> I will not be attending the Tribunal today or for the rest of this listed hearing, due to health/medical reasons.
>
> I am a disabled, unrepresented Claimant with PTSD from sexual trauma. This is plainly stated in the case materials and forms the substance of many of my claims."

35 At the bottom of page 6 of the letter, the claimant said this (in bold font):

> "I also want to be clear that I do not consent for Judge Hyams to ask questions of the Respondents on my behalf or at all, and I do not consent for these proceedings to continue in my absence."

36 We then, at 10:09 on 27 August 2021, resumed the hearing and discussed the way forward with Ms Jennings. Ms Jennings responded orally to EJ Hyams'

document analysing and to an extent restating the parties' list of issues that he had sent to the parties that morning. We did not understand what Ms Jennings said to require any alteration of that document. After careful consideration, at the suggestion of the respondents we agreed to adjourn the hearing as there might have been a good medical reason for the claimant's failure to attend the hearing and press her case, and to do so with sufficient time to permit the claimant to regain sufficient health to be able to resume the hearing. We issued a further detailed case management summary at the end of the day, (1) making orders for the resumption of the hearing on Monday 8 November 2021 by CVP, (2) allowing for the claimant's attendance from Canada by starting the hearing when she was present at 2pm, (3) recording that we intended to conclude the hearing during that week (under rule 47 of the Employment Tribunals Rules of Procedure 2013 if the clamant did not attend) unless we concluded that EJ Hyams should recuse himself, and (4) requiring the parties, if they took issue with any part of EJ Hyams' document analysing and to an extent restating the issues as stated by the parties, to say so by a certain date. In paragraph 4 of the case management summary, we said this:

> "As with her failure to attend on the previous day, the claimant did not put before us any medical evidence (or any evidence of any other sort) to support her proposition that she was not well enough to attend the hearing and would not be so also on Tuesday 31 August and Wednesday 1 September 2021. The claimant's letter sent at 10:00 was, however, long and detailed, and it suggested that the claimant would have been able to make written representations in support of her claim if only on one of the latter two days."

37 The date for responding (it was in fact extended by EJ Hyams because of a delay in the sending by the tribunal of our record of the case management discussion which EJ Hyams had signed on 27 August 2021) to EJ Hyams' proposed analysis and partial redrafting of the agreed list of issues passed with no response from the respondents but with a response in this form from the claimant, sent on 20 September 2021:

> "I write in response to correspondence from the Tribunal which I received on 17 and 20 Sept, 2021. To address point #4, that there was no medical evidence, I refer Judge Hyams to the extensive medical documentation I have already submitted for this case, as well as his own common sense.
>
> It appears Judge Hyams intends to continue to preside over these proceedings and that the hearing is supposed to continue on November 8th which will take place in the middle of my PhD semester. I am unclear if or in what capacity I will attend or if I will have legal support by then, though I am working to secure this. If that happens, they may advise me to apply for recusal and that the hearing is re-listed.
>
> I do not intend to review or respond to Judge Hyams' proposed List of Issues, as I think the problems in framing and understanding the case go well beyond

my ability to explain or correct, and that this has nothing to do with my lack of legal abilities but rather with everyone else's ignorance, blindspots, and biases.

I am now of the mind that the best hope of 'justice' being served in this case (however perversely, and with a high personal cost to myself) is that all parties continue to behave in an abusive, discriminatory, and dehumanizing manner towards me; that Judge Hyams writes what I assume will be an embarrassingly wrong-headed judgment; and then I will leverage all of that into various public policy and advocacy efforts—which are already well underway.

Due to the recent conduct of the Respondents, opposing counsel, and Judge at the hearing in Watford, there is now considerable interest in this case from media, advocates, and an investigative documentary filmmaker. If any of you are interested in a redemptive arc, I suggest thinking about what you might do to earn one (though, again, behaving awfully is helping tremendously to prove my point)."

38 On 5 October 2021, the claimant sent a letter to the tribunal, the first half of which was in these terms:

"I am writing to apply for Judge Hyams' recusal. I refer to my detailed letter (attached) of Aug 27, 2021, which summarizes what happened at the Final Hearing in Watford in August, and led to the hearing having to be stopped due to my stress/ill health caused by the conduct of the hearing.

I do not believe that a fair or unbiased hearing can proceed with Judge Hyams presiding, and also that there is a significant risk to me of additional injury to my health and well-being (and accompanying financial damage) by participating in any further proceedings with Judge Hyams. I also do not believe I have been given the opportunity to present my case or advocate on my own behalf sufficiently, or at all, despite dedicating significant time and money to prepare, fly to the UK, quarantine, etc., and waiting nearly 4 years to have the opportunity to do so.

I seek that the final hearing of this case is re-listed with a different judge."

39 On 18 October 2021, the claimant wrote this to the tribunal, copying it to the respondents and their solicitor:

"To whom it may concern,

I will not be attending the hearing on November 8th. I do not wish to expose myself to anymore pointless cruelty. It is making me quite literally ill.

I ask that the Tribunal staff please write and let me know the outcome of my application for recusal, and any next steps to appeal."

40 The claimant did not attend the resumed hearing on 8 November 2021. She had put before us no medical or other evidence stating that she was unfit to attend the hearing (other than her own assertion, set out in the preceding paragraph above).

41 We first determined the claimant's application for recusal as stated in her letter of 27 August 2021 to which we refer in paragraphs 34 and 35 above. In doing so, we applied the principles in the case of *Ansar v Lloyds TSB Bank PLC* to which we refer in paragraph 31 above, and paragraphs 102-105 of the speech of Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357, to which we paid particular regard. In the light of those authorities, we concluded that a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that EJ Hyams (and therefore the tribunal) was biased, and we therefore were bound to, and did, reject the application for recusal. EJ Hyams stated that conclusion at 2pm on 8 November 2021, by reference to each relevant part of the claimant's letter of 27 August 2021. We record here that we found the claimant's description in that letter of the events at the hearing up to and including 24 August 2021 to be in some respects inaccurate. In some respects the differences in our records and recollection of what occurred will be apparent from what we say above. To the extent that it is not and it is material (and we say that because some of the indented paragraphs in the claimant's letter of 27 August 2021 were irrelevant to the application for recusal: a good example is the paragraph at the bottom of page 2 and the top of page 3), we state those differences in the following subparagraphs.

41.1 We had no note, or recollection, of EJ Hyams saying (as claimed in the second indented paragraph on page 2 of the letter) that "maybe he had glanced over things too quickly, that he was actually talking about later incidents where it seemed I was consenting, and had confused those with the July 10 incident".

41.2 In regard to the fourth indented paragraph on page 2, we agreed that EJ Hyams had indicated that what the claimant was saying was not relevant, but we did not recall him saying the precise words suggested by the claimant.

41.3 None of us recalled EJ Hyams saying, as claimed in the fifth indented paragraph on page 3): "what's it you've got again? PTSD or something?".

41.4 The following indented paragraph on page 3 failed to record the fact that EJ Hyams said that he was drawing his analogy from what he understood to be one of the leading cases on similar fact evidence in a criminal context. He did not then refer to it, but when considering the claimant's application for recusal we took into account that the example he had given was a slightly inaccurately-remembered example used by Lord Hailsham

in the case of *DPP v Boardman* [1975] AC 421, at page 454D-F, where Lord Hailsham said this:.

> 'There are two further points of a general character that I would add. The "striking resemblances" or "unusual features," or whatever phrase is considered appropriate, to ignore which would affront common sense, may either be in the objective facts, as for instance in *Rex v. Smith*, Notable British Trials Series, or *Reg. v. Straffen* [1952] 2 Q.B. 911, or may constitute a striking similarity in the accounts by witnesses of disputed transactions. For instance, whilst it would certainly not be enough to identify the culprit in a series of burglaries that he climbed in through a ground floor window, the fact that he left the same humorous limerick on the walls of the sitting room, or an esoteric symbol written in lipstick on the mirror, might well be enough. In a sex case, to adopt an example given in argument in the Court of Appeal, whilst a repeated homosexual act by itself might be quite insufficient to admit the evidence as confirmatory of identity or design, the fact that it was alleged to have been performed wearing the ceremonial head-dress of a Red Indian chief or other eccentric garb might well in appropriate circumstances suffice.'

41.5 The claimant's assertion that EJ Hyams had "*laughed* at [her]" (the italics are in the original, which is the second indented paragraph on page 4 of the letter) was inaccurate. The claimant did not record the context and manner in which the circumstances to which she referred in the second indented paragraph on page 4 of the letter occurred. What happened was that during Ms Jennings' cross-examination of the claimant, EJ Hyams asked the claimant about the WhatsApp conversation at pages 1935-1936, referring to the fact that the claimant first said she was "deciding if go stay at tree", i.e. The Tree public house/hotel, and then went through the sequence in the top half of page 1936, which was this:

> "[6:01 AM, 8/23/2017] Chelsey Rhodes: It's better that i have boundaries
> [6:01 AM, 8/23/2017] Zaid Hassan: Like 500 yards and a lane
> [6:01 AM, 8/23/2017] Chelsey Rhodes: Which should not depend on physical space
> [6:01 AM, 8/23/2017] Zaid Hassan: Hahahaha
> [6:01 AM, 8/23/2017] Chelsey Rhodes: Lol
> [6:02 AM, 8/23/2017] Zaid Hassan: You're not gonna jump me hahaha
> [6:02 AM, 8/23/2017] Zaid Hassan: Are you?
> [6:02 AM, 8/23/2017] Chelsey Rhodes: Probably not
> [6:02 AM, 8/23/2017] Zaid Hassan: Hahahaha
> [6:02 AM, 8/23/2017] Chelsey Rhodes: ……
> [6:02 AM, 8/23/2017] Zaid Hassan: ……
> [6:02 AM, 8/23/2017] Chelsey Rhodes: No
> [6:02 AM, 8/23/2017] Chelsey Rhodes: I wont"

The series of dots shown there are replacements for emojis. EJ Hyams read out the first part of the passage, and read out the "hahahaha" in the fourth quoted line as a laugh, and said that the claimant replied "Lol", i.e. laugh out loud, and then read out "You're not gonna jump me" with a laugh, i.e. laughing as he did so to illustrate that it was a jokey conversation, and at that point the claimant asked him why he found it funny as it was about something sexual and that was a serious matter for her (or words to that effect). EJ Hyams was taken aback and (as recorded in the third indented paragraph on page 4 of the claimant's letter of 27 August 2021) immediately apologised if he had appeared to be disrespectful as he had not intended to do so, and said that he had been reading out what he thought was a humourous conversation with the intended humour of the conversation reflected in his voice. He also said that he frequently found it helpful in a hearing, including ones like this one, to use humour to lighten the mood if that was possible. The claimant said that she accepted EJ Hyams' apology. EJ Hyams then asked the claimant what the emojis were. She said that the first one was a shrug of the shoulders, and the second one was a hitting by oneself of one's head such as to say: "Silly me!". Ms Jennings then resumed her cross-examination and put it to the claimant that the conversation was a humourous one, and the claimant agreed that it was. At the first opportunity afterwards, when there was the next break in the hearing, we (i.e. the members of the tribunal) discussed the situation and Mr Surrey and Mr Maclean said that they were also taken aback by the claimant's objection: by way of illustration, Mr Maclean said that the response from the claimant came "out of the blue".

41.6 The next two indented paragraphs on page 4 of the letter (the fourth and the fifth ones) are not entirely accurate, in that EJ Hyams referred to the impact on other tribunal users of the loss of his time caused by the need to write a longer judgment than would have been necessary if a party had not included in his or her case all claims that could theoretically be advanced, no matter how flimsy their basis on the factual material before the tribunal, but it is true that he apologised for being what he thought, on reflection, might have been a little terse with the claimant on the first day of the hearing.

41.7 In the next two indented paragraphs on page 4 of the letter, the claimant wrote that EJ Hyams appeared to be "incredulous" when suggesting to the claimant that work colleagues' relationships of a sexual or romantic nature are not unknown, and that an employee's hotel room, even if paid for by the employer, is the employee's private space which he or she must be able to keep private by not permitting the employer to enter. None of us saw EJ Hyams' response to what the claimant was saying as being one of incredulity.

41.8 We did not recall Ms Jennings, as the claimant claimed in the indented paragraph that started at the bottom of page 4 and continued at the top of page 5 of the claimant's letter of 27 August 2021, questioning the claimant in the manner described, but in particular we had no note of Ms Jennings having "suggested that [the claimant] may have up to 7 mental disorders and can't understand reality correctly".

41.9 In regard to what happened at the end of the hearing on 24 August 2021, to which claimant referred in the passage at the bottom of page 5 and the top of page 6 of the letter, while EJ Hyams had recorded in the final paragraph of the letter to the claimant set out in paragraph 29 above that he had directed the claimant not to ask the same question three times, Mr Surrey had noted that EJ Hyams had, by the time that he said that he was fed up because the claimant was not acting in accordance with his directions, by then intervened in a major way on five occasions, and they were all about the same issue.

41.10 We have already, in paragraph 23 above, dealt with the substance of the second full indented paragraph on page 5 of the claimant's letter of 27 August 2021. We add here that it is true that EJ Hyams referred to Mr Hassan's right to respect for his private life, conferred by Article 8 of the European Convention on Human Rights, but that he did so in response to the claimant's asking of what EJ Hyams regarded as irrelevant questions about Mr Hassan's relationships with women other than the claimant.

41.11 We did not perceive EJ Hyams to have become "increasingly upset" with the claimant, as she claimed in the fourth indented paragraph on page 5 of her letter of 27 August 2021. We have dealt with the substance of the rest of that indented paragraph and the next three indented paragraphs in paragraphs 24-27 above.

41.12 The first full indented paragraph on page 6 of the claimant's letter of 27 August 2021 was inaccurate in that it failed to make it clear why EJ Hyams said that the claimant was not on trial. EJ Hyams, when saying to the claimant that she could not ask Mr Hassan about the accuracy of her document at pages 2989-2999, which she had posted on the internet before the orders were made under rule 50 in this case, said that he was saying that because it was not being alleged by the respondent that her claims made to the respondents of what were in substance breaches of the EqA 2010 were made in bad faith, which, if it were correct, would have been a complete defence to the claims of victimisation within the meaning of section 27 of the EqA 2010.

41.13 As for the final indented paragraph in the sequence setting out the claimant's reasons for seeking the recusal of EJ Hyams, where the claimant wrote that EJ Hyams at one point 'said that it seemed [the claimant] thought he was rather "stupid and slow" and just wasn't getting

it', what EJ Hyams said was that it might be that he was somewhat stupid and slow, and that that might be why he was not understanding a particular point that the claimant was seeking to make, which was why he was asking the claimant to explain it to him again. He did not say that he thought that the claimant seemed to think that he was stupid and slow.

42 We record here too that we were unable to understand the basis for the claimant's assertion in the final indented paragraph on page 3 of her letter of 27 August 2021 ("I believe that Mr. Hyams mis-stated the law to me on several occasions. I also believe that Ms. Jennings knew this and didn't correct him, thereby putting me at a disadvantage.")

43 After we had announced that we had concluded that EJ Hyams was neither able to, nor obliged, to recuse himself, we said that we had concluded that we should continue the hearing in the claimant's absence. We did so because the claimant had not put before us any expert evidence (whether medical or otherwise) stating that she was not well enough to participate in the hearing and giving an idea of a time by which she would be able to do so. We had by then considered very carefully the letter from Dr Grace at pages 3246-3250. Ms Jennings submitted, and we agreed, that it was in the interests of justice for us to conclude the hearing by making findings of fact on the evidence before us, including any further oral evidence from the respondents' witnesses, and determining the claimant's claims.

44 Mr Hassan's oral evidence was then concluded by us asking him some further questions. Mr Eisenstadt, the third respondent, was then called to give evidence. We asked him a number of questions. Ms Pugh, the fifth respondent, was then called, and we asked her some questions. Ms M Eisenstadt, Mr Hassan's former wife, was also called to give oral evidence, but we had no questions for her arising from her witness statement or otherwise.

45 Ms Jennings had prepared some detailed written submissions, 41 pages long, and she had them sent to the tribunal and the claimant at the end of 8 November 2021. We adjourned the hearing to 2pm on 9 November 2021 and read Ms Jennings' submissions.

46 We resumed the hearing at 2pm on 9 November 2021 and heard oral submissions from Ms Jennings and discussed with her what we should do about the restricted reporting order and the anonymity order if we found in favour of the claimant to any extent and if we found in favour of the respondents on all issues. Ms Jennings said that if the claims were to any extent successful then there would need to be a remedy hearing, so the order would have to remain in place. If, however, we found in favour of the respondents on all parts of the claim, then the respondents would not press for a continuation of the orders made under rule 50. We then reserved our decision on liability.

The evidence before us

47 We have already (in paragraphs 22-27 and 44 above) referred to the oral evidence which we heard. The parties put before us a joint bundle of documents which had 3606 pages (not including its index). The claimant put an additional bundle before us, containing a further 838 pages (not including its index). Before turning to our findings of fact on the matters in issue, we refer to the expert evidence before us relating to the claimant's psychological health.

The expert psychological evidence before us

48 Because the issue of disability was (see paragraph 18 above) conceded at the start of the hearing, we did not need to consider the expert evidence before us to any great extent until the claimant asserted (in the first paragraph of her letter of 20 September 2021 that we have set out in paragraph 37 above) that there was in the bundle much medical evidence which justified her assertion that she was not well enough to attend the hearing on and after 25 August 2021 (without, however, stating on which particular parts of that evidence she relied in that regard). As stated in paragraph 43 above, we took into account the letter from Dr Grace at pages 3246-3250 before concluding on 8 November 2021 that we should indeed (as we had on 27 August 2021 thought) conclude the hearing in the absence of the claimant. When reviewing the evidence before making our findings of fact about what had happened during the night of 10-11 July 2017 and what Mr Hassan could reasonably have been expected to know about the claimant's state of mind at that time, we were reminded that he had said this in paragraph 214 of his witness statement:

> "I was shocked to read in the Claimant's medical records that she was diagnosed with 'unspecified schizophrenic spectrum and other psychotic disorders' when she was admitted to hospital in December 2015 – I refer specifically to page 3229 of the bundle. Had I been aware of this I would have discussed her conditions before agreeing for her to stay at my house alone with my wife and son. The Claimant never mentioned this diagnosis to me. The Claimant has only mentioned PTSD and I refer to her email to me at page 2002 and dated 27 August 2017 when this was mentioned. I still had no reason to believe that her symptoms were serious enough to be a disability."

49 Page 3229 was clearly a mistaken cross-reference. We found the only page to which Mr Hassan could be referring to be 3201, which was part of a three-page document issued by the hospital at which the claimant was an in-patient for two weeks at the end of 2015. The document was very poorly photocopied, but it was clear from it that the claimant was compulsorily detained under the Canadian Mental Health Act under a certificate that was valid from 24 November 2015 to 24 December 2015, and that the "Admitting Diagnosis" was "Unspecified schizophrenia spectrum and other psychotic disorders". Thus, Mr Hassan's quotation was slightly inaccurate. The claimant was stated to have been prescribed medication for those diagnosed disorders.

50 We then found that there was in the claimant's supplemental bundle at pages 837-838 a letter dated 7 August 2021 from Dr Grace addressed to the "Tribunal Members". Dr Grace was at the time of writing that letter to be a Registered Psychologist. She was stated in the letter at pages 3246-3250 to have a PhD in Counselling Psychology; at the top of page 3248, this was said:

> "I have a Ph.D. in Counselling Psychology, along with extensive training in Critical Incident Stress Management, Cognitive therapy, Grief Counselling, EMDR, Mindfulness, and Bodycentered therapy."

51 We noted that Dr Grace was not a medically qualified doctor, as she said herself in her letter at page 3248 referred to the claimant's medical doctor in this sentence:

> "In addition to counselling, I encouraged Chelsey to continue to seek treatment from her medical doctor."

52 The penultimate full paragraph of Dr Grace's letter of 7 August 2021, on page 838 of the claimant's supplemental bundle, was in these terms:

> "Although Chelsey reported experiencing a short-term hospitalization associated with a severe trauma due to her reports of workplace sexual harassment and bullying, a second workplace harassment situation a few years later, and reported experiencing resultant symptoms of PTSD and depression, she has overcome these oppressive and harmful situations and has resumed as normal functioning as possible with ongoing supports. In my clinical opinion, Chelsey experienced significant traumatic events that lead [by which we assume she meant "led"] to a nervous system shut down and short-term hospitalization. There is no evidence that Chelsey demonstrates a biological propensity for psychosis. In other words, Chelsey (a) experienced an expected psychological reaction to multiple traumatic experiences; (b) underwent treatment to restore her mental, emotional, and occupational functioning; and (c) is pursuing a PhD that demands a high level of functioning."

53 Having seen those further documents relating to the claimant's mental health, we considered whether we should under rule 70 of the 2013 Rules reconsider our decision to conclude the hearing in the claimant's absence, and we concluded that we should not do so. That was because we did not see that further expert evidence as requiring, let alone justifying, us to come to a different view on that matter.

Time limits and the possibility or otherwise of them being extended

54 Early conciliation certificates relating to the second, third and fifth respondents were at pages 50, 51 and 53 respectively. They were issued on 14 January 2018 and the date of receipt by ACAS of notification of early conciliation was 14 December 2017. Accordingly, the claims made under the EqA 2010 were in time in respect of any conduct, including conduct extending over a period within the

meaning of section 123(3)(a) of that Act, which occurred on or after 15 September 2017, but they were out of time in respect of any conduct occurring before that date unless time was extended under section 123(1)(b) of that Act on the basis that we concluded that it was just and equitable to do so. In *Adedeji v University Hospitals Birmingham NHS Trust* [2021] EWCA Civ 23, at paragraph 37, Underhill LJ said that the "best approach" for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to "assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… the length of, and the reasons for, the delay". However, it remains the case that the claimant must satisfy the tribunal that an extension of time should be granted. We found the following paragraph in *Harvey on Industrial Relations and Employment Law ("Harvey*") (PI[280]) to be a helpful summary of the case law in this regard:

> "The Court of Appeal in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327 (at [26] per Wall LJ) held that 'Plainly, the burden of persuading the ET to exercise its discretion to extend time is on the claimant (she, after all, is seeking the exercise of the discretion in her favour)' and in the same case Sedley LJ described (at [31]) that 'there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them'. However, as the EAT noted in *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0320/15 (18 February 2016, unreported) per HHJ Shanks at [25]), the burden is one of persuasion, it is not a burden of proof or evidence, as such. In *Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at [9] the EAT, HHJ Peter Clark, identified a proposition which would seem to follow from this burden of persuasion that 'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one'."

55 As far as the claims of detrimental treatment for making a protected disclosure within the meaning of section 43A of the ERA 1996 were concerned, the position was the same in principle, albeit that the test for an extension of time was more difficult to satisfy: it was as a result of section 48 of that Act whether it was reasonably practicable to bring the claim within the primary time limit and, if it was not, whether the claim was made within a reasonable period of time after the ending of that time limit. In paragraphs PI[190] and [193] of *Harvey*, there is this helpful summary of the applicable law:

> "The starting point is that Parliament has set down a primary time limit which, in the ordinary course of events, it is reasonably practicable for would-be litigants to meet. Thus, to state the obvious, in any assessment of whether it was not reasonably practicable to meet the primary time limit the first question is why that time limit was missed. The burden of proof is on the employee to show a reason or reasons which rendered it not reasonably practicable to meet the limitation period (see for example *Consignia plc v Sealy* [2002] EWCA Civ 878, [2002] IRLR 624 at [23]).

...

In the leading case of *Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1293 (at [20]), it was described as the 'first principle' of analysis of the escape clause that the question of what is reasonably practicable should be given 'a liberal interpretation in favour of the employee'."

Our findings of fact

The claimant's position with the first respondent; how it came about and what happened in the period up to and including 15 July 2017

56 The claimant and Mr Hassan first came to know each other in 2013. The claimant said nothing specific in her witness statement about the manner in which she came to know Mr Hassan. All she said in that regard was this, in paragraph 20 of her witness statement:

"I carried on an online correspondence with the Second Respondent, Zaid Hassan, from around 2013 to 2015. We never met in person. We were connected by Mr. Hassan's friend Katie Chalcraft, who I had met while working in Malawi in 2011. Katie told me that Mr. Hassan and I had similar approaches to our work. Mr. Hassan and I began corresponding online, primarily through email or messaging apps."

57 Rather more precise was this passage in paragraph 5 of Mr Hassan's witness statement:

'I have known the Claimant since April 28 2013 when she contacted me via Twitter. I retweeted one of her tweets and she direct messaged me saying "Thanks for the retweet. Have heard a lot of great stuff about your work at Reos. Cheers". We then communicated online, by mainly texting and email. There was an intellectual connection and it felt like we were both lonely. I was in a period in my marriage when we were in an "open phase."'

58 We accepted Mr Hassan's evidence in preference to that of the claimant about the manner in which they became known to each other because it was more precise than hers, and because she did not challenge his evidence in that regard.

59 The next development was also the subject of differing evidence. The claimant's witness statement included this passage:

24. I recall Mr. Hassan at several points around 2014/2015 talking about being on book tour for his book *The Social Labs Revolution: A New Approach to Solving Our Most Complex Challenges*, and frequently complaining that he was tired and burnt out. Mr. Hassan also, around this time, began flirting with me and consistently turning the conversation to sexual topics. Mr. Hassan was still married at that point but told me that he and his wife

were in an open relationship. He told me he was interested in me, wrote sexually explicit things to me, and pressured me to engage in phone sex which I reluctantly did on several occasions but felt intensely uncomfortable throughout. Mr. Hassan sent me naked photos of himself and requested I do the same. These requests and interactions were mostly initiated and then escalated by Mr. Hassan, and I was initially flattered by his attention.

25. I began feeling more uncomfortable with these interactions when in 2015 Mr. Hassan subsequently invited me to attend a workshop/ Masterclass he would be teaching the following year in Vancouver (July 2016), and said I could have free tuition. On one hand I felt Mr. Hassan was trying to support me to rebuild my career, but I also found it troubling that he thought he was in a position to teach or mentor me, and I felt this introduced (or exposed) an uncomfortable power dynamic. I wondered why Mr. Hassan had pursued those earlier sexualized interactions with me while thinking that he was in a superior position to me. Mr. Hassan also voiced concern about the type of power dynamic that would emerge with him teaching me."

60 Mr Hassan's witness statement, on the other hand, continued after the words set out in paragraph 57 above:

"5. ... The Claimant first initiated telephone sex with me on or around 23 - 24 September 2013, while I was in Denmark for 2 nights and shared her fantasies including wanting to invite me to visit her for the purpose of having sex. We did not have any sexual contact again until we met many years later. After this we continued to communicate via email and text. The Claimant told me that she had a bad experience with EWB without ever telling me what happened. When I asked the Claimant to explain if this is what had happened, she reacted violently, insinuating that I was questioning her story. Following this the Claimant abruptly terminated contact with me. We stopped communication sometime around 2014 I think."

61 We preferred the evidence of Mr Hassan to that of the claimant about who initiated telephone sex, and when it occurred. We did so (1) because of the precision of his evidence in that regard, (2) because the claimant accepted that it happened only on "several occasions", and (3) because of the WhatsApp conversations in the bundle before us referred to in the passage of Mr Hassan's witness statement which followed on immediately after the passage set out in paragraph 60 above. That passage was in these terms:

'6. I had no further contact with the Claimant until 4 May 2017. At this time, I was considering hiring Mike Kang, the first person that the Claimant had accused of assault while she was working at EWB. Mike was a friend who had volunteered for my organisation. During our communications in 2013

the Claimant did not share with me exactly what happened so I asked a friend of the claimants who I knew on Facebook, Patti DeSante, to see if she could shed any light. Patti and I had an exchange on Facebook Messenger where she told me that "It is best that this matter is discussed directly between you and Chelsey," and that she would reach out to the Claimant. The Claimant subsequently emailed me on 4 May 2017 and questioned me in respect of this. I refer to [pages 503 to 514]. This was the first contact since November 2015. This email conversation ended by me asking the Claimant if she was on WhatsApp and the Claimant provided me with her number.

7. The Claimant then initiated contact with me via WhatsApp on 6 May 2017 and I refer to [page 515]. The WhatsApp messages show that we then talked often, as we initially had in 2013. I opened up to her and was also curious about how she was doing. We began messaging each other for hours at a time and almost on a daily basis. I refer to the WhatsApp messages from [page 515 to 817].

8. The majority of these messages are not specifically relevant to the issues to be considered at the final hearing but are relevant to show that there was a relationship between me and the Claimant. At this point, I was working 100-hour weeks, travelling abroad often and dealing with my marriage breakdown. I was deeply sad and overworked. My conversations with the Claimant helped me cope with the real-world situations I was struggling with. Our messages occasionally became intimate and, for example, on 8 May 2017 the Claimant said "I also haven't had good sex in ages" [page 579] and then later said "I guess its easy to fall back into flirting with you" [page 580]. She also states "we inflame each other's passions err to put it diplomatically".'

62 Even though that passage was inconsistent with the final sentence of paragraph 5 of Mr Hassan's witness statement which we have set out in paragraph 60 above, given that he said in paragraph 6 of his witness statement that "This was the first contact since November 2015" whereas in paragraph 5 of that statement he said that he and the claimant "stopped communicating sometime around 2014", the pages of the bundle to which he referred in that passage (515 onwards) bore out fully his evidence in that passage. We saw that the intimate parts of the conversation were very much reciprocated, and that the claimant was the first one to refer to relationships of a romantic nature, when she asked Mr Hassan (at the top of page 518, in their first conversation): "So what .... Never have relationships with women?". She then asked at the top of page 524: "Are you having a rebound fling?" However, Mr Hassan, in his fifth entry on the first page of the WhatsApp conversation (page 515), six minutes after first responding to the claimant's first message, establishing contact via WhatsApp (at the top of page 515), said this: "I had a dream with you in it", in which, he says three lines later, the claimant was "dancing and happy".

63 Then, at the bottom of page 538, Mr Hassan, two hours after the WhatsApp conversation had started, so still on the first day of the exchanges, 6 May 2017, wrote:

> "I can't really cope"
> "Cause I fancy you".

64 The claimant then said (on the next page, 3 minutes later): "I'm prob not the rebound chick for you". However, shortly afterwards she said: "I am totally irresistable", to which Mr Hassan responded: "I know" "You are".

65 Two days later, on 8 May 2017, as seen on page 568, there was this exchange:

> "[8:53 PM, 5/8/2017] Chelsey Rhodes: When are you coming to calgary
> [8:55 PM, 5/8/2017] Zaid Hassan: Hey
> [8:55 PM, 5/8/2017] Chelsey Rhodes: Hi
> [8:55 PM, 5/8/2017] Zaid Hassan: I dunno how come?
> [8:55 PM, 5/8/2017] Chelsey Rhodes: To see me silly".

66 Later on that day, at the bottom of page 580, the claimant said (as stated by Mr Hassan in paragraph 8 of his witness statement, which we have set out in paragraph 61 above): "We inflame each others passions err to put it diplomatically". The conversation then became distinctly sexual in nature, in particular from page 581 onwards. We do not need to set out the relevant passages, but they formed part of the backdrop to what happened on 10 July 2017, which was evidentially very important. The following parts of the WhatsApp conversations which took place before 10 July 2017 were also part of the relevant background to what happened then.

67 In a highly sexual conversation by WhatsApp conducted on 11 May 2017, which was participated in by both Mr Hassan and the claimant, with equal enthusiasm, the claimant wrote (page 688):

> "My mouth waking you up..."

68 Slightly earlier on, on the same day, at page 682, the claimant asked Mr Hassan: "Can we hang out?". He responded: "Whaddya mean?". The conversation continued:

> "[3:23 AM, 5/11/2017] Chelsey Rhodes: Talk. Take naps
> [3:23 AM, 5/11/2017] Zaid Hassan: We'll end up sleeping together?
> [3:24 AM, 5/11/2017] Zaid Hassan: I will want you
> [3:24 AM, 5/11/2017] Zaid Hassan: If we take naps
> [3:24 AM, 5/11/2017] Chelsey Rhodes: What's your main point
> [3:24 AM, 5/11/2017] Zaid Hassan: I mean
> [3:24 AM, 5/11/2017] Zaid Hassan: That maybe you don't want that?
> [3:24 AM, 5/11/2017] Chelsey Rhodes: Well i would tell you".

69 When the claimant was cross-examining him, Mr Hassan said that while he remembered having telephone sex with the claimant only once, when he was in Denmark in 2013, he had what he called "virtual sex" with the claimant many times via WhatsApp. The claimant did not contradict him, and the WhatsApp messages bore out Mr Hassan's evidence that they did have virtual sex on a number of occasions before 10 July 2017.

70 They also had a number of discussions before July 2017 about what would happen if the claimant went to work for the first respondent. Mr Hassan's witness statement contained (in the passage immediately following the one which we have set out in paragraph 61 above) the following summary of the sequence of events concerning the claimant becoming a member of the first respondent's team (albeit not as an employee):

> "9. During these conversations the Claimant talked to me about her personal and professional situation. Her general stance was that she had been punished professionally for what had happened with EWB and her career had suffered. On 8 May I explored the idea of the Claimant joining the First Respondent [page 587] because I believed the Claimant could be really helpful to our work. This then led to a conversation about working together when there is a mutual physical attraction. I noted at [page 592] that we had had virtual and phone sex a few too many times.
>
> 10. Our messaging continued and we discussed how good it would be to meet up [page 643 to 644] . We also continued to explore the possibility of the Claimant joining the First Respondent and the concerns the Claimant had in respect of this. An example of this is at [page 665 to 666]. I tried to assure the Claimant and then made it clear that the decision to work with us was her choice [page 673]. The messaging continued and occasionally became sexual, as on previous occasions. I refer to [page 684- 689] and we talked about how this could become a reality. This was in May 2017 and before the Claimant was engaged by the First Respondent.
>
> 11. On 12 May I offered the Claimant a contract although details still had to be agreed and I refer to [page 719].
>
> 12. On May 15 I spoke to Mike Kang on the phone and informed him that we're hiring the Claimant for a short-term contract. Mr Kang warned me against this and wanted to give me details of what happened with the Claimant, but I said I didn't want to hear.
>
> 13. The Claimant and I often discussed what it would be like to meet one another. An example of us talking about this is at [page 792] .
>
> 14. During this period the Claimant did some proof reading for two articles that I wrote and sent an invoice for this work on 16 May 2017. I refer to

[page 809]. I raised the possibility of offering the Claimant a contract with the Fifth Respondent on 17 May and I refer to [page 818].

15. Our intense WhatsApp messages continued and we would message each other on a daily basis for hours talking about work, life experiences, past and present relationships and sex. An example of this is at [page 825 to 826] when the Claimant described a previous sexual experience with a former boyfriend.

16. During our conversations I raised the concern that if we were in any form of relationship then we could not work together. The Claimant noted at that time that we were already in a relationship. I refer to [page 831] . In that chat the Claimant acknowledges that there are 'mutual romantic feelings' and they are not going to "magically" go away. I repeated that there could not be any romance if we were working together and I refer to [page 832].

17. The conversation concluded by acknowledging that if we work together then we cannot have a romantic relationship. I refer to [page 837]. The Claimant was upset by this [page 838]. I left this with the Claimant to consider and she came back with the proposal that we begin working together but if we find it 'excruciating and like we need to get married then we can stop working together' [page 840]. I found this statement very concerning as I thought I had made the position clear. I then put forward a proposal for a three-month contract to the Claimant and I refer to [page 846]. We discussed the role further on 20 May I refer to [page 852].

18. The Claimant and I continued to message on a daily basis. We occasionally discussed boundaries in our relationship. I refer to [page 907] as an example of this. The Claimant says that she has a flirtatious personality and she needs to be mindful of her own impact. This continues at [page 908].

19. At [page 909] the Claimant states that "only work chats from now on". During this period our flirtation was only via WhatsApp. We did not have telephone sex.

20. From 1 June our messages continued on a daily basis discussing work and each others day. The Claimant raises the issue of our relationship again and noted that we have "failed at emotional suppression" [page 911] I was surprised at her comment and assumed the Claimant was talking about herself.

21. On 8 June I sent an email to the First Respondent management team with my proposal for offering the Claimant a contract. I refer to [page 997]. This email sets out the potential staff list and job titles and I refer to [page 998]. This shows the Claimant in a unique role as Writer in Residence. Further

emails were sent on 9 June with salary details [page 1003]. Again, this shows the Claimant was in a unique role, one we had never had.

22. Our WhatsApp messaging continued on a daily basis and we would often message for hours at a time talking about work, family and relationships. Sometimes the conversations would stray to fantasies of being together and I refer to [page 1015] as an example of this. There was a mutual attraction and we had a very close friendship. The volume of WhatsApp messages demonstrates this. Occasionally we would stray back to discussions regarding our sexual relationship and an example of this is at [page 1035] and we discussed the difficulty of the boundaries we had imposed.

23. On 11 June our conversations discussed again what would happen if we met and I talked about my fantasy of being able to be in a relationship where it could be both a professional working and sexual relationship. The Claimant said that she had a similar fantasy. I refer to [page 1044 to 1045]."

71 We found that to be an accurate and well-balanced account of the WhatsApp conversations to which it referred. In contrast, we found the manner in which the claimant described the WhatsApp conversations which she had with Mr Hassan to be in some respects rather less than accurate. The conversations spoke for themselves, of course, so what she said about them was irrelevant except to the extent that it showed that she had a tendency to mis-describe objectively provable events. Some of the passages in her witness statement where she described what was said (she did that in paragraphs 43-156, at pages 9-33 of her witness statement) were, we concluded, not an accurate reflection of what had occurred. By way of illustration, we give the following examples.

72 In paragraph 118 of her witness statement, the claimant said this:

> 'In Whatsapp messages on 11 June 2017, Mr. Hassan told me it wasn't hard to meet in person and he was assuming we would meet in the next few months. He invited me on a business trip to Chicago and said the company would pay for it [the Respondents allege in the ET3 that I had requested to attend this workshop, which is false]. I told Mr. Hassan that if it was a business trip I wasn't as worried. I then admitted that actually I was a bit worried and didn't want things to get "fucked up." I told Mr. Hassan, "the consequences of fucking up will prob fall on me, because I'll have to leave." Mr. Hassan said, "You could sue me. You could be like "he was my boss and he made me" and everyone will believe you." I was really disturbed by this comment, and responded, "... Anyway let's not. Well clearly female employees havent historically had the upper hand." [pgs 1036-1039 Final Hearing Bundle]'

73 However, the relevant passage at page 1036 onwards starts with the claimant saying:

"It would be nice to hang out in person".

74 Similarly, in paragraph 62 of her witness statement, the claimant said this:

> 'Later the day of 11 May 2017, Mr. Hassan wrote to me in Whatsapp messages that I should seriously consider the column/ writing gig, and "not compromise yourself with me". He said he had started looking up places and hotels we could go together and then realized he was being irresponsible and a "wank." He said he would look into getting a budget to hire me. [pgs 689-690]'

75 However, Mr Hassan's reference to himself being "a wank" was on page 692, which followed a passage in which the claimant (at page 689) said: "I got out my vibrator". It is true that that was at 4:02am (probably UK time), and that the conversation continues at page 689 onwards over 8 hours later. However, the passage in which Mr Hassan said that she should "seriously consider the column/writing gig" and not compromise herself with him was at page 689, and involved her referring to sex (i.e. introducing the topic of sex) after he had said that she should not compromise herself with him:

> "[2:18 PM, 5/11/2017] Zaid Hassan: Hey I think you should seriously consider the column/writing gig.
> [2:18 PM, 5/11/2017] Chelsey Rhodes: Oh?
> [2:18 PM, 5/11/2017] Zaid Hassan: And not compromise yourself with me.
> [2:19 PM, 5/11/2017] Zaid Hassan: Yeah just a thought.
> [2:19 PM, 5/11/2017] Chelsey Rhodes: Oh
> [2:19 PM, 5/11/2017] Zaid Hassan: I think it'll be better for you than me
> [2:19 PM, 5/11/2017] Chelsey Rhodes: The sex?
> [2:19 PM, 5/11/2017] Zaid Hassan: But that's just a lightly held thought
> [2:19 PM, 5/11/2017] Zaid Hassan: No
> [2:19 PM, 5/11/2017] Chelsey Rhodes: Hahaha
> [2:20 PM, 5/11/2017] Zaid Hassan: Haha
> [2:20 PM, 5/11/2017] Zaid Hassan: Funny
> [2:20 PM, 5/11/2017] Chelsey Rhodes: Yeah"

76 Mr Hassan then says (at page 691) that the claimant is "really really beautiful" and "insanely cute" and that she drives him "nuts". Immediately after he refers to himself as being "a wank", i.e. on page 692, there is this passage:

> "[2:38 PM, 5/11/2017] Zaid Hassan: And I started thinking what the responsible thing to do was
> [2:38 PM, 5/11/2017] Chelsey Rhodes: Lol
> [2:39 PM, 5/11/2017] Chelsey Rhodes: Your brain...
> [2:40 PM, 5/11/2017] Zaid Hassan: And what a grown up would do as opposed to something thinking about 7 days of sex on an island in the sun.
> [2:40 PM, 5/11/2017] Zaid Hassan: Someone

[2:40 PM, 5/11/2017] Chelsey Rhodes: Sounds lovely though
[2:40 PM, 5/11/2017] Zaid Hassan: I know
[2:40 PM, 5/11/2017] Zaid Hassan: I was thinking Funchal
[2:40 PM, 5/11/2017] Zaid Hassan: Anyways
[2:40 PM, 5/11/2017] Zaid Hassan: I've never been there
[2:40 PM, 5/11/2017] Chelsey Rhodes: Where the F is that!
[2:40 PM, 5/11/2017] Chelsey Rhodes: Googling
[2:40 PM, 5/11/2017] Zaid Hassan: Reid's Palace
[2:40 PM, 5/11/2017] Zaid Hassan: Google that
[2:41 PM, 5/11/2017] Chelsey Rhodes: This isn't helping
[2:41 PM, 5/11/2017] Chelsey Rhodes: 4 mins
[2:41 PM, 5/11/2017] Zaid Hassan: Haha
[2:41 PM, 5/11/2017] Chelsey Rhodes: Get your head in the game ;)
[2:41 PM, 5/11/2017] Zaid Hassan: I'll sit and mope for a bit and then tune in
[2:41 PM, 5/11/2017] Zaid Hassan: Hahahaha
[2:41 PM, 5/11/2017] Chelsey Rhodes: Right".

77 Thus, Mr Hassan's references to himself as being "irresponsible" and "a wank" were made as part of a sexualised conversation in which the claimant was a completely willing participant.

78 In addition, i.e. by way of further illustration, in paragraph 74 of her witness statement, the claimant said this:

> "I continued job searching and applied for a Policy Analyst position with the Alberta government, which I informed Mr. Hassan about around 16 May 2017. It is likely I would have gotten this job as I was already a 'certified candidate' from a prior interview process where I was a finalist. The salary for a position like that would have been around $70-80k with benefits. [pgs 790-791 Final Hearing Bundle]".

However, there was no reference in pages 790-791 to the claimant being a certified candidate for anything, and no mention of a post which would attract remuneration of "$70-80k with benefits". Nor was there anything elsewhere either in the main hearing bundle or the claimant's supplementary bundle about that.

79 We now turn to what happened on 10 July 2017. The relevant passage in the witness statement of the claimant was in these terms.

> '200. On the evening of 10 July 2017, the Washington, DC area airports were shutdown due to a fire in a control station [pgs ___ Supplemental Bundle]. Our flight to Chicago was delayed multiple times. Mr. Hassan and I had already checked in for our flight and checked our luggage, and were waiting at the departure gate, when around midnight we learned we couldn't fly until 9:30am the next morning.

201. Mr. Hassan said Mr. Eisenstadt was going to be upset at him spending money on a hotel (I later realized that the cost of the hotel could be easily billed to the client, and probably was—though the Respondents refuse to disclose this information.)

202. Mr. Hassan was sitting beside me the whole time looking at hotels on what seemed like a booking app on his phone. At no point did he get up and leave to "call round" to hotels to see about vacancies. He was scrolling through hotels, and when I glanced at his phone the prices were all $300+ and it seemed clear to me that he was looking for 2 rooms. It was also clear that there were multiple hotel options available, and that there was not one single room vacancy in the entirety of Washington DC area that night, as the Respondents are asserting.

203. I suggested to Mr. Hassan that we could sleep at the airport, or that we could stay with Mr. Hassan's cousins. Mr. Hassan said he didn't think those were good ideas, and that we should just get a hotel. I agreed. Mr. Hassan went ahead and booked a hotel on his phone.

204. At no point did I think that I needed to ask or confirm with Mr. Hassan that he was booking us separate hotel rooms. Before the trip Mr. Hassan had already made numerous agreements and promises to me that there would be no sexual or romantic relationship while we were working together, that he knew that would be harmful to me, and that I wouldn't need to share a hotel room with him or anyone else. Mr. Hassan knew that I did not have money to book my own accommodation.

205. Mr. Hassan and I couldn't get our checked luggage back so we decided to get a taxi to Walmart to buy a few overnight essentials. By this time it was probably between midnight and 1am. Mr. Hassan got the taxi to wait for us. I picked up some grey sweats and a black men's t-shirt, and toothpaste/toothbrush. Mr. Hassan paid for those items, because he knew I didn't have money and was relying on him to 'cashflow' the trip.

206. I've since thrown away the clothing Mr. Hassan purchased for me that night along with other clothes I wore that day (including a dress I really liked), as I couldn't bear to look at them or wear them again.

207. We arrived at the hotel and Mr. Hassan paid for the taxi. We went inside to check-in. Upon check-in, the clerk gave Mr. Hassan keys for only one room, and at this point I began feeling very anxious. I didn't say anything, and thought maybe the room had 2 beds or that it was a suite with a pull-out bed.

208. At no point during any of this did Mr. Hassan suggest to me that this was the only hotel room available in all of Washington DC and ask if it

was ok to share it, or state that he was interested in me and wanted to pursue something romantically or sexually and wanted to reverse our earlier agreements.

209. I became further scared when we got to the room and I realized that Mr. Hassan had booked us a room with only one bed. I did not feel comfortable asking Mr. Hassan to book me an additional room for $300+ USD. I made a nervous joke, asking Mr. Hassan if he planned to sleep on the floor. I then felt bad asking my boss to sleep on the floor and said he didn't have to. I didn't know what to do as I had no money and nowhere else to go. I could not have afforded to book my own accommodation, nor could I have afforded to return to the airport and book a flight back to Calgary.

210. I proceeded to lock myself in the bathroom and had a very long shower, and tried to figure out what to do. I stayed in there for approximately 45 mins. I hoped that Mr. Hassan had fallen asleep by then.

211. I came out of the bathroom and got into bed with my back to Mr. Hassan. Mr. Hassan was still awake. Mr. Hassan did not say anything to me, but came up behind me within seconds and put his arms around her [sic]. I remember feeling shocked at the suddenness and sort of brazenness that he did this, almost as if he could not control himself. I believe I dissociated at this point, and when I've tried to recount the following events the memories are very fragmented and jumbled up, like someone took a movie and sliced it all up, accompanied by physiological symptoms of crying/sweating/shaking. On one occasion at a Case Management Hearing, Judge Hyams asked me about the assault and I became so distressed that I had to get off the phone and take a break, and later realized I had injured myself. [see photo of bruise on my eyelid, pg ___ Final Hearing Bundle]

212. Mr. Hassan did not ask my permission or consent to touch me. Mr. Hassan did not ask my permission or consent to book us a single hotel room with one bed. Mr. Hassan did not ask my permission or consent for any of the things that he proceeded to do.

213. I have difficulty recalling the order of events or specific details that happened after Mr. Hassan initiated physical contact with me in the hotel room. I recall that Mr. Hassan proceeded to touch, digitally penetrate, and orally penetrate me. I do not believe that Mr. Hassan had sexual intercourse with me that night. I felt pressured to go along with what happened.

214. After the sexual encounter had ended, Mr. Hassan made a comment along the lines of, "Don't do this with anyone else you are in a power dynamic with." I burst into tears and my body went rigid, and at this

point I realized I was in a traumatic response. I could not believe the insensitivity of Mr. Hassan's comment, and felt that he was blaming me for what just happened, as well as blaming me for my past abuse. I felt that he was basically stating that he knew what he'd just done was wrong, but that he thought he was some kind of exception.

215. Mr. Hassan seemed to become frightened and began pleading with me to stop crying, saying "please, please" and rubbing my back to try to calm me down. I continued crying and shaking for what felt like about 20-30 minutes. I then went back into the bathroom and I don't have a sense of how long I stayed in there. I returned to bed and went to sleep and tried to pretend nothing had happened. In the morning Mr. Hassan did not mention what happened or try to discuss it with me."

80 Mr Hassan's witness statement contained this passage about that sequence of events.

'35. On the evening of the 10 July the Claimant and I were at Washington DC (DC) airport waiting to fly out to Chicago. Cari Caldwell was also at the airport but at a different terminal, flying back to Colorado. There was a fire at the DC airport and flights were delayed. Cari's flight departed but ours did not. After waiting for a number of hours, all flights were announced to be cancelled. As soon as the announcement was made hotels in the area soon sold out. I used an app, Hotel Tonight, to find a hotel. I could only find one room in a 30-mile radius and it cost $300 for one night. I told the Claimant this. I said we could book it, or we could wait at the airport, or she could go to the hotel. The Claimant didn't discuss these options but simply said, "book the room," implying I was being silly for asking. We tried to retrieve our luggage at the airport but told we could not do this, so we caught an Uber to the closest Wal mart to buy clothes and then went to the hotel. During this period there was no discussion of the decision despite the fact we had at this point been alone together for several hours and talking the whole time.

36. Upon entering the room, which had a large king size bed, I made a joke with the Claimant that she had better not do this with a stranger. The Claimant sat on the bed and started to cry. I was baffled by the Claimant's response and asked her to tell me what the matter was. Eventually, she explained that I had implied she was a certain type. I still didn't really understand, but I assured her that I did not mean to make a comment about her character and that I was sorry. The Claimant accepted my apology and seemed fine. I offered to sleep on the floor and joked about building a wall of pillows between us. The Claimant went and took a long shower.

37. I was almost asleep when the Claimant climbed into bed. I had jokingly put a few pillows between us. The Claimant removed these pillows and

begun cuddling me, proceeding to get more intimate and sexual in her contact. At one point she said, “I want you to fuck me now.” I laughed and said, “that is probably a bad idea.” The Claimant also laughed and said, “Yes, I don’t think we are that stupid.” She then mocked me for my self-restraint, and again I laughed this off. We both then fell asleep. I woke the next morning with the Claimant performing oral sex on me. I was asleep at the time and woke up saying “what are you doing”, the Claimant just laughed. I got up and went to have a shower. When I got back, we did not mention what the Claimant had done and we talked about logistics and timing in terms of getting to the airport. We were getting text messages from the airline with shifting times for our flight. The Claimant and I got our bags and went downstairs to wait for an Uber. The Claimant has alleged that I engaged in non-consensual sexual activity, including nonconsensually digitally and orally penetrating the Claimant. I deny this. It was the Claimant who had engaged in sexual activity without my consent.

38. On the way to the airport the Claimant was laughing and seemed happy. She was messaging Ms Caldwell at this point I refer to page 1409. At no point did the Claimant indicate any sign of distress. During, our short flight to Chicago we were both tired. The Claimant told me I could sleep on her lap if I wanted to. I refer to the WhatsApp messages at page 1453 when the Claimant makes reference to this at 8:53pm.”

81 The WhatsApp exchange at page 1453 was between the claimant and Mr Hassan, was completely friendly, and was consistent with the claimant having invited him to sleep on her lap. The relevant passage started in this way (the passage which followed, up to the middle of page 1455, was also relevant by way of background, but we do not see a need to set it out here):

“[8:53 PM, 7/17/2017] Chelsey Rhodes: Sleeping on my lap on the plane
[8:54 PM, 7/17/2017] Zaid Hassan: That was kinda nice
[8:54 PM, 7/17/2017] Chelsey Rhodes: Yeah
[8:54 PM, 7/17/2017] Chelsey Rhodes: And funny
[8:54 PM, 7/17/2017] Zaid Hassan: I really fell asleep haha
[8:54 PM, 7/17/2017] Chelsey Rhodes: You did
[8:54 PM, 7/17/2017] Zaid Hassan: Why was it funny?!?
[8:54 PM, 7/17/2017] Chelsey Rhodes: I dunno
[8:54 PM, 7/17/2017] Zaid Hassan: Was I snoring?
[8:54 PM, 7/17/2017] Chelsey Rhodes: No
[8:54 PM, 7/17/2017] Zaid Hassan: Phew haha
[8:54 PM, 7/17/2017] Chelsey Rhodes: You just really needed to sleep in someone’s lap eh
[8:55 PM, 7/17/2017] Zaid Hassan: I guess?
[8:55 PM, 7/17/2017] Chelsey Rhodes: Haha
[8:55 PM, 7/17/2017] Zaid Hassan: Clearly :-)”

82 We noted that even on the claimant's own evidence she did not object in any way during the events of 10 July 2017 before she got into bed with Mr Hassan to sleeping in the same room as him. She had many opportunities to do so, and at no time did she express any concern about the proposed sleeping arrangement. She was, however, as the three months' preceding WhatsApp messages showed, well able to speak her mind and to call Mr Hassan to account.

83 As we say in paragraph 24 above, during the hearing before us, on 24 August 2021, EJ Hyams asked Mr Hassan what he knew about PTSD and the claimant's ability to give effective consent to conduct towards her. Mr Hassan's answer was that he had a general understanding of PTSD and trauma but that he had no understanding of the claimant's experiences and that he did not know about the claimant's clinical situation or condition in any specific detail. He also said that by the time that he and the claimant met in person for the first time, on 9 July 2017, they had been (as he put it) "friends for many years" and that he was "relating to her as a friend". She had at times been "extremely blunt", he said, so that if she had had any kind of objection to anything that was happening between them then she would have said so clearly. He could not, he said, "fathom her having an issue [with what happened between them on 10-11 July 2017]. Absolutely not."

84 Given the background which we describe in paragraphs 56-78 above, we found it hard to believe the claimant's evidence about what happened on 10 July 2017, and we found it rather more easy to accept Mr Hassan's evidence about what happened on that night. One factor which was of relevance in that regard was that what Mr Hassan described (in paragraph 37 of his witness statement, which we have set out in paragraph 80 above) as having happened in the morning of 11 July 2017 ("I woke the next morning with the Claimant performing oral sex on me") was consistent with what the claimant had said (as we quote in paragraph 67 above) she envisaged doing ("My mouth waking you up..."). We considered the possibility of Mr Hassan deviously making up the evidence that the claimant performed oral sex on him in the morning of 11 July 2017 with a view to impressing the tribunal that heard the claimant's claims by the consistency of his witness statement/oral evidence with what the claimant had said two months before. Having heard and seen Mr Hassan and the claimant give evidence, and having considered that evidence against the background of the contemporaneous documents, our initial conclusion was that Mr Hassan's evidence about this aspect of the matter and about what happened on 10-11 July 2017 generally was accurate, and that of the claimant was not accurate.

85 After we had made our findings of fact about the manner and circumstances in which the claimant's contractual relationship with the respondents ended (see paragraphs 136-151 below), including by reminding ourselves of what the claimant had written in her email of 19 October 2017 at page 2826 (concerning which, see paragraph 150 below), we returned to this critical aspect of the case and reviewed the evidence on both sides. Having done so we became sure that the claimant's evidence was inaccurate, and that that of Mr Hassan was, if not completely true (since genuine memories are often at least slightly, and sometimes more than

slightly, inaccurate) then in substance accurate. Thus, we preferred his evidence to that of the claimant about what happened during the night of 10-11 July 2017, and we concluded without any doubt that the claimant initiated such sexual contact as occurred then and that it was wanted by her. That was despite the fact that Mr Hassan lied to his colleagues initially about the fact that he had had a sexual relationship with the claimant, as we describe in paragraphs 153 and 154 below. People lie for many different reasons, and in this case we concluded that Mr Hassan lied initially about the nature of the relationship which he had had with the claimant because he knew that Ms Caldwell would, as soon as she knew the truth about the manner in which the claimant had come to be employed by the first respondent and about the fact that they had had full sexual intercourse in the period from 11 July 2017 onwards (until, in fact, 29 September 2017, as we describe in paragraphs 121-125 below), then she, Ms Caldwell, would dissociate herself from Mr Hassan completely. While Mr Hassan did not say that in his witness statement, he did say it when he was being cross-examined, and we accepted that evidence of his, not least because it was in fact what happened, i.e. Ms Caldwell did, as Mr Hassan described in paragraph 196 of his witness statement, which we have set out in paragraph 155 below, immediately and permanently dissociate herself from Mr Hassan when he told her the truth.

The sexual intercourse that the claimant and Mr Hassan had on 11-15 July 2017

86 The claimant and Mr Hassan had full sexual intercourse during the night of 11-12 July 2017. The claimant described it in paragraph 222 of her witness statement, where she said this: “In the sexual encounters during that week, Mr. Hassan asked for verbal consent before proceeding.”

87 However, what the claimant said next in paragraph 222 of her witness statement was this:

> “I felt pressure to agree, and was confused by the suddenness and intensiveness of Mr. Hassan’s advances, and felt disoriented by what had happened on July 10 in Washington DC. I think I thought that by going along or pretending we were in some sort of ‘relationship’, I could erase what happened or salvage the situation somehow without putting myself further at risk, jeopardizing my job, or having a breakdown.”

88 However, at pages 1410-1411 there was a WhatsApp exchange between the claimant and Mr Hassan late in the evening of 11 July 2017 which showed that he invited her to come to his room when she was ready, that they had a plainly friendly and relaxed, short, WhatsApp conversation, following which she went to his room. On 13 July 2017, the WhatsApp conversation at page 1412 showed him going to her room after she said: “I can come get you haha”. On the next night, 14 July 2017, as shown by the WhatsApp conversation on page 1413, Mr Hassan wrote: “Come say hi?”, to which the claimant replied: “Sure” “5 mins”. Mr Hassan then wrote: “Just knock”, to which the claimant replied: “OK x”.

89 What the claimant said in paragraph 222 of her witness statement and in paragraph 224, where she alleged that Mr Hassan among other things "seemed relatively unconcerned about my pleasure, comfort or even my active participation" was markedly inconsistent with the following WhatsApp exchange at page 1610, which took place on 28 July 2017:

> "[10:58 PM, 7/28/2017] Chelsey Rhodes: Try to be worse in bed
> [10:58 PM, 7/28/2017] Zaid Hassan: Why?
> [10:58 PM, 7/28/2017] Zaid Hassan: Try to be worse in bed
> [10:58 PM, 7/28/2017] Chelsey Rhodes: Don't be so nice and concerned".

90 Mr Hassan's witness statement was consistent with what was said in that sequence of WhatsApp messages. In paragraphs 42 and 43 he said this:

> "42. The first time the Claimant and I had sex was when she knocked on my door on the first or second night we were in Chicago. I was in bed at the time and she climbed into bed with me and we talked for a few hours and then she initiated sex. This was the first time we had sexual intercourse and it was consensual. After we had had sex she left and went back to her room.
>
> 43. The Claimant and I had consensual sex several times after this whilst we were in Chicago. On most occasions the Claimant came to me room. On one occasion I invited her to come to my room and the Claimant came [July 14, Page 1413]. On another occasion the Claimant knocked on the room of my door very late and woke me as I was asleep."

91 Having heard and seen the claimant and Mr Hassan give evidence and in the light of the contemporary WhatsApp conversations, we preferred Mr Hassan's evidence to that of the claimant and concluded that the sexual intercourse which they had on 11-15 July 2017 was fully consensual.

The relevant events after 15 July 2017 which did not consist purely of things written, whether in a WhatsApp conversation or in one or more emails, by the second respondent, the third respondent or the fifth respondent

<u>Introduction: the documents in which it was claimed by the claimant that something was written which was a breach of the EqA 2010 or detrimental treatment within the meaning of section 47B of the ERA 1996</u>

92 Many of the claimant's claims were about things that were said by Mr Hassan in WhatsApp conversations with her or were about what was said in one or more other documents. That was not immediately apparent from the details of the claim, or from the agreed list of issues, but it was pointed out in paragraphs 10, 19 and 32 of EJ Hyams' analysis of that list. In fact, when going through the claimant's claims in the agreed list of issues, we realised that EJ Hyams had omitted from paragraph 10 of his analysis the claim in paragraph 1.1.4 of the agreed list of

issues, which was also about something which was said only in a WhatsApp conversation. The provenance and content of the WhatsApp conversations on which the claimant relied (she had supplied them for inclusion in the bundle) were not disputed. Similarly, the provenance of the other documents on the contents of which the claimant relied was not disputed. We refer to the relevant parts of those documents when addressing the claimant's claims that specific things written in them were a breach of one or more parts of the EqA 2010.

93 In the rest of this section of our reasons, with two exceptions, we state our findings of fact about the events which were the subject of the claimant's claims and which were not about something that was said in purely documentary form. We do so for convenience by taking the events about which complaint was made in the agreed list of issues in the order in which they appeared in that list, but doing so only once when the same factual circumstances were the subject of two or more separate claims (such as that a particular piece of conduct was claimed to be both harassment within the meaning of section 26 of the EqA 2010 and direct discrimination within the meaning of section 13 of that Act). If in the course of making findings of fact about a particular claim we concluded that the claim was not factually well-founded, we state that in the next section below. In the following underlined headings, references to paragraph numbers are to paragraphs of the agreed list of issues. The first exception to which we refer in the first sentence of this paragraph arises from the fact that the events which were the subject of the complaints in paragraphs 1.1.11 and 1.1.12 of that list overlapped, so that it was convenient to deal with the latter paragraph (which concerned only things said in writing) in this section, rather than when stating our conclusions on the claims. The second exception concerns the events which were the subject of the complaints in paragraphs 1.1.16 and 1.1.17 of the agreed list of issues, which also overlapped.

The claims of harassment within the meaning of section 26 of the EqA 2010

Paragraph 1.1.5; the failure by Mr Hassan to use a condom when having sexual intercourse with the claimant

94 In paragraph 1.1.5 it was stated that the claimant claimed that it was sexual harassment for Mr Hassan not to have worn a condom when having "non-consensual sexual intercourse with" her. While we have concluded (see paragraphs 84-85 and 91 above and paragraphs 107 and 125 below) that all sexual activity between the claimant and Mr Hassan was consensual, we record here that

94.1 the claimant did not claim that she said to Mr Hassan that he should wear a condom, and

94.2 we concluded that there was nothing in the circumstances from which he could reasonably have been expected to infer that she wanted him to do so.

Paragraph 1.1.7: "when C was working in Oxford, R3 told C to provide a written account of her creative process, undermining her professionally"

95 Mr Eisenstadt dealt with this aspect of the claim in paragraphs 17-19 of his witness statement, which were as follows:

> "17. The First Respondent based the management of the team on the Agile Regime. I refer to page 494. This way of working encouraged a process of continuous development through short bursts of activities with then time built in to review and reflect.
>
> 18. The Claimant was reluctant to be involved in the Agile process so whilst she was in Oxford I met with her to try and understand how she worked and to find out 'her creative process'. The purpose of me asking this was to find out how we could support her way of working in a way that might integrate with how the rest of the team worked and also so we knew what she was doing. I was concerned about the quality of services being delivered by the Claimant and we had no collective oversight of what she was doing. Up to that point she had only prepared one article on behalf of the First Respondent which can be seen at page [1694-1698].
>
> 19. My meeting with the Claimant was short, maybe 15-20 minutes, and at the time insignificant so I do not recall much about it. The purpose of the meeting was not to undermine the Claimant or micromanage her, it was just to try and find out how she preferred to work. Nathan, Alexander, and the rest of the team worked within the Agile Regime so there was no need for me to have this conversation or meeting with them."

96 We tested Mr Eisenstadt's evidence on this aspect of the matter, and (1) we accepted his evidence in those paragraphs and (2) we concluded that the manner in which he acted as described in those paragraphs had nothing whatsoever to do with, so that it was completely unconnected with, the claimant's sex. Mr Eisenstadt would have done precisely the same thing if the claimant had been a man.

Paragraph 1.1.9: "On 16 August 2017, when C questioned R2's strategy or attempted to provide critical/analytical input, as she had been hired to do, R2 questioned and attempted to undermine the knowledge and qualifications of C, demanded she provide evidence and deliberately attempted to confuse and destabilise her"

97 Ms Jennings' closing submissions responded to this allegation in the following manner.

> "33. It is agreed that there was a disagreement between Mr D and Ms AB on one evening during home week in Oxford. Mr D did not deliberately undermine, confuse or destabilise Ms AB by demanding evidence; it was an idealistic debate on the notion of capitals. This disagreement was a

continuation of what Mr Heintz described as their heated debate on the matter during a work meeting. Under cross examination on the matter, Ms AB said "I got the impression everyone was on board with what he was dictating for the strategy for the company". She considered this was sexist as opposed to the fact Mr D was the CEO and leading on strategy direction. This disagreement related to previous debates they had regarding 'capitals', for example prior to Ms AB's engagement by C Limited (pp1106-7; 1134-6). It was also repeated in other exchanges, for example on 3 October 2017 (p2428).

34. This disagreement was not in the course of employment. Neither did it amount to unwanted conduct. It is of note that over the next three days, Ms AB told Mr D she missed him, was lonely not talking to him and asked to go to Paris with him (pp.1885, 1887, 1896). Further, there is nothing to suggest that any such disagreement was related to Ms AB's sex, as opposed to the nature of their relationship and their difference of opinion."

98 With the exception of the first two sentences of paragraph 34, we agreed with that submission. We found those paragraphs of Ms Jennings' closing submissions otherwise to be an accurate factual analysis of the nature to the conversation about which complaint was made in paragraph 1.1.9 of the agreed list of issues and of the background to that conversation.

Paragraph 1.1.11: 'R3 told C, who was visiting from Calgary, that Oxford was her "home office" and therefore R1 would not pay for her accommodation or reimburse expenses, leading C to have to remain at the house of R2'

99 The factual situation alleged in paragraph 1.1.11 of the agreed list of issues was linked with that which was the subject of paragraph 1.1.12 of that list. We consider the final part of that factual allegation when considering paragraph 1.1.12, which we do in the section immediately following this one.

100 The claimant was in Oxford for what the first respondent called "home week" between 14 and 18 August 2017, and for that week the first respondent paid for her accommodation. It had paid for her come to the United Kingdom from Canada, and it was paying for her to return to Canada. She chose to stay in the United Kingdom after 18 August 2017, and as far as Mr Eisenstadt and the first respondent were concerned, that was at her own expense.

101 Having heard oral evidence from Mr Eisenstadt about this aspect of the matter, and having considered the situation by asking ourselves what, on a balance of probabilities, occurred, we saw nothing whatsoever from which we could draw the inference that Mr Eisenstadt's and Mr Hassan's treatment of the claimant in this regard was to any extent conduct related to her sex, or to any extent because of her sex. Having then stood back and considered the matter in the round, we had no doubt at all that Mr Eisenstadt would have treated the claimant in precisely the same way as he would have done if she had been a man in regard

to (1) the designation of her home office as being the first respondent's Oxford base and (2) payment for accommodation while she was in Oxford but not for the purposes of the first respondent.

Paragraph 1.1.12: "Knowing C did not feel safe sharing accommodation, R2 returned to his house where C was staying on 25 August 2017 and pressured her not to get a last minute hotel"

102 We have already referred to this part of the claimant's case in passing in paragraph 41.5 above where we have set out and discussed a jokey passage from the WhatsApp conversation at pages 1936. That passage, taken together with what was said in the WhatsApp conversations at pages 1871 (from where the claimant says: "Do u think it is bad idea to stay at your house" to the bottom of that page), 1919-1921 (from where the claimant says "Am annoyed you are not here" at the top of page 1919 to where the claimant says on page 1921 "But that would be silly"), and 1934-1937 (from the first entry on page 1934 to where the claimant says on page 1937: "Hopefully fri") showed (and we accordingly concluded) that Mr Hassan did not in any way "pressure [the claimant] not to get a last minute hotel".

Paragraph 1.1.13: "On 25 August 2017 R2 had non-consensual sexual intercourse with C at his home in Oxford"

103 In paragraph 354 of her witness statement, the claimant said this about what happened in the evening of 25 August 2017:

> "Later we watched a movie on Mr. Hassan's couch downstairs. Despite his multitude of earlier promises, Mr. Hassan initiated physical contact during the movie. Later he had sex with me in his bed upstairs. He seemed to become very upset after, and was acting very strange and sort of crying and saying he was a piece of shit. He then left and slept in his wife's bedroom. I felt really stupid for not just going to stay in the hotel like I'd proposed earlier, or for believing his promises that nothing would happen."

104 Mr Hassan referred to what happened that evening in paragraph 80 of his witness statement. We took into account the whole of that paragraph. It is not necessary to set it all out here. So far as relevant, it was in these terms (with the correction of the apostrophe after "communities": that should plainly have been a comma).

> 'On the Friday 25 August the Claimant and I overlapped for one night at my house August. My ex-wife and son were not there. We watched a Marvel movie together in the living room. During this movie the Claimant moved her bare feet into my lap. I recall being extremely uncomfortable at this because in Asian communities, feet are considered unclean. I didn't say anything because I did not want to offend the Claimant. We watched the movie without incident. As the movie ended, the Claimant said, "I've been wet for an hour." I didn't comment, but I recall being really surprised by the Claimants' bluntness.

> We both went upstairs. I was sleeping in my ex-wife's room and we both went to our rooms. As I went to the bathroom the Claimant's door was open and she called me. I went into the Claimants room to say goodnight. She was in bed. As I came in, she pulled the duvet back and patted the bed. As I got close, she pulled me into bed. We had sex. ... I did not initiate sex, the Claimant initiated sex. The sex was consensual.'

105 When Ms Jennings asked the claimant in cross-examination whether she recalled "making a sexual comment to [Mr Hassan] at the end of the movie?", the claimant said (as noted by EJ Hyams; the notes of both Mr Maclean and Mr Surrey were to the same effect):

> "There were several; he had initiated contact with me; I was going along with it; so there were likely several sexualised comments between us."

106 When it was put to her by Ms Jennings that the sex that she and Mr Hassan had in the evening of 25 August 2017 was consensual, the claimant said (as recorded by EJ Hyams; the notes of Mr Maclean and Mr Surrey were, again, to the same effect):

> "I think there is a distinction between ... there is every indication of me going along with it, yes."

107 In those circumstances we wondered whether we could rationally have concluded that the sex which occurred between the claimant and Mr Hassan on 25 August 2017 was non-consensual. In any event, irrespective of whether we could lawfully have concluded that the sex was non-consensual, we concluded that it was consensual.

Paragraph 1.1.16: "In August 2017, R2 flirted with employee Ms Forrester-Wilson, including giving her a non-consensual massage in the office, and later punished Ms Forrester-Wilson for raising concerns about this, exacerbating C's own experience of a hostile environment (paragraph 28 GoC)"

108 This complaint was about the aspect of the claim to which we refer in paragraph 20 above concerning Mr Hassan's conduct towards a colleague of the claimant on an occasion when the claimant was not present. That conduct of Mr Hassan was reported by Mr Heinz to the claimant. The claim in paragraph 1.1.17 of the agreed list of issues was in large part a repetition of what was in paragraph 1.1.16, and the two paragraphs needed to be considered together.

Paragraph 1.1.17: 'R2 subjected C to an emotional tirade for relaying Ms. Forrester-Wilson's reports of R2 non-consensually touching and flirting with her, and said that Ms. Forrester-Wilson was lying, that she was "a kid," and that he planned to professionally punish her (paragraph 28 GoC)'

109 The facts as we found them to be so far as relevant to the claims made in paragraphs 1.1.16 and 1.1.17 of the agreed list of issues were as follows.

110 Mr Hassan's witness statement described what happened in the following passage.

> '87. The Claimant has repeatedly attempted to fabricate a picture of me as a predator with a history of abuse. This is simply not true. She cites an "incident" with my colleague Sarah Forrester. The Claimant raised this with me in one of our WhatsApp conversation[s] on the 26 August 2017 and I refer to page 1988. The Claimant has said that this was a protected disclosure. The Claimant says 'Sarah told me a thing about a shoulder massage .. '. It is clear from the conversation that this stemmed from the Claimant's own personal insecurities about our relationship and not for any concern about Sarah, she says at p1989 'I am really fearful that I am going to fuck this up .. ' and then later says 'I just need to be in communication and be reassured'. She did not raise this in the public interest. The Claimant did not mention anything about me 'flirting' with Sarah in Chicago which I deny.
>
> 88. The full picture of the incident with Sarah was that Sarah had several times rubbed my shoulders, and I absent minded[ly] did the same one day - in full view of the team . Within a minute of doing so, I asked Sarah to come outside, where I apologised for this and asked her if it was ok. She told me she was "happy" that I had asked her, as she had had "several" such experiences with people who she had worked with. She told me that the fact I had raised it made her feel comfortable. Sarah never made any complaint about me.'

111 At page 1988, in a WhatsApp conversation of 26 August 2017 between the claimant and Mr Hassan, there was this exchange:

> "[5:21 PM, 8/26/2017] Chelsey Rhodes: We are struggling with boundaries. Maybe i am overreacting
> [5:21 PM, 8/26/2017] Zaid Hassan: Struggling with boundaries?
> [5:21 PM, 8/26/2017] Zaid Hassan: Yeah I would say we are struggling with a lot more
> [5:23 PM, 8/26/2017] Chelsey Rhodes: Sarah told me a thing about a shoulder massage or minor boundary thing between you two and i think i am overreacting
> [5:23 PM, 8/26/2017] Zaid Hassan: Wow
> [5:24 PM, 8/26/2017] Zaid Hassan: I touched her shoulder in the office and apologised for it
> [5:24 PM, 8/26/2017] Zaid Hassan: this is a total mess
> [5:24 PM, 8/26/2017] Zaid Hassan: I can't believe this
> [5:24 PM, 8/26/2017] Chelsey Rhodes: Can we please not do this. It doesnt have to be a total mess

[5:25 PM, 8/26/2017] Zaid Hassan: I didn't do anything. I'm only becoming aware as to how fucked up this situation is
[5:25 PM, 8/26/2017] Zaid Hassan: It is a total mess".

112 At page 2040, in a WhatsApp conversation of 29 August 2017 between the claimant and Mr Hassan, the claimant referred to Ms Forrester-Wilson in the following exchange:

"[12:16 PM, 8/29/2017] Chelsey Rhodes: she said that you had a really nice time together in chicago. and that there were a few times where she felt that there was a flirtatious energy and she was a bit on guard
[12:16 PM, 8/29/2017] Chelsey Rhodes: so i think in part she was asking after my own experience and wanting to be reassured
[12:16 PM, 8/29/2017] Zaid Hassan: What?!?!
[12:16 PM, 8/29/2017] Zaid Hassan: Holy shit
[12:16 PM, 8/29/2017] Zaid Hassan: She's like a kid?!?
[12:17 PM, 8/29/2017] Zaid Hassan: There was no flirtatious energy
[12:17 PM, 8/29/2017] Zaid Hassan: Ugh
[12:17 PM, 8/29/2017] Zaid Hassan: I listened to her several times
[12:17 PM, 8/29/2017] Zaid Hassan: Ugh
[12:17 PM, 8/29/2017] Zaid Hassan: That's horrible
[12:17 PM, 8/29/2017] Chelsey Rhodes: ok let's not catastrophize please
[12:17 PM, 8/29/2017] Zaid Hassan: [Sad face emoji]
[12:17 PM, 8/29/2017] Zaid Hassan: That makes me a little sick
[12:17 PM, 8/29/2017] Chelsey Rhodes: we are all trying to figure things out".

113 At page 2041, two minutes later, this was said:

"[12:19 PM, 8/29/2017] Zaid Hassan: I'm not going to travel alone with Sarah or you or anyone other than maybe Angie
[12:19 PM, 8/29/2017] Chelsey Rhodes: ok that is good you feel confident about it. but i'd still like to come up with an actionable plan
[12:19 PM, 8/29/2017] Zaid Hassan: And I'm going to tell everyone I'm going out with someone
[12:20 PM, 8/29/2017] Zaid Hassan: Yes sure we can and will but it's not happening again
[12:20 PM, 8/29/2017] Zaid Hassan: That's the last time
[12:20 PM, 8/29/2017] Zaid Hassan: Otherwise I will quit
[12:20 PM, 8/29/2017] Chelsey Rhodes: yes it is
[12:20 PM, 8/29/2017] Zaid Hassan: I don't want to be accused of sexual harassment
[12:20 PM, 8/29/2017] Chelsey Rhodes: that's a pretty low blow but i get it
[12:20 PM, 8/29/2017] Zaid Hassan: Not by you
[12:20 PM, 8/29/2017] Zaid Hassan: By someone else
[12:21 PM, 8/29/2017] Zaid Hassan: Someone who doesn't know me
[12:21 PM, 8/29/2017] Zaid Hassan: Like Sarah
[12:21 PM, 8/29/2017] Zaid Hassan: I was insanely clear Chelsey in Chicago

> [12:21 PM, 8/29/2017] Chelsey Rhodes: right and i don't want to feed anyone else's anxiety by our behaviour
> [12:21 PM, 8/29/2017] Chelsey Rhodes: see what i mean?
> [12:21 PM, 8/29/2017] Zaid Hassan: Sarah is really tactile and made me uncomfortable several times
> [12:21 PM, 8/29/2017] Zaid Hassan: Yes
> [12:22 PM, 8/29/2017] Chelsey Rhodes: yes she has got boundary issues too".

114 Those exchanges were consistent with Mr Hassan's evidence in paragraphs 87 and 88 of his witness statement, with the exception that (contrary to the final sentence of paragraph 87) the claimant mentioned the possibility of Mr Hassan flirting with Ms Forrester-Wilson by referring to the latter saying that "she felt that there was a flirtatious energy" and that "she was a bit on guard". The exchanges showed incidentally that the claimant at the end of August 2017 expressly disavowed the possibility that Mr Hassan was sexually harassing her (" that's a pretty low blow but i get it"). They also showed that the claimant herself regarded Ms Forrester-Wilson as having boundary issues, and, by implication from the fact that what she said in that regard followed on immediately from Mr Hassan's reference to Ms Forrester-Wilson being "really tactile", that those issues arose from the latter's tactile approach.

115 The claimant learnt of the situation in which Mr Hassan massaged Ms Forrester-Wilson's shoulders from Mr Heinz. When he was cross-examined, Mr Heinz said that he had had a long conversation with Ms Forrester-Wilson about the situation and that she had asked him not to say or do anything about what she had told him. As a result, "out of respect for her privacy", he said, he did not do anything about it.

116 In paragraph 23 of her witness statement, Ms Caldwell said this:

> "Around the same time [i.e. June 2017] we hired another woman who was due to travel with Zaid and teach classes. After the first trip, Zaid expressed concern that he would need to find another role for the new employee because he was worried about 'misinterpretation' of sexual advances while travelling. Despite this being the role she was hired for, conversations started about what else she could do or how she could support the organization without travelling with Zaid."

117 While we concluded that that was not an entirely accurate account of what happened, since Ms Caldwell there referred to "'misinterpretation' of sexual advances", when what she plainly meant was that the "woman" (who was evidently, and we concluded that it was, Ms Forrester-Wilson) misinterpreted what Mr Hassan did as "sexual advances", when they were not that, it did show that Ms Caldwell was told by Mr Hassan about the situation concerning Ms Forrester-Wilson.

Paragraph 1.1.19: "On 23 September 2017, R2 threatened to quit or kill himself if C continued to be upset by his treatment of her (paragraph 37 GoC)"

118 Mr Hassan's witness statement contained this paragraph (numbered 114) relating to the allegation in paragraph 1.1.19:

> "We arrived in Washington DC on 23 September 2017. Upon the Claimant's arrival in DC, I took a taxi to the airport, where I met her at the gate. She told me she almost didn't get on the plane, but she was glad that she came. This was in relation to the disagreement mentioned above in relation to me giving feedback on her work. We talked in the taxi ride to the hotel and the Claimant seemed to have gotten over the disagreement. I did not say that I wanted to hurt myself or kill myself as the Claimant has alleged."

119 In paragraph 469 of her witness statement, the claimant stated her evidence relating to issue 1.1.19. It also bears repeating in full:

> "In Whatsapp messages on 23 September 2017 Mr. Hassan asked what time I was landing and said he would meet me at the airport. I said that he didn't have to meet me. Mr. Hassan asked if I was going to kill him when I saw him, and if I hated him. Mr. Hassan met me at the airport and attempted to apologize for his behaviour. I told him I had almost not gotten on the plane. During the taxi ride Mr. Hassan seemed to realize how upset I was and wasn't in the mood to immediately forgive him, and then he began saying that he should quit, that he wanted to hurt himself or kill himself, and that he should just go home—which was a familiar pattern when I brought up his problematic behaviour. I later realized he did this whenever I came closer to confronting him directly, and was a manipulative effort to get me to comfort him and deflect/derail attention from my concerns with his behaviour. I again felt pressured to placate and forgive him, though I didn't until later that evening. [pgs 2321-2322 Final Hearing Bundle]".

120 As Ms Jennings pointed out in paragraph 52 of her closing submissions, "There was a previous occasion when Mr D referred to his past suicidal ideation (p520), but this was before their employment relationship." That was correct factually, in that page 520 was part of a WhatsApp conversation between the claimant and Mr Hassan that took place on 6 May 2017. Having heard both Mr Hassan and the claimant give evidence, and having had regard to the rest of the evidence before us, we concluded that Mr Hassan did not on 23 September 2017 threaten to "quit or kill himself" if the claimant continued to be upset by his treatment of her.

Paragraph 1.1.20: "Between 24-29 September 2017 R2 had non-consensual sexual intercourse with C in Washington DC and became increasingly aggressive including saying 'I want to fuck your ass' and attempting to do so without consent, after previously stating they needed to have "boundaries", and knowing that C had almost

not gotten on the plane to Washington DC due to being so upset at R2's behaviour (paragraph 39 GoC)"

121 The claimant's evidence about what happened by way of sexual intercourse in 25-29 September 2017 was in paragraph 472 of her witness statement, which was as follows.

> 'Despite Mr. Hassan's multitude of earlier promises about "boundaries" and protecting my wellbeing, he continued to have sex with me throughout the week of 23-29 September 2017 in Washington DC. This began when I went to his room late on the first night to comfort him about his earlier meltdown. I was also a bit worried he wouldn't turn up for the Masterclass the next day or that I'd "broken" him, and then we'd all lose our jobs. I knew that the client had flown in a bunch of staff from San Francisco and Hawaii to attend. Over the course of the next few days, Mr. Hassan became more sexually aggressive and emotionally disconnected, which frightened me. At one point he said, "I want to fuck your ass" and attempted to do so by pressing himself against me, leading me to have to squirm out of the way—this happened 2-3 times and probably lasted under a minute. I felt confused, dissociated from what was happening, and tried to distract myself by focusing on my work (parts of which were genuinely enjoyable and interesting). I began to fear that Mr. Hassan's behaviour would escalate into overt physical forcing or physical harm to me. This was probably the point I was shocked into realizing that Mr. Hassan was either unaware of or uninterested in the notion of consent, and that the July 10 incident was not some sort of accident or mistake. At one point Mr. Hassan also told me that he was annoyed we had stayed up so late (having sex) and that he needed to work the next day. Mr. Hassan did not seem to think about, or care, that I also needed to work the next day. Again I wondered why he even thought I was there, besides to act as his therapist, cheerleader, and sexual servant.'

122 Mr Hassan's evidence as to what happened in 24-29 September 2017 was in these paragraphs of his witness statement.

> "117. The team all stayed at the same hotel but we had our own rooms. On one occasion I was tired and in my room. The Claimant was keen for me to join her by the pool and I refer to [page 2334]. Whilst in DC we worked during the day but the Claimant and I still messaged on a regular basis and at the end of the working day the Claimant was keen to see me. The Claimant asked me to stop by for a hug and I refer to [page 2337] I was still working at this point and I didn't because it was too late. On 26 September the Claimant invited me to come and hang out in her room and I refer to [page 2338] and then we had a joke about whose room was best and it was decided that the Claimant would come to me and I gave her my room number. We had consensual sex.

118. On 28 September the Claimant and I continued to message one another and the Claimant says that she is having a great time [page 2342]. She then continues by saying that she likes working with me [page 2343]. On 28 September we were both tired with jetlag and the Claimant text me and said she wanted a cuddle but was too tired. She then asked if I would come over and I said I was too tired and in bed [page 2345].

119. On the following day we had a similar conversation and I said I could do with a cuddle and the Claimant said for me to go and see her. The Claimant said she was already in bed . We then had a light-hearted discussion about whose turn it was to go to each other's room and I suggested that we just go to sleep. The Claimant encouraged me to go to her room for just 20 minutes. The Claimant persuaded me to go to her room as we wouldn't see each other for months [page 2346]. The Claimant confirmed her room number being 514 [page 2347]. We had consensual sex.

120. On the occasions where we were alone together, usually in my room because the Claimant sought me out, the Claimant initiated sex. In general, I was exhausted and this is clear from the WhatsApp messages. These sexual activities were entirely consensual and instigated by the Claimant. The Claimant usually left my room after we had sex and I would immediately fall asleep. On no occasion did I initiate sex. I do not accept that I became 'increasingly aggressive' as alleged by the Claimant nor did I say 'I want to fuck your ass'. The Claimant's conduct and the WhatsApp messages do not support these allegations."

123 When cross-examining the claimant, Ms Jennings asked her whether she accepted that she "was the one asking to see [Mr Hassan] in the evenings after people had gone to their bedrooms", and the claimant said this:

"I would have to check but I would not be surprised if that were so."

124 Nowhere in her witness statement or her oral evidence did the claimant say that she told Mr Hassan that she did not consent to the sexual intercourse that they had during the week of 23-29 September 2017. We looked with care at all of the passages in the WhatsApp conversations at pages 2334-2347. They bore out fully what Mr Hassan said in paragraphs 117-120 of his witness statement. The exchange of 29 September 2017 at page 2347 ended with the claimant sending Mr Hassan a red heart symbol, and him sending her two back.

125 In those circumstances, and having heard and seen Mr Hassan and the claimant give evidence, we preferred the evidence of Mr Hassan to that of the claimant not least because the WhatsApp messages to which he referred in his witness statement showed the claimant being more than just a willing participant in the

sexual intercourse: she was not uncommonly an instigator of it. In any event, we came to the clear conclusion, without any doubt, that the claimant's account of what happened was inaccurate, and we accepted in its entirety Mr Hassan's account of what happened during the week of 23-29 September 2017.

Paragraph 1.1.28: On 29 Nov 2017 R2 flew to Calgary and met with C alone despite C stating that she was in a vulnerable state and was afraid R2 would harm her, and despite R2 being instructed by his lawyers not to contact C (paragraph 80 GoC)

126 The claimant invited Mr Hassan to come to Calgary to see her, as shown by her email to him of 25 November 2017 at pages 361-363 of her supplemental bundle where, at page 363, she wrote this to him:

> "You owe it to me to come here and listen to me. To sit there and shut up and listen. To say you are sorry. All of you owe that to me, but you owe it to me most of all."

127 In addition, as shown by the text numbered 10 on page 425 of the claimant's supplementary bundle, Mr Hassan wrote to the claimant: "And you wanted me to come to your apartment". In paragraph 186 of his witness statement, Mr Hassan described what happened when he was in Calgary with the claimant. While material parts of it were denied by the claimant in cross-examination, we accepted the paragraph as a completely accurate statement of what occurred when Mr Hassan was with the claimant on 29 November 2017. It was in these terms.

> 'In emails she demands to see flight booking details, threatening until the day before I travel that she will go public unless she gets confirmed flight bookings. She then suggests coming to pick me up from the airport and going to her apartment. She says it will be more comfortable there and she could "light a fire and make tea". I refused to put myself in that position and therefore agreed to meet her in a coffee shop close to her apartment. The Claimant said that she was not comfortable talking in public and therefore we agreed a compromise which was to drive to Banff and talk in the car. During the drive the Claimant talked for the entire two hour journey about her own history with men, explaining how badly she has been treated. I repeatedly informed the Claimant that I was there to listen and during this process the Claimant suggested that we go for a walk. We then drove to the nearby Fairmont Band Springs and sat in the restaurant. The Claimant then suggested to me that I fire the whole team and set up a new company with her. I tell her that I was not going to do that. One of her terms was also that we remained friends. The Claimant then said that she was sick and tired and just wants to walk away. I asked her what she needs to do in order to do that. She replied that she will need USD $20,000. Whilst I did not think that I had done anything wrong I agreed to this in an attempt to resolve the situation knowing what damage the Claimant could cause. On the drive back the Claimant spoke for most of the way and told me about how men are awful. We then drove back to the hotel

> that I was staying in and sat in the lobby and ordered tea. When it was time for me to go the Claimant began to cry and then said that I had only come to see her to "save his [presumably that should have been "my"] ass". I tried to reassure the Claimant that I was there to listen and support her. I then walked with her to her car and she drove home.'

128 In oral evidence, in answer to a question asked by EJ Hyams, Mr Hassan said that he had gone to Calgary as he thought that he and the claimant were friends. After she had asked for USD $20,000 to walk away and then the next day said that the first respondent would have to pay her USD $40,000 for her to agree not to disclose anything, he realised that Dr Herbert was right and that "this was all about control". We accepted that evidence of Mr Hassan.

129 In those circumstances, we could not accept the claimant's claim that the conduct referred to in paragraph 1.1.28 of the agreed list of issues was unwanted conduct, let alone conduct which was related to her sex within the meaning of section 26 of the EqA 2010, nor that by doing those things about which complaint was made in that paragraph, Mr Hassan had the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or that what he did had that effect.

The claims of direct sex discrimination within the meaning of section 13 of the EqA 2010

Paragraph 2.1.3: "On or around 16 July 2017 C wrote a report on the behaviour of R2 and R1's employees and sent to R2 and Cari Caldwell but no action was taken (paragraph 17 GoC)"

130 The report that the claimant wrote the response to which she claimed was direct sex discrimination was at pages 2675-2680. It was entitled "Reflections on Chicago Rapid Action Lab, July 13-15". In it, the claimant did not ask for any particular action to be taken. At the end, the claimant wrote this:

> "These are my general tangled-up concerns. Also, I am very optimistic that we will figure it all out, happy to be in the kind of environment that welcomes critical reflection, and hoping that I can receive it with as much grace as others have shown. :)"

131 The claimant described in detail the WhatsApp messages which she exchanged with Mr Hassan about the report in paragraphs 265-275 of her witness statement. Having said in paragraph 265 that to her knowledge "no action was taken as a result of my report", in paragraphs 266-274 the claimant described in detail the exchanges which she had with Mr Hassan about what she said in the report, which showed that he took it very much to heart, and in paragraph 275 of her witness statement the claimant said this:

> 'In an email exchange on 19 July 2017, Ms. Caldwell thanked me for my Chicago Reflections and said that she identified with a lot of what I had written, and that she had left the client meeting in Washington DC on 9 July "really upset," but that she tended to turn it inward and be self critical. She wrote, "Thank you for sharing and thank you for being here with us… we need you."'

132 In fact, that was a slightly erroneous quotation, as Ms Caldwell had written (the email exchange of 19 July 2017 between the claimant and her was at page 249 of the claimant's supplemental bundle) that she had left "that meeting really upset", and it was not clear to which meeting she was referring.

133 In any event, in her original email enclosing the "Reflections" report, which was sent on 18 July 2017 (it was at page 249 of the claimant's supplemental bundle), the claimant merely said this:

> "Ended up writing this more like a mostly-uncensored journal entry ... anyways here you go."

134 The report was then sent again as part of the claimant's email of 8 October 2017 to Ms Caldwell at page 2674, in which the claimant said this about the report of 18 July 2017:

> "[Hi Cari just sending this to you so you can decide if/ when to send it out to everyone]
>
> Hi team,
>
> I hope you all are doing ok.
>
> First wanted to say that I really love and appreciate you all. Have rarely encountered a lovelier or more talented/committed group of people.
>
> Next is to say that I'm really struggling to figure out my place in Roller and how to bring my whole self forward in a way that doesn't cause massive upset or backlash. I am feeling a bit like I don't fit, that I am pushing for things that aren't being heard or understood, and it has taken a toll (not that I've been a walk in the park either, and I apologize for that). So at the moment I need to step back and do some recovering and reflection- stress leave or whatever to call it.
>
> To bring some context to my experience the past 3 months I am attaching the writing I have done so far. One of the issues that I'm experiencing is that my thoughts seem undiscussable within Roller (and following from that, unpublishable on the blog or wherever). I've found this really challenging.
>
> So i am attaching a one-week-in reflection from the Chicago sanctuary lab (pasted below)".

135 We saw no evidence that the claimant's thoughts were "undiscussable" with the first respondent's organisation, not least because Ms Caldwell's response at page 249 of the claimant's supplemental bundle was wholly welcoming of the report, and because the claimant's discussion with Mr Hassan about the content of the report was extensive and (as we say in paragraph 131 above) showed that he took it very much to heart.

The events in writing which followed the ending of the claimant's contract for services on 30 September 2017

136 It is convenient to refer here to the sequence of events which either took place in writing or were evidenced almost exclusively in writing after 29 September 2017. We have already referred to one material document, which was the claimant's email of 8 October 2017 which we have set out in paragraph 134 above. That document followed what occurred on 6 October 2017, which was of critical importance in our view in understanding why the claimant's contract with the first respondent for (as EJ Hawksworth had found) services was not renewed. We refer to the date of 29 September 2017 because (as we say in paragraphs 121-125 above) the claimant and Mr Hassan had consensual sexual intercourse on that day. The following day, the claimant's contract for services with the respondent expired.

137 It is convenient by way of exposition to set out what Mr Hassan said in his witness statement about what happened after 29 September 2017 up to and including the claimant's rejection on 6-7 October 2017 of a new contract. Although it is a long passage, among other things it describes what was said over many pages of WhatsApp conversations:

> **'October 2017**
>
> 127. Following the trip to Washington DC the Claimant and I continued to chat by WhatsApp on a daily basis and for hours at a time. I refer to the messages at [page 2384 to 2391]. The Claimant was still sending me love heart emojis.
>
> 128. The Claimants actions are not those of someone who she claims has sexually assaulted her. I see in the text messages between the Claimant and Cari Caldwell on 2 October that the Claimant said "I feel a bit protective of Z" [page 2420]. The Claimant also spoke about the law suit that she filed [this was against someone other than the respondents to these claims] and the drain it was having on her and I refer to [page 2424]. I offered my support and suggested she take some time off.
>
> 129. During one lengthy conversation on 3 October 2017 I felt the Claimant was being abusive and accusatory about strategy. I found this

frustrating and told the Claimant. I refer to [page 2436] as an example of these conversations. I believe this demonstrates that the Claimant was not frightened to voice her opinion. More often that not it would be me who said that it was too exhausting to fight and try and end the conversations. I refer to [page 2439].

130. I found these conversations with the Claimant very difficult. She had no experience of running an organisation or leading a team and yet she was telling me how I should be doing my job. The Claimant seemed to always be coming at strategy from two perspectives. Firstly, as an activist, with very strong judgments, and secondly as academic with a knowledge of trauma literature but no practical experience at supporting other people in any capacity. The Claimant always seemed to arguing about how things should be, without any understanding of how they actually were.

131. In general, my response to the Claimants' attitudes were to patiently talk through the issues she raised, even when her suggestions were usually impractical. However, I was not always patient, due to the extreme pressures I was under, coupled with how aggressive the Claimant was with her views. The Claimant rarely asked questions, always offering opinions. At no point did I feel that the Claimant was holding back on her views and opinions or that was she scared or intimidated. At all times I felt we acted as peers, albeit with different experiences.

132. The Claimant sent an email to the First Respondent team on 3 October 2017 with the title "TOG Reflections: "Twins, Terrors and the great cosmic joke"". I refer to [page 2448]. In that email she comments on her experiences at the First Respondent. As a side comment she says that she had a great day of sight seeing with me and Sarah in Washington DC. She also states at [page 2449] that "I personally can't think of anything else I would rather be doing". The email and behaviour of the Claimant is not someone who is working in an intimidating and hostile environment.

133. The team of consisting of the Fifth Respondent, Alexander Craig, Nathan Heintz, Simone Reeves and Sarah Forrester-Wilson, were due to go to Zimbabwe from 17 - 24 October 2017. The purpose of this trip was to conduct a number of interviews in Zimbabwe where we were working for one of our clients. Sarah Forrester-Wilson was due to be part of the team but she told me on 4 October that she was not well and I told the Claimant in confidence about this on 4 October. I refer to [page 2451]. I mentioned that she was considering not going to Zim and I asked the Claimant if she would be willing to go. I explained what this would involve and the Claimant was willing to do this [page 2452].

Further on in the conversation the Claimant confirmed that she would go. I was not going on this trip.

134. On 5 October the Claimant and I discussed her trip to Zimbabwe (Zim) and she was excited by this. I refer to [page 2460-2461]. I also asked whether she had received the contract from the Third Respondent and the Claimant said she hadn't. I did say that we had agreed a small payrise. Upon hearing this the Claimant asked if we had evaluated her debt and cash situation and then I told her that the First Respondent had a US$120k deficit for 2017 and I told her that we had agreed USD $3,500 with a review in January, this was an increase of USD $800 from her current contract. The Claimant asked what others were getting paid and I refer to [page 2462]. I then attempted to estimate what others were being paid and I refer to [page 2463]. During the course of the conversation the Claimant claims that "all of the woman are a bit annoyed" and I refer to [page 2465]. I pressed the Claimant on this as this was the first I had heard of this and asked who she was speaking on behalf. The Claimant confirmed that she was only speaking for herself [page 2465]. The Claimant claimed there was a pay equity issue but I did not accept this. I made the point that Cari got paid more than I did and that the Fifth Respondent got paid more than the Third Respondent. It was unfair of the Claimant to make this judgement and compare her pay to others. The Claimant was in a unique role. The Claimant's role with the First Respondent was primarily copy-writing. She was in the unique position of having a single role, whereas most people on the team played several roles. Our roles can be thought as being located in the "front," "middle," or "back" rooms. A frontroom [role] requires working directly with groups or being client facing, a middle room role requires liaising between the front and the back-room roles, a back-room role is usually administrative or technical, with no contact with clients or group work. The Claimant only played a middle room role. This is in sharp contrast to everyone else, who usually played front, middle and back-room roles. The Claimant occasionally compared her role to a predecessor, Sam Rye, who wrote blog posts for us before the Claimant joined. However, in addition to his middle-room role, Mr Rye also played several back-room roles including developing and implementing social media and digital marketing strategy. There was no one on the team who carried out like for like work or work of a similar kind to the Claimant. The Claimant was paid appropriately and fairly for the role she did. There was no pay equity issue in the business. The Claimant did not have access to our internal pay-scales or rates, nor did she seem to have any grasp of the difference of roles, when she raised the issue of pay equity.

135. The Claimant then continued the argument and said that she had to fight for respect in the team. This is the first time she had mentioned this to me. I told the Claimant that I believed in parity and equality. The

Claimant was very forceful in her views, I refer to [page 2468 to 2469]. At one point the Claimant also accused me of mansplaining I refer to [page 2477 to 2481]. At no time during this confrontational WhatsApp conversation did the Claimant accuse me of sexual harassment. Her complaint was about her pay.

136. I see in the bundle that the Claimant had a long conversation with Cari Caldwell on 5 October and told her about our argument regarding pay and me apparently mansplaining. The Claimant's reasoning for wanting an increase was based on her living costs which included healthcare costs, legal bills and student loans. She was not assessing it based on her job role. I refer to [page 2490]. She did not report any allegations of sexual harassment to Cari at this time.

137. The Claimant contact me by WhatsApp on Friday, October 6. The context at the time was that the team were engaged in a preparation and planning workshop as they were flying to Zimbabwe the following Monday. The Claimant contacted me late in the afternoon UK time and the conversation began in a friendly manner. I refer you to [page 2558]. The Claimant then turned the conversation to pay and asked if the management team were going to have an 'open book convo'. I said we were not as we were having to concentrate on the Zim trip. The Claimant seemed to have no understanding that it was late in the day on a Friday, with the team due to fly on Monday.

138. At this point she had received the email from the Third Respondent offering her the new contract. I refer to the emails between the Claimant and the Third Respondent and the draft contract at [page 2577 to 2587]; the role was still Writer in Residence which was a unique role but was going to be a permanent position with an increase in pay to US$3,500 per month. I explained that if she did not sign the contract then she would not be covered under our insurance. This means that she would not be able to go to Zim. I tried to explain that there were numerous factors regarding the precarious financial position of the First Respondent and that we would try and review her pay again in January. The Claimant's concerns were just relating to her own pay and she wanted the First Respondent to pay more than what it could afford. At [page 2560] I said that the contract was the best we can do and the Claimant said she had to think about it. The Claimant then insinuated that she was being forced to drop everything and go to Zim. I clarified this with her and said she had been asked and she had said yes. Later on in the conversation the Claimant informed me that she would not be coming to Zim and I refer to [page 2561]. The Claimant expressed no concerns for how we would deliver the work, our responsibility to undertake the work nor the impact of her not joining the team.

> 139. The Claimant then raised concerns of the gender dynamics of the Zim team and that it would be a repeat of Chicago [page 2563]. This comment was made after the Claimant had already said she was not going to Zim because of the pay issue. This team was also being led by the Fifth Respondent and not me so there was no basis for her to assert this. I asked the Claimant if she thinks that the Fifth Respondent is unaware of gender dynamics and the Claimant acknowledges that she is aware. [Page 2562] We resumed our conversation later on that day and I clarified with the Claimant that she could not go on the Zim trip without a contract because she will not be covered by our indemnity and travel insurance. I then confirmed to the Claimant that the flights will be cancelled. I then went on to explain the cash flow problems for the First Respondent.
>
> 140. The Claimant gave me and the First Respondent an ultimatum. Her demand was for us to suspend the Zim preparation and review the financial position and pay across the company. I refer to the WhatsApp messages as page 2569 to 2570 and I accept at one point I did say I felt the Claimant was blackmailing me. These demands from the Claimant show that her only concern was herself, not her colleagues, nor the overall wellbeing of the company. Had we suspended the whole Zimbabwe trip then we would have been in breach of contract and incurred major liabilities, from flights and hotels, to consulting fees.
>
> 141. It is only when the First Respondent did not meet the Claimant's demands for a pay increase did the Claimant begin to make complaints of bullying all of which I deny for the reasons set out above. At this point she had not made any allegations of sexual harassment."

138 We accepted that passage in its entirety in so far as it was a statement of fact, or a description of the effect of a WhatsApp conversation. The latter conversations of course spoke for themselves, as we have said, but we read the relevant passages and we agreed with Mr Hassan's description of the effect of those passages.

139 We found the passages in the WhatsApp conversations of (a) Ms Caldwell and (b) Mr Hassan with the claimant on 5-7 October 2017 at pages (1) 2496-2499 and (2) 2557-2576 and 2653-2671 (the whole conversation, without the first line to which we refer in the next sentence, was at pages 2588-2642) respectively to be of critical importance in showing what happened in regard to the offering of a new contract to the claimant at that time. At the top of page 2557, the claimant wrote: "Love you lots Z", so the conversation started with a positive expression towards Mr Hassan from the claimant. Those WhatsApp conversations were relied on by the claimant in a number of respects, so we refer back to them when dealing with the relevant specific claims of the claimant. Here, we say simply that in her conversation with the claimant Ms Caldwell was wholly open to the claimant's views, but was clear with her that it would not be possible to agree

any kind of increase in the offer made to the claimant at that time (which was Friday afternoon, with the team's flights to Zimbabwe taking place over the weekend and as far as the claimant was concerned, on Monday, but only if she signed a new contract with the first respondent so that she was then covered by the first respondent's insurance policies) and that Mr Hassan was cajoling the claimant to accept the offer, but writing to her in the manner in which they had previously written by WhatsApp, namely in a very open way, so that for example at page 2657 he wrote: "Chelsey I love you a lot", but he also wrote "Stop playing the victim" in this sequence (on page 2569):

'06/10/2017, 23:01:34: Zaid: You want me to make up for injustice you have experienced your whole life in how long? 2 hours? 3 months?
06/10/2017, 23:01:39: Zaid: How long?
06/10/2017, 23:01:41: Zaid: Tell me
06/10/2017, 23:01:58: Chelsey Rhodes: That's not what I'm asking and that isnt fair
06/10/2017, 23:02:06: Zaid: It sounds like it is?
06/10/2017, 23:02:11: Zaid: What do you want me to do?
06/10/2017, 23:02:18: Zaid: You have me an ultimatum
06/10/2017, 23:02:24: Zaid: Gave me
06/10/2017, 23:02:37: Chelsey Rhodes: You gave me one
06/10/2017, 23:02:51: Zaid: A contract?
06/10/2017, 23:02:54: Zaid: Really?
06/10/2017, 23:03:23: Zaid: You experienced leo sending you a contract with a $800 pay rise as an ultimatum?
06/10/2017, 23:03:32: Zaid: I mean...ok
06/10/2017, 23:03:32: Chelsey Rhodes: It's fine Z you have zand now and sarah and etc
06/10/2017, 23:03:42: Zaid: What are you talking about?
06/10/2017, 23:03:50: Zaid: Stop playing the victim
06/10/2017, 23:03:52: Zaid: Please
06/10/2017, 23:04:01: Chelsey Rhodes: I experienced it as- me raising concerns and said i was upset. It was ignored and the contract sent
06/10/2017, 23:04:13: Zaid: What were we supposed to do?
06/10/2017, 23:04:16: Zaid: Seriously
06/10/2017, 23:04:18: Zaid: Tell me
06/10/2017, 23:04:23: Zaid: What were we supposed to do?
06/10/2017, 23:04:25: Chelsey Rhodes: You told me i could say "go take a running jump"
06/10/2017, 23:04:33: Zaid: It's Friday 2PM
06/10/2017, 23:04:37: Zaid: You could
06/10/2017, 23:04:51: Zaid: So what were we supposed to do?'

140 At page 2655, this exchange showed precisely what happened in regard to the offer of 6 October 2017 made in the email from Mr Eisenstadt at page 2577, and that was that the claimant just could not bring herself to accept it (for convenience we have put the key part in bold font):

"07/10/2017, 00:14:32: Chelsey Rhodes: I dunno sorry i am not rich and not healthy and not perfect
07/10/2017, 00:14:45: Chelsey Rhodes: And i cant do what you need
07/10/2017, 00:14:50: Zaid: I see
07/10/2017, 00:14:57: Chelsey Rhodes: I really am
07/10/2017, 00:15:03: Chelsey Rhodes: It makes me feel ashamed
07/10/2017, 00:15:07: Chelsey Rhodes: And horrible
07/10/2017, 00:15:14: Chelsey Rhodes: Like i am some greedy person
07/10/2017, 00:15:18: Chelsey Rhodes: Or ungrateful
07/10/2017, 00:15:22: Zaid: You're sorry you're not rich? Healthy and perfect?
07/10/2017, 00:15:30: Chelsey Rhodes: But i just really can't
07/10/2017, 00:15:36: Zaid: Can't what?
07/10/2017, 00:15:47: Chelsey Rhodes: I cant seem to do what you're asking
07/10/2017, 00:15:54: Zaid: What's that?
07/10/2017, 00:16:50: Chelsey Rhodes: To do the job you want and sign the contract and get on the plane and etc.
07/10/2017, 00:17:10: Chelsey Rhodes: And wait for things to play out
07/10/2017, 00:17:10: Zaid: I thought that's what you wanted
07/10/2017, 00:17:19: Zaid: Ok
07/10/2017, 00:17:25: Chelsey Rhodes: I thought so
07/10/2017, 00:17:31: Zaid: You don't?
07/10/2017, 00:17:37: Chelsey Rhodes: And then i couldnt
07/10/2017, 00:17:51: Chelsey Rhodes: Or i cant
07/10/2017, 00:18:11: Zaid: You are not making a choice?
07/10/2017, 00:18:29: Zaid: I don't know what you want from me
07/10/2017, 00:18:36: Zaid: Or Roller
07/10/2017, 00:18:58: Chelsey Rhodes: I dunno maybe roller needs to be in a more stable place to hire me
07/10/2017, 00:19:28: Zaid: I guess?
07/10/2017, 00:19:37: Zaid: Are you quitting?
07/10/2017, 00:19:38: Chelsey Rhodes: I guess
07/10/2017, 00:19:42: Chelsey Rhodes: No
07/10/2017, 00:19:51: Zaid: It sounds like we can't afford you
07/10/2017, 00:19:52: Chelsey Rhodes: Am just being realistic
07/10/2017, 00:20:14: Zaid: Realistic
07/10/2017, 00:20:17: Zaid: Ok".

141 The following short exchange of 7 October 2017 at page 2662 was also of critical importance:

"07/10/2017, 01:09:55: Zaid: So if we had offered you $5k you would have signed and flown?
07/10/2017, 01:10:01: Chelsey Rhodes: Yes
07/10/2017, 01:10:17: Zaid: What about the gender equity stuff?

07/10/2017, 01:10:53: Chelsey Rhodes: That would be completely doable. And i would know that i would have a stable base to approach the harder stuff
07/10/2017, 01:11:08: Zaid: What harder stuff?
07/10/2017, 01:11:17: Chelsey Rhodes: The gender stuff".

142 A further critical passage of Mr Hassan's witness statement was this one:

'152. On 8 October the Claimant sent Cari an email that was a draft email she was going to send to the team. In it she said that it was her view that the team was not prepared for the Zimbabwe contract and she shared again the article she wrote on 18 July 2017 "Reflections on Chicago Rapid Action Lab July 13-15". I refer to [page 2674-2675]. The Claimant claims this was a protected disclosure. Firstly, the Claimant did not send this email to me and therefore did not make this disclosure to me. Secondly, the Claimant had no reasonable basis to believe there were health and safety concerns. She was not involved in the preparation for the trip to Zimbabwe. The First Respondent had prepared for the trip and had all the necessary insurance policies in place including medical assistance and evacuation for when the team was travelling.

153. As the Claimant had declined to sign the contract we had offered her, her flight to Zimbabwe was cancelled and I told the management team that we would have to tell the Claimant that she was not coming. I refer to the email at [page 2681]. I did try and reach out to the Claimant to see if she was ok on 8 October but she said she needed space - page 2683. At this point it was agreed that Cari would deal with the Claimant on behalf of the First Respondent and the management team.

154. The conversation with Cari continued and on 9 October Cari asked the Claimant what she would need and she said that she was working in the range of USD $5,000 per month. During the discussions Cari tells the Claimant that the First Respondent could increase the pay a bit to USD $4,000. The Claimant seemed to indicate that that might be acceptable but there was also the concern about relationships. She accuses me of bullying and gender power dynamics and says 'when I bring that stuff up with him he lashes out' [page 2517]. She does not make any complaint of sexual harassment or abuse. The Claimant even tells Cari that she loves me and does not want me to be in pain. I refer to [page 2519]. In an email to Cari on the 10 October the Claimant says that she will need $82,000CAD per annum. This is the equivalent to approximately £45,000 per annum and reflects the Claimant's unrealistic demands. I refer to the First Respondent salary information at page 2913. This shows she was asking to be paid more than the Third and Fifth Respondent."

143 Again, we found that passage of Mr Hassan's witness statement to be an accurate and balanced account of the factual matters to which it referred.

144 There was then a series of further emails and WhatsApp conversations to which it is not necessary to refer here, culminating in Ms Caldwell sending the letter at page 2809 to the claimant on 25 October 2017, the majority of which we set out in the following paragraph below. The communications from the claimant were increasingly caustic and combative. Ms Caldwell's witness statement included this sentence in paragraph 48, which we accepted was an accurate account of what happened:

> "We could hardly have a Whats app conversation of a few lines without either us harming her or her saying she rightfully needed to take care of herself."

145 The letter of 25 October 2017 at page 2809 marked the end of the attempts to persuade the claimant to enter into a new contract with the first respondent, so its content was of critical importance. It was in these terms.

> "Dear Chelsey
>
> You've said that you want to move on in a few messages now and we think that is best also.
>
> We have taken advice and counselling from several people as we've said to you along the way. We have spoken to and sought advice from the following people:
>
> Laura van dernoot Lipsky
> Dr. Claudia Herbert (https://www.oxforddevelopmentcentre.co.uk/dr-claudia-herbert)
> Elizabeth Clements (http://www.elizabethclemants.com/bio/),
> Monica Hanaway
> Alexandra Heath
> Myrna Lewis
>
> We have both tried really hard to figure this out, we offered meditation [sic] and support to talk through things, but it does not seem possible at this point.
>
> We will not be offering you a further contract or a settlement. Your previous 3-month contract expired at the end of September.
>
> We will be taking all the steps laid out in previous emails as an organization going forward.
>
> The following payments are due to arrive with you this Friday. They were not made under any contractual relationship or obligation. They are:

> $4,0000.00 [that was an error; it should have been $4,000.00] financial support
> $1,050.44 healthcare
> $350.00 books
> $308.20 TOG DC expenses
>
> We are sad our relationship did not work out. We wish you well on your journey."

146 However, before that letter was sent, the claimant realised that the first respondent was ending her involvement with it because her email account in the first respondent's systems was deleted in the circumstances described by Mr Eisenstadt (who caused that deletion) in paragraph 41 of his witness statement, which was in these terms:

> "The Claimant has alleged that a further act of victimisation and/or detriment was committed after she was blocked from the internal communications and the company's website. I do not accept this. By mid October 2017 it was clear that the Claimant was not going to accept the contract that had been offered. I therefore took the necessary steps to remove her from the First Respondent's email and computer systems. This was done on or around the 24 October 2017. This was standard process for a team member who is no longer employed or contracted with the First Respondent. I refer to page 499 for a copy of the First Respondent's protocol for departed staff which was implemented in May 2017, before the Claimant was engaged with the First Respondent. This was not done because of any complaints the Claimant had made."

147 We accepted that evidence of Mr Eisenstadt in its entirety.

148 The claimant's realisation that the respondent was ending its attempts to get her to sign a new contract led to her sending the email at pages 2825-2835 (ignoring the email at the top of page 2825, which was sent on 29 October 2017). The email was sent at 10:04am on 25 October 2017, which would have been the time where the claimant was when she sent it (Canada). The email of 10:04am enclosed a long chain of emails. The claimant's email of 10:04am was in these terms (alone):

> 'Here you go Cari, now you have the full story. I was not supposed to tell anyone.
> Felt like being threatened actually. "Do not tell anyone you could ruin my life."'

149 The email chain referred to a sexual relationship as having happened between the claimant and Mr Hassan (which, of course, it had). Ms Caldwell's witness statement described what happened next:

> '51. I immediately confronted Zaid about the information. I said I clearly cannot send the letter now and it changes everything. He denied all of it. He said there was no truth to her claims and that he had stayed with his cousins in DC on the night of July 10th and that he wouldn't put up with being questioned. I hesitatingly believed him.
>
> 52. At 2:15pm mountain time, I sent the letter [i.e. the one dated 25 October 2017 at page 2809, the material part of which we have set out in paragraph 145 above] to Chelsey.
>
> 53. I received an email back from Chelsey at 3:56pm mountain saying : "This is clearly not going to fly."
>
> 54. Between October 2017-March 2018, I continued to believe Zaid that what happened between them was consensual. This informed all of my decisions and I deeply regret acting from this basis and the further harm it caused Chelsey.'

150 However, in the email of 19 October 2017 copied as part of the chain at page 2825 onwards, at page 2826, the claimant had written this to Mr Hassan (with bold font added by us):

> "48hrs after I met you, you booked a hotel room with 1 bed without even asking me. That was the first mistake. **But then, I was interested in you too so I went along with it.**"

151 Ms Caldwell confirmed in cross-examination that the letter of 25 October 2017 at page 2809 was written before the claimant sent her the email chain at pages 2825-2835.

152 One further document to which we need to refer here is the set of notes at pages 2802-2804. The circumstances in which those notes came to be written were described by Mr Hassan in paragraph 168 of his witness statement. The notes were of a conversation that he had had with Dr Claudia Herbert, a clinical psychologist, whom he had met on 25 October 2017 and whom the respondents had located as part of their research to find a suitable mediator, which was done at the claimant's request. He said that had "consulted Dr Herbert because [he was] struggling to understand the accusations being made against [him] by the Claimant and her behaviour". In paragraph 169 of his witness statement, Mr Hassan said this:

> "At this point I was scared and confused. I was aware of the Claimant's history and the allegations she had made against at least two other men. I knew we had had a consensual sexual relationship so felt vulnerable and I did not know how far the Claimant would go in her claims. I did not understand how I was supposed to respond to accusations. I knew I did not harass or assault the Claimant in any way."

153 Mr Hassan then (on the same day, 25 October 2017) had the text exchange with Ms Caldwell at page 2780, describing it, and the reasons for him not acknowledging that he had had a sexual relationship with the claimant, in the following paragraphs of his witness statement, which we accepted.

> "170. During the text exchange with Cari I explained my relationship with the Claimant although I did not talk about my sexual relationship and I explain my reason for this below. My conversation with Cari refers to the power-dynamic between the Claimant and me based on my role as the CEO. I also try and explain the complex relationship the Claimant and I had – we had a fiery argumentative relationship – page 2787. Towards the end of the conversation Cari confirmed that the Claimant had not yet alleged sexual harassment but we acknowledged that in view of the Claimant's behaviour she was likely to escalate.
>
> 171. At this point I had not disclosed to anyone that the Claimant and I had been in a sexual relationship. There were two reasons for me not making this disclosure. The first was simply that I thought this was a private matter and did not believe it was any else's business. I come from a cultural background where there is a taboo on speaking about such matters. The second reason I didn't disclose the nature of the relationship was that I was scared and confused. I believed that as a male person of colour being accused of any sexual impropriety by a white woman de facto meant that she would be believed, and I would not. I also considered the Claimant a friend, which meant I also had a loyalty to her on a personal level and I thought we would be able to resolve the matter. In retrospect I believe that Dr Claudia Herbert's assessment of the Claimant was a more accurate one than my assessment of the Claimant."

154 That assessment was of (see page 2803) "narcissistic personality disorder", although that assessment was made on the basis only of what Mr Hassan had reported to Dr Herbert and he had denied to her that he had had a sexual relationship with the claimant. The diagnosis at page 2803 was of critical importance because it was an important part of the basis for the acts of the respondents which were the subject of the claimant's claims about what happened after 25 October 2017. It was this:

> "CH: They [i.e. people with narcissistic personality disorder] get into your control center (touches center of forehead) and you start doubting yourself.
>
> Narcissists feed on power of others and it leads to people feeling exhausted.
>
> Very righteous. Very convincing. But it's not based on fact.

Something happened and it made you lose your connection to your self, you[r] purpose and your team.

Narcissist presentation is very charming. Draws you in.

One characteristic is that they absolutely cannot tolerate boundaries because they want to be in control. They change systems to be in control.

Her way of negotiating her salary was quite shocking. She tried to destroy the whole system.

It is an MT decision. It cannot and should not be dictated. She tried to split you. Narcissists work by splitting teams.

You can't negotiate with a narcissist. You'll never win. They change the goal posts. You spend a lot of time negotiating. If you reach agreement they have lost control. So they change the agreements all the time. You try to please her. You give more power. They abuse. You can't please her.

You can't have a friendship with a narcissist unless you are willing to give up everything and suffer.

Narcissists see themselves as victims and powerless. You invest in that powerlessness and they abuse that. Very resistant to change – even therapy doesn't help. The only thing likely to work is a complete breakdown of their life and sometimes not even that."

155 Mr Hassan described what happened next in the following paragraphs of his witness statement which are an accurate summary of the events which it is convenient (and which, given the volume of documentation which it describes, it is in the interests of brevity) to set out here. For the avoidance of doubt, we accepted Mr Hassan's evidence in paragraph 194 of his witness statement.

"191. The Claimant began to contact our clients and prospective clients. She contacted Rob Ricigliano and Karen Grattan of the Omidyar Group. Cari Caldwell replied to that email and I refer to [page 2942]. This was an agreed statement by the First Respondent. The Claimant sent a further email to Aubrey Yee with the heading "Roller Strategies Unethical Behaviour" on 15 February 2018 and I refer to [page 2954]. In that email she informs our client that she had been discriminated against and treated violently by me and claims that she was fired after reporting sexual assault by me. She then makes a further untrue statement by stating that I admitted a history of sexism, assault and abuse. I also refer to a further email sent by the Claimant to Mr Isgitt of Humanity United dated 16 February 2018 at page 2957 which is a further attempt by the Claimant to forward the email on to Aubrey Yee. The Claimant then sent a further email to Karen Grattan on 20 February

2018 and I refer to [page 2960] where she makes similar statements. A further email is sent to Terry Mazany on 5 March 2018 making similar allegations and attaching a copy of the ET1 - I refer to page 2962.

192. As a direct result of these communications the First Respondent suffered losses in the form of revenue due to early contract termination and the potential loss of future revenue from this clients [sic]. The Omidyar Group ended our contract as a direct result of the Claimant's email. I refer to page 2963 to 2965 which is an email communication between me, the Third Respondent and Terry Mazany. This confirms that as a direct result of the email the Claimant sent to Rob Ricigliano they terminated the contract the First Respondent was working on with the Omidyar Group. We were also in the process of negotiating with this client for a much larger piece of work worth $1million+ which we were unable to continue with. As a result of the Claimant's communications the Omidyar Group were no longer amenable to working with the First Respondent in the future until the issue with the Claimant had been resolved which meant the future work we had been in the process of discussing was no longer viable.

193. Subsequent to this the Claimant sent further emails, an example of these can be seen at page 2983 when she sent a copy of the Employment Tribunal claim form to Mr Peters who was an investor in the First Respondent. I also refer to a further email sent from the Claimant to numerous parties on 2 October 2018 at page 2985 and again on 9 October 2018 at page 2987. In this email she states that she has contacted Mike Metelits who was also an investor in the First Respondent and has forwarded him information about what allegedly happened to her at the First Respondent.

194. The First Respondent did agree a statement to send to any clients/contacts who had been contacted by the Claimant and I refer to page 2940. This email was only sent to people who had contacted us after receiving communication from the Claimant. It is important to put this email and message into context. The Claimant was contacting our clients and contacts with a view to destroying the First Respondent and Second Respondent's reputation. The statement was only sent to clients/contacts who had been contacted by the Claimant. The statement was not sent to anyone else.

195. The Claimant commenced a claim at the Employment Tribunal on 4 February 2018 and I refer you to [page 1] of the bundle. It is only on receipt of the Grounds of Complaint that we became aware of the full details of the Claimant's claims and in particular the allegations relating to sexual harassment.

196. In March 2018, Cari and I spoke. She told me she only had one question for me, this was “Did you sleep with [the Claimant]?” When I replied in the affirmative, Cari told me she didn’t want to know anything else. She ended our almost two-decade friendship without once asking me what happened.

197. At this point the First Respondent was in difficulty as the Claimant had contacted many of our clients and we needed to consider the options that were available. I refer to my email to the management team at [page 2971]. In this email I gave my views upon what the Claimant wanted and the options available to the company.”

156 That email was four pages long, and was the subject of the penultimate claim of the claimant, that which was stated in paragraph 7.2.26 of the agreed list of issues. In response to the final agreed issue, stated in paragraph 7.2.27 of that list, Mr Hassan said this in paragraph 208 of his witness statement:

> “In January 2019 I did contact Medium and reported copyright infringement by the Claimant and asked them to be removed. The Claimant had published an article called ‘Ghosts of Systems Past’ which was written on behalf of the First Respondent and during the period she was engaged by the First Respondent and so the article belonged to the First Respondent. It was not for the Claimant to publish.”

157 The claimant at no time cross-examined Mr Hassan on his reason for asking for that article to be removed from Medium’s website. The best indicator of the reason for that removal was in our view the content of paragraph 210 of Mr Hassan’s witness statement, which described the effect on the first respondent of the claimant’s allegations (made, of course, before they had been determined by this tribunal) in these terms:

> “The First Respondent was irreparably damaged by these public allegations and the directors, having regard to the company’s financial position, decided to take steps to place it into creditors voluntary liquidation on 8 July 2019 and I refer to the letter from Begbies Traynor to all known creditors at [page 3179]. Whilst the Claimant was not a creditor she was aware of this and corresponded with Anne-Marie Harding. The First Respondent was dissolved on 15 December 2020”.

158 The claimant’s application to amend her claims to add the claim stated in paragraph 7.2.27 of the agreed list of issues was made in the letter of 18 May 2020 to which we refer in paragraph 13 above.

The absence of evidence from the claimant about the reasons for her making claims outside the applicable primary time limits

159 The claimant put no evidence before us to justify the making of her application to amend her claims only in May 2020, i.e. a year and four months after the final event in the sequence of events to which that application related. The same was true of any other claim that was made outside the primary time limit: the claimant put no evidence before us on which we could have concluded that it was just and equitable to extend time for making the claim in question outside the primary time limit.

The relevant law

The relevant parts of the EqA 2010

Harassment

160 Section 26 of the EqA 2010 provides:

> "(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.
>
> (2) A also harasses B if–
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if–
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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."

Direct discrimination and whether a claim of harassment adds anything to a claim of direct discrimination

161 We return to what constitutes harassment within the meaning of section 26 below, after considering the meaning of the words "conduct related to a relevant protected characteristic". In order to do the latter, it is helpful to consider the effect of section 13 of the EqA 2010, which of course was also a central provision in this case. Section 13 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."

162 The manner in which that section needs to be applied, given section 136 of the EqA 2010 (to which we refer in paragraphs 168-170 below), is now well-established. It may be thought that there is a fundamental difference between sections 13 and 26 of the EqA 2010, in that they use different operative words: "because of a protected characteristic" in section 13 and "unwanted conduct related to a relevant protected characteristic" in section 26.

163 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of those different words. It shows that only rarely will a claim of harassment add anything to a claim of discrimination. By way of illustration, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination. Underhill LJ confirmed that in the succinct statement in paragraph 14 of his judgment in *Base Childrenswear Limited v Otshudi* [2020] IRLR 118. The approach which we needed to take here when applying section 26(1) of the EqA 2010 was shown by paragraphs 108-109 and the opening part of paragraph 110 of Underhill LJ's judgment in *Nailard*. That passage is as follows:

> '**Harassment**
>
> 108. Mr Carr [counsel for the claimant] submitted that, even if the employed officials' conduct could not be said to be "because of" the Claimant's sex, it was on any view "related to" it within the meaning of section 26. I have already explained at paras 96-98 above why that language does not cover cases of third party liability; and for the reasons given at para 104, the present claim is,

on the ET's reasoning, in substance such a case. If the employed officials, and through them the union, are to be liable for harassing the claimant because of their failure to protect her from the harassment of the lay officials, and (in the case of Mr Kavanagh) for transferring her, that can only be because of their own motivation, as to which the tribunal made no finding.

109. Mr Segal [counsel for the respondent employer, the union] sought in his post-hearing submissions to distinguish between a situation where an employer was "culpably inactive knowing that an employee is subjected to continuing harassment (as on the facts of the *Burton* case)" and one where he was "culpably inactive without [any such knowledge]"; and to show that the employment tribunal's findings established that the case was in the latter category. I am not sure of the relevance of the distinction; but since we did not hear oral submissions on it I prefer to say no more than that, on the law as I believe it to be, the employer will not be automatically liable in either situation. I repeat, to avoid any possible misunderstanding, that the key word is "automatically": it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.

Conclusion

110. For those reasons I agree with the appeal tribunal that the reasoning of the employment tribunal was flawed. It found the union liable on the basis of the acts and omissions of the employed officials without making any finding as to whether the claimant's sex formed part of their motivation.'

Victimisation

164 Section 27 of the EqA 2010 provides:

"(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."

165 The word “detriment” in that section is applied from the claimant’s and not the alleged victimiser’s perspective: *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16, [2007] ICR 841. Nevertheless, as a result of the decision of the Court of Appeal in *Ministry of Defence v Jeremiah* [1980] ICR 13, a “detriment” for this purpose occurs only “if a reasonable worker would take the view that the treatment was to [her] detriment”. In addition, it is possible to act without breaching section 27 with a view to preserving one’s position in anticipated or current litigation. That is clear from the decision of the House of Lords in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065, where a reference for an officer was withheld, not ‘by reason that’ he had brought discrimination proceedings, but because those proceedings were imminent at the time of the reference request and the Chief Constable needed to preserve his position. The full reasoning in that case was departed from in the *Derbyshire* case, but the result of the decision in *Khan* was nevertheless not criticised. By way of illustration, in paragraph 9 of his speech in *Derbyshire*, Lord Bingham said this:

> “In *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, para 29, Lord Nicholls propounded a simple, common sense approach to this question. It is to ask why the alleged discriminator acted as he did. What matters is the discriminator’s subjective intention: what was he seeking to achieve by treating the alleged victim as he did? The decisions in *Cornelius v University College of Swansea* [1987] IRLR 141 and *Khan* [2001] ICR 1065 are, I think, consistent with this approach. In *Cornelius*, the applicant complained that the college had not transferred her or given her access to the college’s internal grievance procedure pending tribunal decisions on her complaints of sexual discrimination. There was no finding that she had been the victim of less favourable treatment or detriment or that, if she had, it had had anything to do with her pending proceedings. It appeared (para 33) that the college authorities wished to defer internal steps until the proceedings were over, to avoid acting in a way which might embarrass the handling or be inconsistent with the outcome of the tribunal proceedings. Similarly, in *Khan* the chief constable declined to give the applicant a reference for appointment to another force pending the determination of a racial discrimination complaint not because he wished to obstruct the conduct of those proceedings but because he believed, on advice, that any reference he gave would weaken his defence in those proceedings or aggravate the damages recoverable against him. The contrast with the present case is striking and obvious”.

166 However the decision of the EAT presided over by Underhill J (as the then was) in *Martin v Devonshires Solicitors* [2011] ICR 352, is to the effect (as it is said in the headnote):

> “that there would be cases where an employer dismissed an employee, or subjected him to some other detriment, in response to the doing of a protected act but where it could be said, as a matter of common sense and justice, that the reason for the dismissal was not the protected act as such but some

> feature of it which could properly be treated as separable, such as the manner in which the employee made the complaint relied on as the protected act."

167 However, as Underhill J said there in paragraph 22 of the judgment of the EAT:

> 'Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.'

<u>The burden of proof</u>

168 Section 136 of the EqA 2010 provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

169 There is much case law concerning the application of that provision, and we refer to its effect in the following paragraph below. However, we bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been for example direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

170 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

Harassment in practice

171 The provisions of section 26 of the EqA 2010 have been considered by appellate courts on a number of occasions in helpful ways, including (1) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 and (2) by the Court of Appeal in *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

> "[The claimed] effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

172 In paragraph 22 of *Dhaliwal*, the EAT (Underhill P presiding) said this:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

173 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UKEAT/0179/13/JOJ, 28 February 2014), the EAT (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

> '12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.
>
> 13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012:
>
> > "…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular

> characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;".'

174 *Dhaliwal* is authority for the proposition that the intent of the impugned conduct is relevant. That was said at the end of paragraph 15 of the EAT's judgment in that case.

Vicarious liability

175 An employer will be liable under the EqA 2010 only for acts of an employee which are within the course of the employee's employment. In paragraph L[501.03] of *Harvey*, reference is made to "the well-known and longstanding authority of *Jones v Tower Boot Co* [1997] IRLR 168, CA", to which we ourselves referred during the course of the hearing. As *Harvey* there says, that case "establishes that the common law rules of the law of tort on vicarious liability are not to be applied; instead, a tribunal is to take a wider and more common sense approach, in the light of the intent of the legislation".

176 However, as it is said in the headnote to that case:

> 'In determining whether conduct complained of was done by a person "in the course of employment", for the purposes of s.32 of the Race Relations Act and the corresponding provisions in s.41 of the Sex Discrimination Act, the words "in the course of employment" should be interpreted in the sense in which they are employed in everyday speech and not restrictively by reference to the principles laid down by case law for establishing an employer's vicarious liability for the torts committed by an employee. The application of the phrase is a question of fact for each industrial tribunal to resolve.'

177 Further, this is said in the headnote:

> "A purposive construction requires these sections of the Acts to be given a broad interpretation. The policy of s.32 (and its counterpart in sex discrimination) is to deter racial and sexual harassment in the workplace through a widening of the net of responsibility beyond the guilty employees themselves, by making all employers additionally liable for such harassment, and then supplying them with the reasonable steps defence under s.32(3), which will exonerate the conscientious employer who has used his best endeavours to prevent such harassment, and will encourage all employers who have not yet undertaken such endeavours to take the steps necessary to make the same defence available in their own workplace."

178 We noted that in paragraph L[504] of *Harvey*, this is said:

> "There are numerous examples of behaviour which takes place away from the working environment / outside of working hours giving rise to liability. It is important to note that whether this is so in any particular case will depend very much on the view of the facts taken by the tribunal of first instance.
>
> 'Chief Constable of the Lincolnshire Police v Stubbs [1999] IRLR 81, [1999] ICR 547, EAT. Ms Stubbs was subjected to sexual harassment by a police colleague in a pub, where she had gone after her duty had ended. The employment tribunal was held entitled to find that these acts gave rise to liability on the part of the harasser's employer, under SDA 1975 s 41(1). The words 'in the course of employment' were to be widely construed, in line with the views expressed in *Jones v Tower Boot Co Ltd*, even though they would not go so far as to cover behaviour taking place as part of a purely social gathering, or in the course of a chance meeting after hours.
>
> *Sidhu v Aerospace Composite Technology Ltd* [2000] IRLR 602, [2001] ICR 167, CA. The employer was not vicariously liable for direct racial discrimination for a racialist attack on Mr Sidhu, carried out by a fellow employee out of hours at a racetrack, during a social event organised by the company. The ET was entitled to find that such behaviour did not fall with the 'course of employment' required by RRA 1976 s 32(1). It may have been significant that the majority of those attending the event were friends and family rather than employees.'

Claims of detrimental treatment within the meaning of section 47B of the ERA 1996

179 A claim of detrimental treatment for making a protected disclosure within the meaning of section 43A of the ERA 1996 under section 47B of the ERA 1996 must be made under section 48 of that Act. The claim here was made under section 47B(1A). Detrimental treatment within the meaning of section 47B is "any act, or any deliberate failure to act, ... done on the ground that the worker has made a protected disclosure". By reason of section 48(2) of the ERA 1996, "it is for the employer to show the ground on which any act, or deliberate failure to act, was done." For there to be a protected disclosure within the meaning of section 43A, there must be a disclosure satisfying the requirements of section 43B of the ERA 1996, which provides so far as relevant:

> '(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, ...

(d) that the health or safety of any individual has been, is being or is likely to be endangered'.

180 There will not be detrimental treatment done "on the ground" of the making of a protected disclosure for the purposes of section 47B if the employee is subjected to a detriment only because of the manner in which that disclosure was made (i.e. and not to any material extent because of the making of the protected disclosure as such). That is clear from the decision of the Court of Appeal in *Bolton School v Evans* [2007] ICR 641. However, it is clear from the decision of the EAT (Simler P presiding) in *Shinwari v Vue Entertainment* UKEAT/0394/14 (12 March 2015, unreported) and the decision of the Court of Appeal in *Page v Lord Chancellor* [2021] IRLR 377, that the statements of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 to which we refer in paragraphs 166 and 167 above apply here too.

Our conclusions on the claimant's claims

Time limit questions

181 In the absence of any evidence from the claimant, either in her very long witness statement or otherwise, for her failure to make her application to amend her claim form by the addition of the claims for which she sought permission to amend on 18 May 2020, and for her failure to make her claims in respect of the events which occurred before 15 September 2017 in time, we concluded

181.1 that in respect of the claims made under the EqA 2010 it was not just and equitable to extend time, and

181.2 in respect of the claims of detrimental treatment for whistleblowing within the meaning of section 47B of the ERA 1996, it was reasonably practicable to make the claims in time.

182 We noted in any event that on page 2871 there was an email from the claimant to the respondents dated 5 November 2017 in which the claimant wrote

> "I don't know if anyone has bothered to use google, but you guys have done about a bazillion illegal things."

and that the claimant wrote a day later (on page 2872):

> "And somebody better start communicating with me (ignoring me is a form of retaliation- also illegal) because may patience and generosity: has expired."

183 Thus, the claimant was well aware of the possibility of her having viable claims to an employment tribunal by at the latest 5 November 2017. In fact, she was plainly familiar with court proceedings in general terms at the very latest by 6 October 2017 given her reference in the WhatsApp conversation of that date that we have set out in paragraph 335 below, where she referred to the "lawsuit with the bc [presumably British Columbia] supreme court" that she had "had to file [from the dc airport]". In addition, during the period after the making of the claim to this tribunal, the claimant was actively involved in seeking to overturn the restricted reporting order to which we refer in paragraph 3 above, as can be seen from the reserved judgment of EJ Hawksworth on page 239 and the written communications from the claimant at pages 214-217. In addition, the claimant was able to write the lengthy email of 4 April 2019 seeking disclosure at pages 3114-3119. Thus, there was no obvious impediment to the making of the claims long before they were in fact made.

184 In any event, we concluded that time should not be extended for any claim that was made outside the primary time limit for making it. We nevertheless, for the sake of finality, determined the factual issues arising in relation to those claims.

Our conclusions on the claims stated in the agreed list of issues

185 We now state our conclusions on the claimant's claims, taking them in the order in which they are stated in the agreed list of issues. Where we have already set out the relevant part of the list, we do not repeat the claim here. Otherwise, for the sake of clarity, we set it out in the underlined headings below.

The claims of harassment within the meaning of section 26 of the EqA 2010

Issue 1.1.1: 'On 10 July 2017 R2 booked a single hotel room for himself and C despite knowing that she felt unsafe doing so, despite knowing that she had no money to pay for alternate accommodation, despite knowing she suffered PTSD from prior abuse by a male boss, and despite having assured her that she would not have to share a hotel room with a colleague (paragraph 13 Grounds of Complaint ("GoC")'
Issue 1.1.2: "On 10 July 2017 R2 engaged in non-consensual sexual activity with C, including non-consensually digitally and orally penetrating C (paragraph 13 GoC)"

Issue 1.1.3: "Between 11 and 17 July 2017 R2 engaged in non-consensual sexual activity, including non-consensual sexual intercourse with C in Chicago (paragraphs 14 and 15 GoC)"

186 None of the first three claims was well-founded on the facts as (see paragraphs 84, 85 and 91 above) the sexual intercourse about which the claimant complained in those three claims was consensual. It was therefore not unwanted conduct within the meaning of section 26 of the EqA 2010. In addition, and in any event, the intercourse was not conduct which was done for the purpose of violating the claimant's dignity or creating for her an intimidating, hostile,

degrading, humiliating or offensive environment, nor did it (applying section 26(4) of that Act) have that effect. In what follows, if in the course of determining a claim of a breach of section 26 of the EqA 2010 we say that conduct was not done for the relevant purpose or have the relevant effect, we mean that it was not done for the purpose of violating the claimant's dignity or creating for her an intimidating, hostile, degrading, humiliating or offensive environment, nor did it (applying section 26(4) of that Act) have that effect.

Issue 1.1.4: "On several occasions, R2 referred to non-consensual sexual intercourse with C as 'medicinal sex' (paragraph 19 GoC)"

187 There were two places where Mr Hassan referred to sex as being medicinal or said something to the like effect. They were at pages 1506-1507 and 2246-2248. In both cases, the reference was to sex generally, and not to sex with the claimant. In neither place could what Mr Hassan said be understood to be a reference to non-consensual sex, whether with the claimant or anyone else. Thus, this claim failed on the facts.

Issue 1.1.5: "R2 did not wear a condom when engaging in non-consensual sexual intercourse with C, exposing her to possible infection and/or pregnancy. C attended a sexual health clinic due to developing a yeast infection which she worried was an STI (paragraph 18 GoC)"

188 On the factual findings made in paragraph 94 above, the claim stated as issue 1.1.5 had to fail. That was because the claimant at no time made it clear that she wanted Mr Hassan to wear a condom, so even if (which we did not accept) it was unwanted conduct for him not to wear one, what he did was not done for the relevant purpose and did not have the relevant effect.

Issue 1.1.6: "R2 repeatedly spoke to C about his marriage, complained about his wife and sought emotional support, humiliating C (paragraph 21, 31, 69 GoC)"

189 We could see nothing in any of the references made by Mr Hassan in the WhatsApp messages in the bundle to his marriage and his wife which was in any way capable of being regarded as having the relevant effect. Nor did the claimant satisfy us that there were any facts from which we could draw the inference that Mr Hassan did it for the relevant purpose. We say that not only because of the content of the references but also because in many cases it was the claimant who initiated a conversation about Mr Hassan's wife. Thus, this claim did not succeed.

Issue 1.1.7: "In August 2017 when C was working in Oxford, R3 told C to provide a written account of her creative process, undermining her professionally (paragraph 24 GoC)"

190 Given what we say in paragraph 96 above, this claim did not succeed.

Issue 1.1.9: "On 16 August 2017, when C questioned R2's strategy or attempted to provide critical/analytical input, as she had been hired to do, R2 questioned and attempted to undermine the knowledge and qualifications of C, demanded she provide evidence and deliberately attempted to confuse and destabilise her during a discussion on strategy at his home (paragraph 23 GoC)"

191 Given what we say in paragraphs 97 and 98 above, this claim could not, and did not, succeed, unless Mr Hassan's oral evidence assisted the claimant in regard to this claim. It did not. We were completely satisfied that the manner in which he spoke to the claimant on 16 August 2017 had nothing to do with her sex. Necessarily, therefore, it was not conduct related to her sex for the purposes of section 26 of the EqA 2010.

Issue 1.1.11: 'R3 told C, who was visiting from Calgary, that Oxford was her "home office" and therefore R1 would not pay for her accommodation or reimburse expenses, leading C to have to remain at the house of R2'

Issue 1.1.12: "Knowing C did not feel safe sharing accommodation, R2 returned to his house where C was staying on 25 August 2017 and pressured her not to get a last minute hotel"

192 Given what we say in paragraphs 99-102 above, and having heard and seen Mr Hassan and Mr Eisenstadt give evidence, we concluded that these two claims were not well-founded on the facts in that we concluded that the manner in which Mr Hassan and Mr Eisenstadt acted so far as relevant had nothing to do with the claimant's sex. Necessarily, therefore, it was not conduct related to her sex for the purposes of section 26 of the EqA 2010.

Issue 1.1.13: "On 25 August 2017 R2 had non-consensual sexual intercourse with C at his home in Oxford"

193 Given what we say in paragraph 107 above, this claim had to, and did, fail on the facts.

Issue 1.1.14: "On 26 August 2017 R2 used dismissive and profane language toward C when she raised concerns with gender equity, including telling her to go fuck herself, that he didn't believe her, and insinuating he would end her employment – leading C to have minor panic attack (paragraph 29, 30 GoC)"

194 This allegation was based purely on the WhatsApp conversation at pages 1976-1986. That conversation spoke for itself, in that it was there to be seen and there was no doubt that it happened. What was in issue was whether or not in saying the things about which the claimant complained Mr Hassan said something that was unwanted conduct which was related to the claimant's sex, either for the purpose, or (if not for the purpose) with the effect, of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

195 We came to the view after a careful examination of that WhatsApp conversation that there was nothing in it from which we could draw the inference that what Mr Hassan said in it was said with the relevant purpose. We then concluded that what he said, when read in the context of the whole of the conversation, did not have the relevant effect. For the avoidance of doubt we agreed with Ms Jennings' submissions on this part of the claim, which were as follows.

> '42. This written exchange was explored at some length under cross-examination (pp1976-1976-837). There was a discussion about Ms AB's concerns with her work and her insecurities about not feeling she had a lot to offer. Mr D said he thought she did have a lot to offer. As the conversation turned to their relationship, Ms AB stated "I feel I have to earn respect and I don't like that". Mr D became upset with this remark. Following an exchange relating to the same, Mr D commented that some of the things she had said made him feel "really fucking horrible" and when she said "Well maybe that is your shit" he responded "I can't believe the things you are saying. It's horrible. Go fuck yourself" (p1985-6). Six minutes later he apologised for this comment, but remarked that he was "devastated" by her suggestion that he did not respect her.
>
> 43. Mr D did not make this remark to Ms AB because she raised issues of gender equity, but because she had touched a nerve. It was a personal disagreement, not in the course of employment. Although possibly unwanted conduct, there is nothing to suggest this related to Ms AB's sex, or otherwise that it had the relevant effect.
>
> 44. Ms AB alleges that Mr D threatened her job loss during this exchange. To the contrary, although Ms AB brings this topic up, Mr D expressly disavows the notion (p1991). This was not unwanted conduct and did not relate to Ms AB's sex.'

196 In those circumstances, this claim could not, and did not, succeed.

<u>Issue 1.1.15: "R2 in speaking to C repeatedly made light of his harassing behaviour, including saying that he had also recently told R5 to fuck off and that he never wanted to see her again, that he had told his wife to go fuck herself, and that everyone on the team was stressed because they weren't getting properly fucked"</u>

197 Ms Jennings referred in her closing submissions to the things complained about in issue 1.1.15 as having been said in the WhatsApp conversation of 14 September 2017 at pages 2231-2232. We saw that Mr Hassan did say there at the top of page 2231 that "No ones getting properly fucked", but we saw that the other things that were referred to in issue 1.1.15 were not said there (or, in precise terms, anywhere in the WhatsApp conversations in the bundle). Something like the things complained about were said on 9 September 2017 in

the WhatsApp conversation at pages 2149-2150, which was plainly part of what we could only describe as a warm, friendly, even loving conversation between Mr Hassan and the claimant (which started at page 2136). Given that finding, and having heard and seen Mr Hassan give evidence, and having read the full exchanges at pages 2231-2232 and 2149-2150, we concluded that what was said as stated in issue 1.1.15 (1) was not said in the course of employment, (2) did not amount to unwanted conduct, (3) did not relate to the claimant's sex, and (4) was not done for the relevant purpose or have the relevant effect.

Issue 1.1.16: "In August 2017, R2 flirted with employee Ms Forrester-Wilson, including giving her a non-consensual massage in the office, and later punished Ms Forrester-Wilson for raising concerns about this, exacerbating C's own experience of a hostile environment (paragraph 28 GoC)"

Issue 1.1.17: 'R2 subjected C to an emotional tirade for relaying Ms. Forrester-Wilson's reports of R2 non-consensually touching and flirting with her, and said that Ms. Forrester-Wilson was lying, that she was "a kid," and that he planned to professionally punish her (paragraph 28 GoC)'

198 We have stated our factual findings on the matters complained of in issues 1.1.16 and 1.1.17 in paragraphs 109-117 above. We concluded on those facts, having stood back and looked at the overall picture (including our other findings of fact) that while it was unlikely that Mr Hassan would have massaged the shoulders of a man, it was also unlikely that a man would have massaged his shoulders. In any event, though, we concluded that what Mr Hassan did to Ms Forrester-Wilson's shoulders was not in any way done with the relevant purpose or have the relevant effect, bearing in mind that that purpose and effect had to relate to the claimant: the purpose (or if not the purpose then the effect) had to be of violating the claimant's dignity or creating for her an intimidating, hostile, degrading, humiliating or offensive environment. We did not see in the facts as we found them anything from which we could draw the inference that Mr Hassan did what he did to Ms Forrester-Wilson's shoulders for that purpose, and in the circumstances we concluded that it could not reasonably be said to have had the relevant effect.

199 What Mr Hassan did otherwise was also, we concluded, for the same reasons, not done for the relevant purpose or have the relevant effect. The claimant's characterisation of what Mr Hassan said in the relevant WhatsApp conversations was in our judgment inaccurate: it was at best a mis-characterisation of it.

Issue 1.1.18: "On 21 September 2017, after C submitted a piece of writing that discussed sexism in their field (as she had been hired explicitly to bring a critical gender lens to the company), R2 disparaged C's work and told her she would have to stop 'playing that gender card' if she wanted his help (paragraph 34 GoC)"

200 The relevant WhatsApp exchange was on pages 2316-2317 (as part of a conversation that started at page 2313 and ended on page 2322) and included this passage:

> "22/09/2017, 20:35:51: Chelsey Rhodes: Really. Have u ever said or written anything as a woman?
> 22/09/2017, 20:36:00: Zaid: Ok I'm done
> 22/09/2017, 20:36:09: Chelsey Rhodes: Hahaha jeez
> 22/09/2017, 20:36:15: Zaid: Good luck, send me something if you want to and I'll do my best.
> 22/09/2017, 20:36:18: Zaid: Ciao x
> 22/09/2017, 20:36:41: Chelsey Rhodes: I missed your first comment
> 22/09/2017, 20:36:58: Chelsey Rhodes: I see what you are saying
> 22/09/2017, 20:36:59: Zaid: If you want my help then I would request you stop playing that card
> 22/09/2017, 20:37:29: Zaid: Get a woman to edit your work if that's your problem
> 22/09/2017, 20:37:34: Chelsey Rhodes: The whole point of my asking for your help is to make sure i am making solid claims.
> 22/09/2017, 20:37:45: Zaid: Then don't patronise me
> 22/09/2017, 20:38:07: Zaid: Ok?"

201 The rest of the conversation (which included the words "Get a woman to edit your work if that's your problem") was to like effect. Having heard and seen Mr Hassan give evidence and having read the WhatsApp conversation as a whole, we concluded that what Mr Hassan said in that conversation (1) did not relate to the claimant's sex, (2) was not said because of her sex, (3) was not done for the relevant purpose, and (4) did not have the relevant effect.

Issue 1.1.19: "On 23 September 2017, R2 threatened to quit or kill himself if C continued to be upset by his treatment of her (paragraph 37 GoC)"

202 Given our conclusion stated in paragraph 120 above, this claim could not, and did not succeed.

Issue 1.1.20: "Between 24-29 September 2017 R2 had non-consensual sexual intercourse with C in Washington DC and became increasingly aggressive including saying 'I want to fuck your ass' and attempting to do so without consent, after previously stating they needed to have "boundaries", and knowing that C had almost not gotten on the plane to Washington DC due to being so upset at R2's behaviour (paragraph 39 GoC)"

203 Given what we say in paragraph 125 above, this claim could not, and did not, succeed.

Issue 1.1.21: "On 6 October 2017, R2 characterised C raising concerns about equal pay as C 'blackmailing' him (paragraph 45 GoC)"

204 In her closing submissions, Ms Jennings dealt with this issue along with issues 1.1.22, 1.1.24 and 1.1.25. We agreed that they were all related and that we both could and should consider them together. We have set out the factual background to them all in paragraphs 137-141 above, and it can be seen from those paragraphs that (1) all four issues are related and (2) all of them concern what was said in WhatsApp conversations.

Issue 1.1.22: "R2 again characterised C's concerns about equal pay as blackmailing him and attempted to persuade her to sign an employment contract with unequal terms by telling her that he loves her and asking if she had considered the impact that her demands for equal pay would have on their relationship (paragraph 47 GoC)"

Issue 1.1.24: "R2 belittled C's concerns about gender equity, telling her that he loves her a lot, to 'stop being reactionary' and to 'stop playing the victim' and implied that her concerns stemmed from her past trauma rather than good faith concerns about unequal pay (paragraph 48 GoC)"

Issue 1.1.25: "R2 told C she had ruined his life and exacerbated his depression and burn out and had blown up her relationship with the company by raising concerns about gender equity (paragraph 49 GoC)"

205 Issue 1.1.21 arose from the WhatsApp conversation at pages 2558-2563. It involved Mr Hassan saying on page 2560: "I feel you're blackmailing me". The precise sequence in which that was said was this:

> "06/10/2017, 14:02:36: Chelsey Rhodes: Now i get the contract sent and u say "just decide and let me know" that doesn't seem fair when i am also scrambling last minute to go away for a month?
> 06/10/2017, 14:03:05: Zaid: Well you can't go without a contract
> 06/10/2017, 14:03:13: Chelsey Rhodes: Ok
> 06/10/2017, 14:03:16: Zaid: I'm sorry but it's the best we can do
> 06/10/2017, 14:03:34: Chelsey Rhodes: Then i guess that is the decision
> 06/10/2017, 14:03:39: Zaid: You can't get to perfect because you need it now - I'm committed to getting there but it'll take time
> 06/10/2017, 14:03:49: Zaid: Well what's your decision?
> 06/10/2017, 14:04:30: Zaid: There's no company if we don't deliver
> 06/10/2017, 14:05:19: Chelsey Rhodes: I need to think
> 06/10/2017, 14:05:39: Zaid: Ok xx
> 06/10/2017, 14:05:50: Chelsey Rhodes: I am not sure i can agree
> 06/10/2017, 14:06:19: Zaid: Ok well this isn't a democracy and it never pretended to be one
> 06/10/2017, 14:06:25: Zaid: I feel you're blackmailing me
> 06/10/2017, 14:06:29: Zaid: Anyways you decide
> 06/10/2017, 14:07:25: Chelsey Rhodes: I feel I'm being asked to take on more of a burden than others . and if i dont I'm being selfish or ruining the company

06/10/2017, 14:07:43: Zaid: More of a burden?!?
06/10/2017, 14:07:53: Zaid: I'm gonna go now
06/10/2017, 14:07:58: Chelsey Rhodes: And simultaneously being asked to drop everything and leave for a month
06/10/2017, 14:08:01: Zaid: Let me know what you want to do
06/10/2017, 14:08:06: Chelsey Rhodes: Ok
06/10/2017, 14:08:07: Zaid: You're being asked and you said yes
06/10/2017, 14:08:14: Chelsey Rhodes: I will let you know
06/10/2017, 14:08:15: Zaid: Say no if you don't want to
06/10/2017, 14:08:19: Zaid: Ok bye x"

206 We saw Mr Hassan saying in that conversation seen against the factual background described in paragraphs 137-141 above that he "felt" blackmailed to be innocuous in that it was in our view plainly unconnected with the claimant's sex and was plainly not done for the relevant purpose or with the relevant effect. (Where we say below that something was in our view innocuous, that is what we mean.)

207 The following exchange was relevant also to the claim in issue 1.1.22. At pages 2562-2563, this was said.

"06/10/2017, 16:00:03: Zaid: I want to know if you thought about the impact your demand would have on our relationship?
06/10/2017, 16:00:07: Zaid: I'm asking honestly
06/10/2017, 16:00:15: Chelsey Rhodes: I did not make a demand
06/10/2017, 16:00:19: Zaid: Also it wasn't a request
06/10/2017, 16:00:21: Zaid: Yeah it was
06/10/2017, 16:00:21: Chelsey Rhodes: I made a request
06/10/2017, 16:00:24: Chelsey Rhodes: You said no
06/10/2017, 16:00:40: Zaid: That's the thing about requests
06/10/2017, 16:00:53: Zaid: I assumed there was room to say no
06/10/2017, 16:01:04: Zaid: So basically you didn't consider the impact? On you and me?
06/10/2017, 16:01:11: Chelsey Rhodes: What?
06/10/2017, 16:01:20: Zaid: Cause it was a request - to which there was only one right answer
06/10/2017, 16:01:22: Zaid: Anyways
06/10/2017, 16:01:24: Zaid: I got it
06/10/2017, 16:01:43: Zaid: I'm your friend
06/10/2017, 16:01:52: Zaid: And I want to fight for the things you believe in
06/10/2017, 16:02:32: Zaid: And I feel totally blackmailed and let down
06/10/2017, 16:02:50: Chelsey Rhodes: Z what are you talking about? I wrote a reflection after chicago, one week in, that raised this issue and applied it to zim. You want me to go with same team of guys to zim, which will be a setting thst [sic] brings back powerful memories of dealing with intensely gendered bullshit from my own team that led to my near death
06/10/2017, 16:03:06: Zaid: I'm gonna go now

06/10/2017, 16:03:13: Zaid: We can talk about it some other time
06/10/2017, 16:03:36: Chelsey Rhodes: And i am only saying this needs to be right and i dont feel supported or that i can raise this and have it addresses [sic]
06/10/2017, 16:04:18: Zaid: I don't want to talk. I have to go figure out how we are going to deliver Zim. I have to figure out what to do about the fact that we don't have any cash for the trip in a week.
06/10/2017, 16:04:25: Chelsey Rhodes: I have brought up issues with you repeatedly about not feeling respected or valued
06/10/2017, 16:04:42: Zaid: Yeah and you said you've never seen anyone make faster progress
06/10/2017, 16:04:47: Zaid: Clearly not fast enough
06/10/2017, 16:04:54: Zaid: Take care X
06/10/2017, 16:05:11: Chelsey Rhodes: Well i am happy to help with all of this, i am happy to go all in, but you are saying you dont want a democracy that u make the decisions and tell me
06/10/2017, 16:05:30: Zaid: I feel blackmailed
06/10/2017, 16:05:35: Chelsey Rhodes: And it doesnt feel ok and i cant do it
06/10/2017, 16:05:37: Chelsey Rhodes: So do i
06/10/2017, 16:05:40: Zaid: I don't trust you to support me
06/10/2017, 16:05:58: Zaid: Ok well then this relationship isn't what we both thought it was - which is respectful.
06/10/2017, 16:06:08: Zaid: I have to go now
06/10/2017, 16:06:11: Chelsey Rhodes: I feel like i was sent a last min contract and expected to agree to what was offered and then get on an airplane
06/10/2017, 16:06:20: Zaid: Well sure
06/10/2017, 16:06:23: Zaid: Take your time
06/10/2017, 16:06:35: Zaid: I have to go and sort shit out
06/10/2017, 16:06:41: Zaid: Take care x"

208 We saw that exchange as also being innocuous. In addition, if and to the extent that it involved the claimant's relationship with Mr Hassan outside of work, it was not said in the course of Mr Hassan's employment. In any event, the claim stated as issue number 1.1.21 did not succeed.

209 The claim in issue 1.1.22 arose also from the following exchange on page 2561:

"06/10/2017, 15:51:16: Zaid: You know I'm your friend and I love you a lot right?
06/10/2017, 15:51:21: Chelsey Rhodes: Yes
06/10/2017, 15:51:29: Zaid: Will you listen to me? Or you don't trust me?
06/10/2017, 15:51:33: Chelsey Rhodes: And you're also my boss and this isnt a democracy
06/10/2017, 15:51:41: Zaid: Yes that's also true

06/10/2017, 15:51:46: Chelsey Rhodes: And you accused me of blackmailing you
06/10/2017, 15:51:55: Chelsey Rhodes: Is it true?
06/10/2017, 15:51:59: Zaid: That's how it landed yes
06/10/2017, 15:52:07: Zaid: With the timing
06/10/2017, 15:52:19: Chelsey Rhodes: If it's not a democracy then it's not my problem
06/10/2017, 15:52:29: Zaid: Ol
06/10/2017, 15:52:31: Zaid: Ok
06/10/2017, 15:52:35: Zaid: Will you listen to me?
06/10/2017, 15:52:37: Chelsey Rhodes: Right?
06/10/2017, 15:52:39: Zaid: Please?
06/10/2017, 15:52:53: Zaid: And put your sword down for a second?
06/10/2017, 15:52:57: Zaid: I'm your friend
06/10/2017, 15:53:14: Zaid: Will you listen for a second?
06/10/2017, 15:53:17: Zaid: Please?
06/10/2017, 15:53:21: Chelsey Rhodes: Ok
06/10/2017, 15:53:35: Zaid: And will you be honest?
06/10/2017, 15:53:40: Chelsey Rhodes: Ok
06/10/2017, 15:54:16: Zaid: Did you think about the impact of your "request"? On me and on Angie? Please be honest?
06/10/2017, 15:54:27: Chelsey Rhodes: Yes
06/10/2017, 15:54:37: Zaid: And what do you think the impact is?
06/10/2017, 15:54:54: Chelsey Rhodes: Prob large
06/10/2017, 15:55:02: Zaid: What though?
06/10/2017, 15:55:15: Zaid: What's the impact on Angie?
06/10/2017, 15:55:27: Chelsey Rhodes: Multiple
06/10/2017, 15:55:30: Zaid: In your opinion?
06/10/2017, 15:56:07: Chelsey Rhodes: She is worried she fucked up, she is worried bout zim, she prob feels unfairly accused and characterized
06/10/2017, 15:56:18: Chelsey Rhodes: And that she is doing her best
06/10/2017, 15:56:20: Zaid: And how does she feel now?
06/10/2017, 15:56:28: Zaid: Given you're not coming?
06/10/2017, 15:56:44: Zaid: You thought about this? Before you made the request? I'm just curious.
06/10/2017, 15:56:46: Chelsey Rhodes: Dont blackmail me please
06/10/2017, 15:56:51: Chelsey Rhodes: I am aware of the impact
06/10/2017, 15:56:57: Zaid: I'm just checking
06/10/2017, 15:56:58: Zaid: Ok
06/10/2017, 15:57:06: Zaid: Also one last question
06/10/2017, 15:57:40: Zaid: Do you think that neither Cari nor Angie have enough awareness of gender dynamics in our system?
06/10/2017, 15:57:59: Chelsey Rhodes: I think they are aware
06/10/2017, 15:58:09: Chelsey Rhodes: Possibly not sure what to do
06/10/2017, 15:58:15: Zaid: Ah
06/10/2017, 15:58:31: Chelsey Rhodes: Which would require making you aware

06/10/2017, 15:58:37: Zaid: Also did consider the impact on your and my relationship?
06/10/2017, 15:58:46: Zaid: I'm guessing the answer is yes
06/10/2017, 15:58:58: Chelsey Rhodes: Have you considered the impact of not doing anything, on me?
06/10/2017, 15:59:03: Zaid: Please"

210 In that exchange Mr Hassan was not in our judgment seeking to persuade the claimant to sign a contract with "unequal terms", i.e. a contract which would be a breach of the EqA 2010. If and to the extent that the claimant's pay was going to be different from that of other people engaged by the first respondent to provide services, that difference had (we concluded) nothing whatsoever to do with the claimant's sex. We repeat what we say in paragraph 208 above, which is that if and to the extent that in the conversation Mr Hassan referred to his relationship with the claimant outside of work, it was not said in the course of Mr Hassan's employment. In addition, and in any event, we considered that the conversation was innocuous.

211 We have set out in paragraph 139 above the WhatsApp conversation in which Mr Hassan told the claimant to stop playing the victim. We saw that conversation as being innocuous. The conversation in which Mr Hassan referred to the claimant being a reactionary was at page 2567, and was in these terms:

"06/10/2017, 22:52:38: Zaid: You told me you wanted me to have a gender equity conversation with the whole team today?
06/10/2017, 22:52:39: Chelsey Rhodes: To take it or leave it
06/10/2017, 22:52:48: Zaid: You said you wanted a decision?!?
06/10/2017, 22:52:50: Zaid: Jesus
06/10/2017, 22:52:51: Chelsey Rhodes: Yes and there is that
06/10/2017, 22:53:11: Zaid: Jesus fucking Christ
06/10/2017, 22:53:21: Zaid: I think my head is gonna explode
06/10/2017, 22:53:28: Chelsey Rhodes: I'm gonna need you to not talk to me like that
06/10/2017, 22:53:39: Zaid: Ok
06/10/2017, 22:53:41: Zaid: Sorry
06/10/2017, 22:53:49: Zaid: I am trying not to have a stroke
06/10/2017, 22:53:51: Chelsey Rhodes: This is a large part of my upset
06/10/2017, 22:53:55: Chelsey Rhodes: Ok try hard
06/10/2017, 22:53:56: Zaid: This?
06/10/2017, 22:53:57: Chelsey Rhodes: Please
06/10/2017, 22:54:15: Zaid: Chelsey I love you a lot
06/10/2017, 22:54:23: Chelsey Rhodes: I dont know what you want me to do
06/10/2017, 22:54:53: Zaid: I want you to stop being a reactionary
06/10/2017, 22:55:06: Zaid: This is a total mess
06/10/2017, 22:55:14: Chelsey Rhodes: I'm not
06/10/2017, 22:55:18: Zaid: Ok

06/10/2017, 22:55:23: Zaid: So let me understand
06/10/2017, 22:55:33: Zaid: You messaged me at 2PM my time
06/10/2017, 22:55:38: Zaid: With a request?
06/10/2017, 22:55:43: Zaid: That I convene the whole team
06/10/2017, 22:55:52: Zaid: To discuss your offer
06/10/2017, 22:56:04: Chelsey Rhodes: Well i asked you and cari last night to talk and that i was upset about the offer"

212 We saw that conversation as being innocuous (not least because the request to the claimant to stop being a reactionary was said immediately after Mr Hassan said that he loved the claimant "a lot").

213 At page 2568, there was a further reference by Mr Hassan to being a reactionary, where he asked the claimant: "You're not a reactionary?", after which there was this exchange referring to the claimant's past experience:

"06/10/2017, 22:59:34: Chelsey Rhodes: It's not easy there's a massive cost to me physically emotionally financially
06/10/2017, 22:59:43: Zaid: I am not disputing the cost to you
06/10/2017, 23:00:01: Zaid: But the cost is clearly cumulative
06/10/2017, 23:00:12: Zaid: And not simply something that has happened in the last 3 months
06/10/2017, 23:00:16: Zaid: Right?
06/10/2017, 23:00:28: Zaid: It is years of paying the cost
06/10/2017, 23:00:33: Chelsey Rhodes: You cant pay a person working for gender equity less than everyone else and not piss them off
06/10/2017, 23:00:37: Chelsey Rhodes: I mean really?
06/10/2017, 23:00:54: Chelsey Rhodes: Yes years
06/10/2017, 23:00:56: Zaid: We don't have ANY money
06/10/2017, 23:01:00: Chelsey Rhodes: My whole life
06/10/2017, 23:01:03: Zaid: Do you get that?
06/10/2017, 23:01:10: Chelsey Rhodes: Yes i do
06/10/2017, 23:01:25: Chelsey Rhodes: And neither do i. So hire a rich person
06/10/2017, 23:01:34: Zaid: You want me to make up for injustice you have experienced your whole life in how long? 2 hours? 3 months?
06/10/2017, 23:01:39: Zaid: How long?
06/10/2017, 23:01:41: Zaid: Tell me
06/10/2017, 23:01:58: Chelsey Rhodes: That's not what I'm asking and that isnt fair
06/10/2017, 23:02:06: Zaid: It sounds like it is?
06/10/2017, 23:02:11: Zaid: What do you want me to do?
06/10/2017, 23:02:18: Zaid: You have me an ultimatum
06/10/2017, 23:02:24: Zaid: Gave me
06/10/2017, 23:02:37: Chelsey Rhodes: You gave me one
06/10/2017, 23:02:51: Zaid: A contract?
06/10/2017, 23:02:54: Zaid: Really?"

214 Again, that conversation was innocuous. We saw that in paragraph 64 of her closing submissions, Ms Jennings said this:

> "Further to the above, Mr D did not 'belittle' Ms AB's concerns about gender equity. Her concerns were validated by both Mr D and Ms F, but it was explained that there were two women paid more than the men and further that they could not [have] a further conversation on the point at that time, but that they would be able to do so in January 2018 (pp pp2497; 2559). Mr D did not challenge or suggest that Ms AB's concerns about unequal pay were not held in 'good faith'."

215 We found that to be an apt submission, not only because we could not find any place in the 3606 pages of the bundle where Mr Hassan accused the claimant of raising the issue of what she saw as unequal pay in bad faith or otherwise than in good faith.

216 Thus, the claim stated as issue number 1.1.24 did not succeed.

217 As for the claim stated as issue number 1.1.25, the exchange in which it was said by Mr Hassan that the claimant had exacerbated his depression and burn-out was at pages 2653 to 2670. The whole of the exchange on those pages was relevant. In our view the conversation in those pages was not to the effect asserted by the claimant in paragraph 1.1.25: it was not in any way to the effect that the claimant had "exacerbated [Mr Hassan's] depression and burn out and had blown up her relationship with the company by raising concerns about gender equity". What he was concerned about was the manner in which the claimant had sought to take advantage of the pressure that the respondents were under in regard to the forthcoming trip to Zimbabwe and had demanded that they stop preparing for that trip and instead considered her demand for more money, characterising it as a claim for equal pay, when (1) the respondents had offered the claimant an additional 800 United States dollars per month and (2) the claimant was comparing herself with persons whose work and responsibilities were plainly not the same as hers. In addition, in the exchange at pages 2653-2670, there was much intermingling of (1) considerations which were relevant to the personal relationship between the claimant and Mr Hassan with (2) her demand for money and its impact on the first respondent (which Mr Hassan said during that exchange owed "$350k" and needed "$200k in the next quarter").

218 We refer below to the claim of victimisation. For present purposes, i.e. in response to the claim stated as issue 1.1.25, we concluded that the conversation and the matters about which the claimant complained were innocuous. Accordingly, that claim also failed on the facts.

<u>Issue 1.1.23: "R2 told C of accusations of assault and abuse towards his female 'friend' (which turned out to be R5) and his wife, and then belittled the women involved by saying R5 sent mixed messages and lacked boundaries, and by portraying his wife as</u>

insane and threatening him, as well as later claiming that no one had ever accused him of abuse besides C; making C feel that her own complaints would not be taken seriously or would bring significant retaliation (paragraph 69 GoC)"

219 Ms Jennings' submissions in response to this part of the claim were as follows:

> "68. Mr D did not tell Ms AB of accusations of assault and abuse towards others. It is right that Mr D told Ms AB of an argument he had with his wife where she had called him abusive (p2261-2). It is also right that he referred to a disagreement with a colleague regarding boundaries when he "held her hand" (p904). He never belittled the women involved, but explained the context and his point of view.
>
> 69. This claim is not well founded. Such conversations were not in the course of employment, they were personal conversations in which Mr D and Ms AB shared life experiences. Further, they did not amount to unwanted conduct towards Ms AB; did not relate to Ms AB's sex; and could not have had the relevant effect."

220 We agreed that the claim stated as issue 1.1.23 arose from the passages at pages 904 and (principally) 2261-2262. The conversation at page 904 preceded the claimant's contractual relationship with the first respondent (it occurred on 1 June 2017). The second one occurred on 15 September 2017 and plainly had nothing to do with and occurred completely outside the course of Mr Hassan's employment. In any event, the conversations could not conceivably be read as being in any way related to the claimant's sex (within the meaning of section 26 of the EqA 2010), because of her sex (within the meaning of section 13 of that Act), or as having either the relevant purpose or as having the relevant effect. For all of those reasons, the claim stated as issue 1.1.23 failed.

Issue 1.1.26: "On 18 October 2017, R2 told C he was thinking of killing himself, making C feel pressured to drop her complaint (paragraph 66 GoC)"

221 Paragraph 70 of Ms Jennings' closing submissions responded to this issue in this way:

> "It is right that in the middle of a number of emails discussing the breakdown in their relationship on both a personal and professional level, Mr D made reference to having had a dream where he killed himself (p2835). He did not say he was thinking of killing himself. This did not amount to unwanted conduct and in any event there is nothing to suggest this could relate to Ms AB's sex."

222 The email at page 2835 had to be read as a whole. It was in our view innocuous. Thus, the claim stated as issue 1.1.26 failed.

Issue 1.1.27: 'On 24 November 2017 R2 emailed C from his personal email and said "Hey, I'm not supposed to contact you (lawyers). Can we talk on the phone Sunday eves?"'

223 This issue had to be considered alongside issue 1.1.28, which we have set out and considered in paragraphs 126-129 above. We could not understand why the claimant had sought permission to add issue 1.1.27: it added nothing to the claim stated as issue 1.1.28. The events to which both issues related were in our judgment innocuous. The claims stated as issues 1.1.27 and 1.1.28 therefore did not succeed.

The claims of direct discrimination because of sex within the meaning of section 13 of the EqA 2010

Issue 2.1.3: "On or around 16 July 2017 C wrote a report on the behaviour of R2 and R1's employees and sent to R2 and Cari Caldwell but no action was taken (paragraph 17 GoC)"

224 We have in paragraphs 130-135 above set out our findings on the facts relating to the allegation stated in issue 2.1.3. We saw nothing in those circumstances from which we could draw the inference that the manner in which Mr Hassan responded to that report was to any extent less favourable treatment of the claimant because of her sex. Having heard and seen Mr Hassan give evidence, we were satisfied that he did not in this regard treat the claimant less favourably because of her sex within the meaning of section 13 of the EqA 2010. We accordingly concluded that the manner in which Mr Hassan responded to the claimant's report of 16 July 2017 was in no way tainted by direct discrimination because of the claimant's sex. In what follows, if we say that we concluded that the claim of sex discrimination was not well-founded it is because we found the same thing in regard to that claim: that there were no facts before us from which we could draw the inference that the claimed discriminatory treatment was in fact discriminatory, and in any event we were satisfied on the balance of probabilities that the manner in which the relevant person (or, as the case may be, persons) acted was in no way tainted by direct discrimination because of the claimant's sex.

Issue 2.1.5: "R2 directed C to mentor and help her male colleagues who were being paid significantly more than her (paragraph 22 GoC)"

225 This allegation could not be understood without reference back to paragraph 22 of the grounds of claim, which was at page 21 and was in these terms:

> "In a written conversation on July 29, 2017, Mr. Hassan directed the Claimant to help her colleague Nathan Heinz "get good." Mr. Hassan wrote that Mr. Heinz was struggling to perform tasks reliably. The Claimant later found out she was being paid 56% what Mr. Heinz was being paid, a detail she found out in August 2017 when Mr. Heinz wrote his salary on a budget

> they were working on together. When the Claimant found this out, she felt she was being taken advantage of and discriminated against based on her sex."

226 The "written conversation" was the WhatsApp conversation at pages 1639-1640. It was clearly an informal conversation. It was written (according to the times of the entries) at 11:02 to 11:03pm on 29 July 2017. So far as relevant, Mr Hassan wrote that the claimant would "have to help [Mr Heinz] get better" by speeding up, talking less, doing more, and focussing, after which so far as relevant there was this short exchange only (after which the conversation moved on to other topics):

> "[11:02 PM, 7/29/2017] Zaid Hassan: He's all over the place
> [11:02 PM, 7/29/2017] Zaid Hassan: Get good
> [11:03 PM, 7/29/2017] Chelsey Rhodes: He will if he feels creative and inspired and i can help with that
> [11:03 PM, 7/29/2017] Zaid Hassan: Yes please help
> [11:03 PM, 7/29/2017] Chelsey Rhodes: Lol".

227 In those circumstances, we concluded that what occurred was not that Mr Hassan directed the claimant to mentor and help her male colleagues. Rather, the claimant was invited to share her experience and expertise in the way in which any person in the same position (no matter what their sex) would have been. In any event, this claim of sex discrimination was not well-founded.

<u>Issue 2.1.8. "R2 did not report the complaint by Ms. Forrester-Wilson (that he had non-consensually touched her and flirted with her) to the rest of the Management Team so that they could investigate it appropriately and support Ms. Forrester-Wilson"</u>

228 This claim was not well-founded on the facts, as was shown by paragraph 23 of Ms Caldwell's witness statement (which we have set out in paragraph 116 above), where she referred to a "new employee" who was plainly Ms Forrester-Wilson and said that "After the first trip, [Mr Hassan] expressed concern that he would need to find another role for the new employee because he was worried about 'misinterpretation' of sexual advances while travelling." Thus, Ms Caldwell was made aware by Mr Hassan of Ms Forrester-Wilson's concerns. In addition, and in any event, as we say in paragraph 115 above, Mr Heinz said in cross-examination that Ms Forrester-Wilson had said to him that she did not want anything done about her concerns: he asked her specifically whether she wanted anything to be done about them and she said that she did not.

229 Furthermore, we could not see any basis on which it could credibly be claimed that Mr Hassan's treatment of Ms Forrester-Wilson's concerns was less favourable treatment of the claimant because of sex.

230 In addition, we agreed with Ms Jennings' submission (in paragraph 78 of her closing submissions) that:

> "There was no complaint by Ms Forrester Wilson, but rather a casual relaying of a conversation by Ms AB to Mr D about a "minor boundary thing" between them (p1988). The tribunal heard from Mr D that he and Ms Forrester Wilson had discussed the issue and resolved any possible misunderstanding at the time."

231 In conclusion, this claim of sex discrimination was not well-founded.

Issue 2.1.9. "Between 14-18 August 2017, C was asked to provide a written account of her creative process by R3, undermining her professionally and subjecting her to a level of micromanaging to which Alexander Heintz and Nathan Heintz were not subjected (paragraph 24 GoC)"

232 Given our conclusion stated in paragraph 96 above, this claim had to, and did, fail.

Issue 2.1.10: "On 16 August 2017, when C questioned R2's strategy or attempted to provide critical/analytical input, as she had been hired to do, R2 questioned and attempted to undermine the knowledge and qualifications of C, demanded she provide evidence and deliberately attempted to confuse and destabilise her during a discussion on strategy at his home (paragraph 23 GoC)"

233 Given our conclusion in paragraph 191 above, this claim could not, and did not, succeed.

Issue 2.1.12: 'On 21 September 2017 R2 undermined C professionally and disparaged C's work that was critical of R1 and the field more generally, though she had been specifically hired to bring a critical lens to their work, and said that C's work was "crazy shit", "hyperbolic and ungrounded", "get a woman to edit your work", "I'm not patronising you. Get over it or don't. Not my problem" (paragraph 34 GoC)'

234 Given our conclusion in paragraph 201 above, the part of this claim relating to the use of the words "get a woman to edit your work" did not succeed. As for the rest of the claim, the words used had to be seen in the context in which they were used. Ms Jennings' closing submissions addressed this complaint in the following way:

> '82. ... As with earlier examples, Ms AB has taken these comments out of context.
>
> 83. The words "crazy shit" were Ms AB's words. She said she wanted to make sure the article and themes were not "crazy shit". Mr D responded saying "there is some crazy shit". This was not derogatory in the context it was said. He went on to specifically assure her that her work was "not crazy". The use of the words "hyperbolic and ungrounded" were not directed at Ms AB's writing. Mr D said "the problem with most activist

> writing is that it's preaching to the converted so you don't really have to ground any accusations or claims as everyone believes them anyways. This is different – we are preaching to the establishment and they will react i.e. stop reading if we are hyperbolic and ungrounded". See pp2315-6.'

235 In fact, Mr Hassan referred to claimant's written work as being "shit" in the jokey exchange at the top of page 2315, and then, when the claimant said "It's not shit!", said "I didn't mean that", after which the claimant said: "Haha ok", following which Mr Hassan then said "Shit = stuff" and then said "It's good!". The claimant then said:

> "I just wanna make sure if i say some crazy shit that I'm getting it right".

236 The passage on page 2316 supported fully what Ms Jennings said about it.

237 In conclusion here, in our judgment (a) there was nothing in the circumstances from which we could draw the inference that the relevant words used were less favourable treatment of the claimant because of her sex and (b) in any event having heard and seen Mr Hassan give evidence we were satisfied on the balance of probabilities that the words used were not less favourable treatment of the claimant because of her sex.

<u>Issue 2.1.13: 'R2 used C and other women he employed for what R5 referred to as "emotional dumping," including repeatedly discussing with C his misery, marital troubles, family troubles, romantic and sexual problems, self-harming, and suicidality (paragraph 31 GoC)'</u>

238 This claim was in large part, if not completely, about the same subject-matter as the claim stated in paragraph 1.1.6 of the agreed list of issues, with which we deal in paragraph 189 above. We saw in the circumstances before us nothing from which we could draw the inference that what Mr Hassan did so far as relevant was less favourable of the claimant because of her sex. In this regard, we agreed with the following part of paragraph 85 of Ms Jennings' closing submissions:

> "Mr D and Ms AB both discussed deeply personal matters and leaned on one another emotionally. ... [S]uch conversations were not in the course of employment – they were had both before and after the employment relationship began. Notwithstanding this, there is nothing from which the tribunal could conclude that the reason for such emotional support and sharing of personal issues with Ms AB was because of her sex as opposed to a result of the nature of their relationship."

239 We therefore concluded that this claim of sex discrimination was not well-founded.

Issue 2.1.14: 'On 5 October 2017, R2 told C "we can't afford pay parity in 2017 even if we agreed with the principle" (paragraph 43 GoC)'

240 This claim concerned the statement of Mr Hassan in the WhatsApp conversation at page 2472, which had to be read against the background of the preceding pages of that conversation, which started at page 2461. The reference to "pay parity" was to the claimant being paid the same as two other employees (Zand and Sarah) who were doing different jobs from that which was being offered to the claimant. We concluded that this claim of sex discrimination was not well-founded, not only because the claimant was seeking pay parity with a woman as well as a man, but also because we concluded that there was nothing in the circumstances from which we could draw the inference that the manner in which Mr Hassan treated the claimant was less favourable than if she had been a man in comparable circumstances. In any event we were satisfied on the balance of probabilities that Mr Hassan's statement that the first respondent could not afford pay parity had nothing to do with the claimant's sex.

Issue 2.1.15: "On 6 October 2017, R2 characterised C raising concerns about equal pay as C 'blackmailing' him (paragraph 45 GoC)"

Issue 2.1.16: "R2 again characterised C's concerns about equal pay as blackmailing him and attempted to persuade her to sign an employment contract with unequal terms by telling her that he loves her and asking if she had considered the impact that her demands for equal pay would have on their relationship (paragraph 47 GoC)"

Issue 2.1.17: "R2 belittled C's concerns about gender equity, telling her that he loves her a lot, to 'stop being reactionary' and to 'stop playing the victim' and implied that her concerns stemmed from her past trauma rather than good faith concerns about unequal pay (paragraph 48 GoC)"

241 These issues concerned precisely the same matters as those about which we make findings of fact in paragraphs 139-143 and 205-218 above. We saw nothing in those facts from which we could draw the inference that Mr Hassan's treatment of the claimant which was the subject of issues 2.1.15, 2.1.16 and 2.1.16 was to any extent less favourable treatment of the claimant because of her sex, and in any event we were satisfied on the balance of probabilities, having heard and seen him give evidence, that it was indeed to no extent less favourable treatment of the claimant because of her sex. Thus, the claims stated as issues 2.1.15, 2.1.16 and 2.1.17 did not succeed.

Issue 2.1.19: "In September and October 2017 R2, R3 and R5 refused to investigate C's harassment complaints or look in to pay equity issues"

242 In response to this allegation, Ms Jennings said this in paragraph 87 of her closing submissions:

> "As detailed above at paragraph 14, the timeline of complaints was confusing, as were Ms AB's complaints and requests. Initially there was going to be a mediation, but Ms AB shut this process down. She did not raise any coherent complaint until November 2017, by which time Ms AB was sending multiple, highly personal, threatening emails to the Respondents and they were in discussions regarding reaching an agreement. At this time the Respondents chose not to proceed with investigating her complaint in any formal sense. Nothing the Respondents did or did not do was because of Ms AB's sex, but rather to protect their position and because a decision had been taken to disengage with Ms AB."

243 It was necessary to remind ourselves here that the claim in issue 2.1.19 was of direct discrimination because of sex and that the question whether an alleged failure to investigate a complaint of breaches of the EqA 2010 was such discrimination required the court or tribunal to ask itself whether the complaint would have been treated any differently if the complainant had been of the opposite sex. It is convenient here to set out the history recorded by Ms Jennings in paragraph 14 of her closing submissions (with some corrections and in some cases additions made by us):

> 'It is important to note how Ms AB's accusations against Mr D escalated around this time. This is the sum chronology of the reports regarding Mr D's behaviour towards Ms AB from 6 October 2017:
>
> a. On 6 October 2017, Ms AB referred to the conversation with Mr D regarding the contract and said "there's a deeper convo that needs to happen about power/gender dynamics…and a shared understanding on the team of things like pay, liabilities … i don't feel comfortable with ... waiting til jan to address this" (p2495).
>
> b. Later that day, Ms AB said, "Had a horrible convo with [Mr D]. He said some incredibly awful things to me. In past few days he has said I'm being abusive, today it was that I'm blackmailing, reactionary… i ended our friendship, i have made his life horrible etc. I am starting to not understand anything he is saying, and it is really dangerous for me to be on the receiving end of a dynamic like that" (p2501).
>
> c. On 7 October 2017, Ms AB referred to Mr D telling her to "go fuck [herself]" a month previously (p2503)
>
> d. On 9 October 2017 Ms AB referred to Mr D having "some really toxic behaviour patterns" (p2517).
>
> e. On 10 October 2017, Ms AB talked about being "traumatised" in C Limited [i.e. the first respondent] and this was why she "didn't feel safe in the assessments process" (p2524).

f. On 11 October 2017, Ms AB said “i told [Mr D] over and over metaphorically like ‘i need you not to kick me in the left knee because it breaks easily’ and then he did it” (p2533).

g. On 11 October 2017, she asked why Mr D had not been “suspended” and asked Ms F and Mr D to go to Canada with a mediator (p2529-30).

h. On 12 October 2017, Ms AB said ‘I need anyone but particularly [Mr D] to say “i fucked up and hurt you, i am so sorry, we believe you”’ (p2538).

i. On 15 October 2017, Ms AB suggests she needs Mr D and asks him to get on a plane (p2727).

j. On 16 October 2017 there were protracted emails where Mr D and Ms F tried to engage with Ms AB to find a way forward and she shut down these conversations saying she did not “have much desire anymore to resolve this”, could not “take anymore of this”, saying she was “tapping out” and did not “want to try anymore” (pp2731-3, 2751).

k. On 23 October 2017, Ms AB emailed Ms F saying that Mr D was gaslighting her and “doubling down on abusive behaviour” (p2767).

l. On 25 October Ms AB forwarded emails between her and Mr D to Ms F stating “now you have the full story” (p2825). This included reference to them having a “sexual relationship”. It referred to her allegation that Mr D booked a single hotel room without asking her, which she “went along with” because she “liked” him. She refers to being “horribly harmed by him”, but gives the reasoning for this as him saying “go fuck yourself” and not liking it when she challenges his ideas. She refers to “abuse”, but gives the reasoning for this as telling her not to “catch feelings” and then ignoring or discounting her ideas as her boss (see (pp2825-31).

m. There then followed numerous emails where Ms AB sent articles and referred to unrelated stories of gender imbalance and rape (e.g. pp2751-7, 2810, 2825).

n. On 3 and 4 November 2017, Ms AB sent threatening and demanding emails regarding making “this situation public” and referring to “unethical abuses of power” and alleged C Limited had covered up abuse (pp2862-6).

o. On 6 November 2017, Ms AB emailed stating her intention to make a formal "harassment complaint". She provided zero details (p2873).

p. On 15 November 2017, Ms AB alleged that Mr D had a non-consensual sexual encounter with her on 10 July 2017 (although the claimant did not go so far as to say that she said that she did not consent to it). This was the first time any allegation of sexual assault had been made (p2876-9).

q. On the same day, Ms AB emailed other members of staff asking them to stand by her and saying that Mr D's conduct towards her "was very serious", and that it "include[d] sexual assault" and was "an insidious continuation of violence, and it is illegal" (p2888)

r. It was only in February 2018, with the bringing of these proceedings that the allegations against Mr D were fleshed out to the extent they are now.'

244 There was nothing there from which we could draw the inference that the way in which the claimant's complaints were responded to by the respondents had anything to do with her sex. We agreed with Ms Jennings' characterisation of the claimant's complaints as escalating. We saw that on 16 October 2017, in the email at page 2732, the claimant wrote that "To be honest I feel sick and like everything is a giant clusterfuck" and 'I cannot begin to explain the depths of my hurt and anger about all of this. I am currently in "blind rage" and have nothing coherent to say.' We have ourselves referred to the exchanges which the claimant had with Mr Hassan and Ms Caldwell on 6 and 7 October 2017 and concluded (in paragraph 140 above) that "the claimant just could not bring herself to accept" to offer of a new contract with the proposed monthly pay but that (see paragraph 141 above) she would have accepted the offer of the contract if the pay had been at the rate of $5,000 USD, and that the "gender equity stuff" would have been as far as she was concerned "completely doable", i.e. she could have lived with it.

245 In all the circumstances, this claim of sex discrimination was not well-founded.

The claimant's complaints of direct discrimination because of disability within the meaning of section 13 of the EqA 2010

246 Issue 3.2 asked "Did the following take place:", immediately following which there was this issue stated as issue 3.3:

Issue 3.3: "Any of the instances of sexual harassment listed in paragraph 1.1. above, insofar as they took place because R2 knew that C suffered from PTSD and so was vulnerable to his abuse of authority (paragraphs of GoC listed in 1.1 above)"

247 Since none of the claims of sexual harassment succeeded, this claim could not, and did not, succeed. In any event, we saw nothing in the factual circumstances which gave rise to those claims of sexual harassment from which we could draw the inference that the claimant was in those circumstances discriminated against because (within the meaning of section 13 of the EqA 2010) she had PTSD.

248 There then followed in the list of issues the following subparagraphs of paragraph 3.3.

3.3.1: "On 21 September 2017 R2 referred to C's writing as 'crazy shit' (paragraph 34 GoC)"

249 We have in paragraphs 234-237 above described the circumstances in which the words "crazy shit" about which complaint was made here were used. We saw nothing in those circumstances from which we could draw the inference that by referring to the claimant's work as "crazy shit", Mr Hassan was to any extent treating the claimant less favourably than he would have done if she had not had PTSD, and in any event we were satisfied that in using those words he was not treating her less favourably than he would have treated her if she had not had PTSD.

Issue 3.3.2: "In October 2017 R2, R3, and R5 withdrew a permanent contract offer to C after she had disclosed that she was in mental health crisis and asked for support and to not be retaliated against (paragraph 52, 61 GoC)"

250 This was a complete mis-characterisation of what occurred. The claimant refused the new offer of a contract in the manner we describe in paragraphs 139 and 140 above after which the events which we describe in paragraphs 141-144 occurred. There was in those circumstances nothing from which we could draw the inference that the ending of the negotiations by Ms Caldwell on 25 October 2017 by sending the letter whose terms we have set out in paragraph 145 above was to any extent less favourable treatment of the claimant than would have occurred if she had not had PTSD, and in any event we were satisfied that the agreement of the respondents to Ms Caldwell sending that letter was not less favourable treatment of the claimant than she would have received if she had not had PTSD.

Issue 3.3.4: 'On 15 September 2017 R2 told C that his wife who had accused him of abuse had "gone mental" and was "losing her shit" and that she was "threatening" him (paragraph 69 GoC)'

251 This claim concerned what Mr Hassan said in the WhatsApp conversation at pages 2261-2262, to which we refer in paragraphs 219-220 above. There, we concluded that the conversation took place outside the course of Mr Hassan's employment, but in any event we were completely satisfied that what he said about his wife in that conversation had nothing whatsoever to do with the fact that the claimant had PTSD. Accordingly, this claim failed.

Issue 3.3.5: "R2 told C that because she suffered from PTSD she needed to explain trauma and gender violence to the entire team and educate them about it so they could do their work properly"

252 In paragraph 453 of her witness statement, the claimant clarified that this claim arose from the WhatsApp conversation she had with Mr Hassan at pages 2266-2267. She set out parts of the conversation in that paragraph and the following one, paragraph 454. Reading the conversation as a whole, starting with the entry on page 2266 timed at 23:13:37, where Mr Hassan said "You are like this because you can see something few people can see" to the bottom of 2267, it was wholly warm and supportive on the part of Mr Hassan. It was in no way capable of being read as involving him treating the claimant less favourably within the meaning of section 13 of the EqA 2010 because of her PTSD. This claim therefore failed.

Issue 3.3.6: "R2, R3, and R5 held meetings with C's colleagues and told them that C's complaints were fabricated due to her mental health issues"

253 The claimed foundation for this allegation was in paragraph 586 of the claimant's witness statement, which was in these terms:

> "I later learned that on 25 October 2017 Mr. Hassan went to a psychologist in the UK, Dr. Claudia Herbert, and told her that I had fabricated allegations against him. He took notes at the session. Cari Caldwell then emailed all of my colleagues on behalf of the Management Team to announce I'd been removed from Roller Strategies Ltd [pg 2799 Final Hearing Bundle], and attached the notes from the Dr. Herbert session and another session with Elizabeth Clements. Ms. Caldwell wrote, "We anticipate she will reach out to you all as well and possibly with more and more disturbing accusations." Ms. Caldwell attached the Dr. Claudia notes (the Respondents have not disclosed Dr. Herbert's own notes or receipts from these sessions, despite my multiple requests) and sent them to all of my colleagues. Mr. Hassan's notes on the Dr. Claudia Herbert session included the following".

254 The claimant then set out 26 sentences from Mr Hassan's notes of what Dr Herbert had said to him. We ourselves refer in paragraphs 152 and 154 above to those notes, setting out what we regarded as the key part of the notes.

255 We accepted the evidence of Mr Hassan to which we refer in paragraph 152 above. We concluded that he was by 25 October 2017 baffled by the claimant's response to the situation, and that he engaged Dr Herbert to give advice because he was desperate to understand why the claimant was acting as she was. What he did then was, we concluded, in no way done because (within the meaning of section 13 of the EqA 2010) the claimant had PTSD. Thus, the claim stated as issue 3.3.6 did not succeed.

Issue 3.3.7: "R2, R3, and R5 divulged C's private mental health history and gendered violence history to her colleagues"

Issue 3.3.8: 'R2, R3, and R5, along with Cari Caldwell, arranged meetings with psychologists and trauma specialists and told them C fabricated complaints, and then used their remote assessments and diagnoses to discredit C including emailing R2's notes on Dr. Claudia Herbert's "diagnosis" to all of C's colleagues suggesting among other things that she was a sociopath'

256 The factual basis for the assertions in issues 3.3.7 and 3.3.8 was in paragraph 588 of the claimant's witness statement where, so far as relevant, the claimant said that the respondents "arranged sessions with company advisor Myrna Lewis". Necessarily, however, the content of the witness statement was not even hearsay, because the claimant stated no evidential basis for her assertions in issues 3.3.7 and 3.3.8, and gave no indication that there was one. Thus, it was as far as we could see speculation to say that (as the claimant said in paragraph 588) "Myrna Lewis facilitated sessions with my entire team where they were told I had fabricated allegations and it was because of my mental health, and that's why I had been removed from the company." In fact, the claimant had not been "removed from the company": she had refused an offer of a new contract with the first respondent and then the offer had eventually, after increasingly difficult correspondence from the claimant, been withdrawn.

257 In any event, we did not see what the claimant stated in paragraph 588 of her witness statement as material from which, if it was to any extent (or even all) true, we could draw the inference that the treatment described in that paragraph was to any extent done because (within the meaning of section 13 of the EqA 2010) the claimant had PTSD. Also in any event, we concluded on the balance of probabilities that the manner in which the respondents responded to the claimant's increasingly aggressive correspondence and increasingly serious assertions of misconduct on the part in particular of Mr Hassan had nothing whatsoever to do with the fact that the claimant had PTSD.

Issue 3.3.9: "In September and October 2017 R2, R3 and R5 refused to investigate C's harassment complaints or look in to pay equity issues, despite C repeatedly stating that she had PTSD from prior workplace abuse from a male boss (i.e. was uniquely vulnerable to harassment and hostile environment), had extra health costs as a result, and had gone more into debt while working for R1 due to inability to meet her living costs"

258 We have described in paragraphs 242-244 above the factual circumstances to which this issue related. We saw nothing in those circumstances from which we could draw the inference that the manner in which the respondents responded to the claimant's complaints made in September and (at least principally) October 2017 was to any extent the result of the fact that the claimant had PTSD, and we concluded, having heard the respondents give evidence, that it had nothing whatsoever to do with that fact.

Issue 3.3.10: "On or around 16 July 2017 C wrote a report on the behaviour of R2 and R1's employees and sent to R2 and Cari Caldwell but no action was taken, knowing the delay/silence was likely to exacerbate her PTSD (paragraph 17 GoC)"

259 We have stated the factual background to this allegation in paragraphs 130-135 above. We saw nothing in that background from which we could draw the inference that the manner in which the respondents responded to the claimant's report of 16 July 2017 was to any extent the result of the fact that the claimant had PTSD, and we concluded, having heard the respondents give evidence, that it had nothing whatsoever to do with that fact.

The claimant's complaints of detrimental treatment for making protected disclosures and of victimisation within the meaning of section 27 of the EqA 2010

Introduction

260 The claims of detrimental treatment within the meaning of section 47B of the ERA 1996 for making protected disclosures within the meaning of section 43A of that Act added nothing to (and were in fact more difficult to make successfully) than the claims of victimisation within the meaning of section 27 of the EqA 2010 in respect of claimed assertions of breaches of the EqA 2010. The issues were originally stated in precisely the same terms, but after EJ Hyams gave the claimant permission to add claims in the manner described in paragraphs 15 and 16 above, several claimed protected acts or disclosures were added to the lists for each type of claim, and two claimed protected acts within the meaning of section 27 of the EqA 2010 were added to the list of claimed protected acts but were not added to the list of claimed protected disclosures (the new paragraphs numbered 7.1.1.21, and 7.1.1.23; in fact that left paragraph 7.1.1 with two subparagraphs numbered 7.1.1.22, and we of course consider those paragraphs separately below).

261 The claims of detrimental treatment also overlapped to a considerable, albeit a lesser, extent.

262 The claimed public interest disclosures and claimed detriments for making those disclosures were stated in paragraph 6 of the agreed list of issues. The claimed protected acts and detrimental treatment within the meaning of section 27 of the EqA 2010 were stated in paragraph 7 of the agreed list of issues. In what follows, we consider the issues stated in those paragraphs in precisely the same terms together, treating them as claimed protected acts within the meaning of section 27 of the EqA 2010. We then go on to consider the additional issues arising in the claims of victimisation, i.e. those which were not also raised in the course of stating claims of detrimental treatment for making a public interest disclosure. In the course of considering the claimed protected disclosures and/or acts, in, in some cases we consider whether there was any evidence before us of

detrimental treatment for saying the thing in question. We then, and finally, address the particular claimed acts of detrimental treatment.

The claimed protected acts and protected disclosures

Issues 6.1.1.1 and 7.1.1.1: "On 9 July 2017 C told R2 that '3 women in the room had basically watched him and the male client have an hours long conversation' (paragraph 12 GoC)"

263 Ms Jennings' closing submissions dealt with this claimed protected act in paragraph 94, in this way:

> "Mr D does not recall any such conversation. Ms AB does not recall the details. Even if Ms AB did complain to Mr D in this vein, this does not amount to a protected disclosure. Further, on the balance of probabilities the Claimant did not believe any such conversation was in the public interest. Neither can it amount to a protected act for the purposes of s27(2) EqA 2010."

264 In fact, it appeared from paragraph 198 of her witness statement that the claimant had got the date of this claimed conversation with Mr Hassan wrong. In that paragraph, the claimant said this:

> "At the client meeting on 10 July 2017, Mr. Hassan dominated and basically took over the meeting, deviating from the agreed agenda and speaking the majority of the time to the male client Rob Ricigliano while ignoring Ms. Caldwell, me, and the female client Karen Grattan. I later told Mr. Hassan that the 3 women in the room had basically watched him and the male client have an hours-long conversation."

265 We could not see how the claimant telling Mr Hassan "that the 3 women in the room had basically watched him and the male client have an hours-long conversation" could be an allegation of a breach of the EqA 2010. We therefore concluded that it was not a protected act within the meaning of section 27 of that Act. In any event, we saw no evidence whatsoever that Mr Hassan treated the claimant detrimentally for raising the issue of sex discrimination in the first week of her employment by the first respondent: this element of the claims was best tested by reference to the way in which Mr Hassan responded to the claimant's report at pages 2675-2680, and we describe that report and his response to it in paragraphs 130-135 above. We say there in paragraph 131 that "in paragraphs 266-274 [of her witness statement] the claimant described in detail the exchanges which she had with Mr Hassan about what she said in the report, which showed that he took it very much to heart".

Issues 6.1.1.2 and 7.1.1.2: "On 15 July 2017 C discussed the 'sexism she had noticed and experienced' with R2 (paragraph 16 GoC)"

266 Ms Jennings said in paragraph 95 of her closing submissions that this claimed protected act/disclosure was in a WhatsApp conversation at pages 1421-1423. That conversation was almost completely about the conduct of a client. In paragraph 230 of her witness statement, the claimant referred to a WhatsApp conversation at pages 1417-1418. In neither conversation could we see how what the claimant said could properly (i.e. lawfully) be regarded as an assertion of a potential breach of the EqA 2010. Thus we concluded that the claimant did not, in either conversation, do a protected act within the meaning of section 27 of that Act. We record here that, while it was not determinative of the issue whether Mr Hassan treated the claimant detrimentally within the meaning of section 27(1)(a), we did not see Mr Hassan as having reacted in the course of the conversation (taking it as a whole) negatively to what the claimant said. His immediate reaction was in pages 1421-1428 (which had to be read as a whole) and while in one place (on page 1427) he said that part of him was "a little disappointed and maybe a little angry" with the claimant, he said also (all on the same page):

266.1 "But mostly I'm embarrassed to have not done more to surface the gendered aspects of what was happening in the room";

266.2 "And the part of me that's angry thinks you don't have my back";

266.3 "And I don't have a right to be angry"

266.4 "I'm tired"

266.5 "And depressed".

267 Mr Hassan then said (on the next page):

> "[1:53 AM, 7/16/2017] Zaid Hassan: And it meant that a particular gendered space was created
> [1:54 AM, 7/16/2017] Zaid Hassan: And I'm embarrassed and sorry about that".

<u>Issues 6.1.1.3 and 7.1.1.3: "On 16 July 2017 C wrote to R2 and Cari Caldwell and reported the sexist behaviour of R2 and other male colleagues (Nathan Heintz, Alexander Craig) and the client (paragraph 17 GoC)"</u>

268 We saw that Ms Jennings said this in her closing submissions about this part of the claim:

> "96. It is denied that Ms AB wrote to the Respondents reporting "sexist behaviour" of Mr D and other employees. The Reflections document mirrored the conversation had on 15 July 2017 and was drafted in agreement with the Respondents (pp2675-9) Although reflecting on feeling patronised and not asked of her opinion, the document went on

to express that Ms AB had addressed and resolved these matters on a personal level. Again, even if a possible disclosure, the Claimant did not likely believe this was in the public interest.

97. There were no facts asserted capable of amounting in law to an act of discrimination and this does not amount to a protected act for the purposes of s27(2) EqA 2010."

269 We disagreed. We accepted that the report at pages 2675-2680 constituted a protected act within the meaning of section 27 of the EqA 2010.

Issues 6.1.1.4 and 7.1.1.4: "On 21 and 25 July 2017 C spoke to R2 about his behaviour in the hotel room on the 10 July 2017 (paragraph 19 GoC)"

270 Ms Jennings' response to these issues was stated in paragraph 98 of her closing submissions, which was in these terms:

> "The 21 July 2017 exchange can be seen at pp1498-1530. The 25 July 2017 exchange can be seen at pp1555-72. There is nothing in these exchanges which discusses Mr D's alleged behaviour on 10 July 2017 or otherwise that could amount to a protected disclose and/or a protected act."

271 Plainly, the claimant did not "speak" to Mr Hassan on 21 and 25 July 2017 about his behaviour in the hotel room on 10 July 2017: she wrote about it in the course of her WhatsApp conversations with him of those days. The claimant referred in her witness statement to the parts of the exchanges on which she relied in claiming that she did a protected act. She did so principally in paragraphs 282-286, where she referred to the WhatsApp conversation of 21 July 2017, and paragraph 295, where she referred to the WhatsApp conversation of 25 July 2017. At the end of the latter paragraph, she said this:

> 'I wrote, "This is kinda making me feel upset… Well you are saying that you would book and pay for her [Mia's] hotel etc and are being all protective, but after knowing me 24hrs and without asking you booked us a single hotel room. And it's just like wtf. And it turned out fine but dont be a hypocrite." I was afraid of Mr. Hassan's reaction if I told him how upset I was over the July 10 incident. Mr. Hassan told the me [sic] to leave him alone and ended the conversation. [pgs 1574-1577 Final Hearing Bundle]'

272 Given our conclusions in paragraphs 84, 85 and 91 above, we did not accept that the claimant was "upset ... over the 10 July incident" in any material way. That, however, was not determinative of the question whether the words set out in the extract at the end of the preceding paragraph above constituted a protected act within the meaning of section 27 of the EqA 2010. We concluded that they did not constitute such an act. That was because (1) sexual intercourse is not normally done in the course of employment and (2) in our view what happened

between the claimant and Mr Hassan on 10-11 July 2017 was (for the reasons we give in paragraphs 84 and 85 above) consensual.

Issues 6.1.1.5 and 7.1.1.5: "In or around August 2017 C 'brought Ms Forrester-Wilson's concerns up' to R2 (paragraph 28 GoC)"

273 We have stated the factual background to this allegation in some detail in paragraphs 110-117 above. Ms Jennings' response to issues 6.1.1.5 and 7.1.1.5 was stated in paragraph 99 of her closing submissions, which was as follows:

> "This was discussed on two occasions with Mr D: on 26 and 29 August 2017. Ms AB framed it as "a minor boundary thing" and suggested Ms Forrester Wilson thought Mr D had flirted with her referring to "a flirtatious energy" (pp1988, 2040). There was no discussion about "professionally punishing" Ms Forrester-Wilson, as alleged. This was not a disclosure of information and the Claimant did not likely believe this was in the public interest. This stemmed from the Claimant's own insecurities about her relationship with Mr D and her need to 'be reassured' (p1989). This did not amount to a protected act for the purposes of s27(2) EqA 2010."

274 We accepted that submission in its entirety.

Issues 6.1.1.6 and 7.1.1.6: "C repeatedly brought up her concerns with the team's strategy/external work to R2, including stating that she thought there was insufficient attention to or skills/knowledge related to gender, trauma, and violence"

275 This was a rather general assertion. The claimant, as will be clear from what we say above, did not support her claim with submissions of any sort. In the absence of such submissions, it was difficult to know precisely what the claimant was referring to in paragraphs 6.1.1.6 and 7.1.1.6 of the agreed list of issues.

276 We saw that Ms Jennings' response to those paragraphs was in paragraph 100 of her closing submissions, which was as follows:

> "There is no evidence of this. It is agreed that Ms AB had a different vision as to development (non-capital v capital) and this was discussed often. No such disagreement could amount to a protected disclosure. She alleges that she raised problems with "insufficient attention to or skills/knowledge related to gender, trauma, and violence". It is admitted that Ms AB raised such matters, for example in the Reflections document, but the same did not amount to a disclosure of information and could not amount to a protected disclosure. Neither did the same amount to a protected act."

277 We looked at the claimant's witness statement for anything relating to this aspect of the matter, and found only paragraph 248, where she said this:

> 'In Whatsapp messages on 16 July 2017, Mr. Hassan said I had him, I was not alone, and he would always listen to me. He said he granted me "authority" in the "domain" of gender, trauma, and violence. He explained that in their team Assessments, "we either do or don't grant people authority." Mr. Hassan wrote, "So in this domain you have authority. I don't. So my invitation is to please for the love of god help." Mr. Hassan continued to explain what he meant but I found it confusing. [pg 1434-1435 Final Hearing Bundle]'.

278 We saw no indication there of a negative response on the part of Mr Hassan to any references by the claimant to a perception that "there was insufficient attention to or skills/knowledge related to gender, trauma, and violence". More importantly at this point, however, we could not see in issues 6.1.1.6 and 7.1.1.6 any protected act with the meaning of section 27 of the EqA 2010 or any disclosure satisfying the requirements of section 43B of the ERA 1996.

<u>Issues 6.1.1.7 and 7.1.1.7: "On 26 August 2017 C had a written conversation with R2 about his conduct and his disrespect towards her based on her gender (paragraph 29 GoC)"</u>

279 Ms Jennings' response to these issues was in paragraph 101 of her closing submissions, which was in these terms:

> "The tribunal has seen this exchange at pp1976-94. There is nothing in this exchange which demonstrates Ms AB informing Mr D about his conduct and disrespect towards her based on her gender. Under cross-examination Ms AB accepted there was no such content. This did not amount to a protected disclose and/or a protected act."

280 The claimant referred to that WhatsApp exchange in great detail in paragraphs 355-367 of her witness statement, so we assumed that the parts of the passage in that exchange on which she relied here were in those paragraphs. We looked back at our notes of Ms Jennings' cross-examination of the claimant, and we were unable to accept that the claimant accepted then that there was nothing in the WhatsApp exchange which related to the issue of gender and the manner in which Mr Hassan treated her. However, during the exchange (on page 1982) the claimant brought up the topic of sleeping together and the conversation was plainly in part about her personal relationship with Mr Hassan. Nevertheless, at page 1983, the claimant referred to "zand you etc talking bout strategy amd [sic] capitals etc like i wasnt there". The conversation then developed, and included this exchange at page 1986:

> "[4:44 PM, 8/26/2017] Zaid Hassan: I can't believe the things you are saying. It's horrible.
> [4:44 PM, 8/26/2017] Zaid Hassan: Go fuck yourself
> [4:44 PM, 8/26/2017] Zaid Hassan: Bye

> [4:50 PM, 8/26/2017] Zaid Hassan: Hey I'm sorry. I'm very upset at the prospect that you don't think I respect you.
> [4:50 PM, 8/26/2017] Zaid Hassan: I don't know what we have been doing if you think that.
> [4:51 PM, 8/26/2017] Zaid Hassan: I'm a little devastated.
> [4:59 PM, 8/26/2017] Zaid Hassan: I'm wondering why you think I hired you, what you actually think of me, why you think I'm hosting you, why I've made such an effort If I don't respect you. I feel like none of it means anything.
> [4:59 PM, 8/26/2017] Zaid Hassan: And we have to start from scratch".

281 We accepted that the claimant had in that exchange impliedly referred to the rights conferred by the EqA 2010. We also concluded that it was done in the course of a conversation which did not occur in the course of her employment with the first respondent. We were nevertheless prepared to, and did, assume that what was said in the course of a conversation which occurred outside the course of employment could be a protected act within the meaning of section 27 of the EqA 2010.

Issues 6.1.1.8 and 7.1.1.8: "On 23-24 September 2017 C reported the 'ongoing difficulties' with R2's behaviour to Ms Caldwell and Ms Forrester-Wilson (paragraph 38 GoC)"

282 Ms Jennings' response to these issues was in paragraph 102 of her closing submissions and was as follows.

> "Ms AB suggests she told Ms F and Ms Forrester Wilson that she almost did not get on a plane due to ongoing difficulties with Mr D. She accepts she did not disclose any details of any such difficulties. There was no disclosure of information that could amount to a protected disclosure. Further, this was purely personal and Ms AB did not likely believe this was in the public interest. This did not amount to a protected act."

283 The claimant gave no additional details concerning this alleged disclosure in her witness statement. She dealt with it briefly only in paragraph 470 of that statement, where she said this (only):

> "On 23 or 24 September 2017, I informed my colleague Ms. Forrester-Wilson, and Ms. Caldwell, that I had almost not gotten on the airplane due to ongoing difficulties with Mr. Hassan's behaviour. Ms. Caldwell did not further inquire or attempt to intervene. By then I had reported issues with sexism and bullying to Ms. Caldwell multiple times."

284 We concluded that the claimant had <u>not</u> by then "reported issues with sexism and bullying to Ms. Caldwell multiple times", and that what the claimant did here was not a protected act within the meaning of section 27 of the EqA 2010 or a protected disclosure within the meaning of section 47B of the ERA 1996. In case that was wrong, but also because it was relevant in any event, we saw that Ms

Caldwell said nothing in her witness statement about what the claimant told her (if anything) on 23 or 24 September 2017, but that she did say this in paragraph 32:

> "As the 3 month initial period was coming to a close we began conversations about hiring Chelsey to a full-time contract. Zaid advocated for bringing her on in a strategy role in addition to her writing. She was clearly doing more than writing in helping with design, facilitation, and being strategic thinking partner to Zaid."

285 That suggested rather strongly that Mr Hassan did not take amiss what the claimant had been saying to him about possible breaches of the EqA 2010.

Issues 6.1.1.9 and 7.1.1.9: "On 29 September 2017 sought assurance from R2 and Ms Caldwell about pay (paragraph 40 GoC)"

286 Ms Jennings' response to these issues was in paragraph 103 of her closing submissions, which was in these terms:

> "It is agreed that a conversation was had regarding a pay increase. Seeking assurance regarding pay is not a disclosure of information, neither could Ms AB likely believe any such conversation was in the public interest. This did not amount to a protected act."

287 Mr Hassan's witness statement contained this paragraph (numbered 121):

> "I met the Claimant and Cari for breakfast on the 29 September 2017 and we discussed the Claimant's contract. The Claimant said she wanted more money and we said we will see what we can do; no promises were made about a payrise."

288 The claimant said nothing in her witness statement about that conversation. In the circumstances, we accepted Ms Jennings' submission that in the conversation the claimant did not do a protected act or make a protected disclosure.

Issues 6.1.1.10 and 7.1.1.10: "On 5 October 2017 C asked R2 about pay equity and sex discrimination within the team (paragraph 43 GoC)"

289 We have referred extensively in paragraphs 137-143 above to the WhatsApp conversations between the claimant and Mr Hassan of 5-7 October 2017. Ms Jennings' response to issues 6.1.1.10 and 7.1.1.10 was in paragraph 104 of her closing submissions, and was this:

> "The tribunal has seen this conversation at pp2451-67. Ms AB asked what others were being paid and challenged Mr D on this. She did not ask him about sex discrimination. The discussion as to pay equity was related

> exclusively to Ms AB and she was immediately informed that two women on the team earned more than the men. There was no disclosure of information; Ms AB was seeking information. Neither did this amount to a protected act for the purposes of s27(2) EqA 2010."

290 Given the factual background to which we refer in paragraphs 137-143 above, that was a tenable proposition, but we accepted that the claimant's references to pay were implicit references to the EqA 2010 and therefore that they were protected acts within the meaning of section 27 of that Act.

Issues 6.1.1.13 and 7.1.1.13: "On 6 October 2017 C raised pay equity with R2 (paragraph 49 GoC)"

291 In paragraph 105 of her closing submissions, Ms Jennings said this in response to these issues:

> "The tribunal has seen this conversation at pp2557-76. As above, this discussion was personal to Ms AB and there was no disclosure of information. Even if there was, Ms AB did not likely believe any such information was in the public interest. Further, this did not amount to a protected act for the purposes of s27(2) EqA 2010."

292 We refer in detail in paragraphs 139-143 above to the discussion about "pay parity" of 6 October 2017. We accepted that in that discussion the claimant referred impliedly to the rights conferred by the EqA 2010 and therefore that she did a protected act within the meaning of section 27 of Act.

Issues 6.1.1.15 and 7.1.1.15: "In October 2017 C reported to Cari Caldwell and R2 that she was in a mental health crisis, and this was relayed to R3 and R5 (paragraphs 52, 61 GoC)"

293 In response, Ms Jennings said this in paragraph 106 of her closing submissions:

> "It is agreed that the Claimant alluded to mental health problems following 6 October 2017 as her complaints escalated regarding the pay dispute. Ms AB made bare assertions, such as being "traumatised in [C Limited]" (p2524). She did not disclose any information regarding her mental health crisis which could amount to a protected disclosure. Neither could any such statement amount to a protected act. Further, Ms AB did not likely believe any such information was in the public interest."

294 We agreed with the final three sentences of that paragraph. The WhatsApp conversation at page 2524 was with Ms Caldwell. The material passage was this (at the top of that page):

> "10/10/17, 10:50:43 AM: Chelsey Rhodes: i just mean that can we hold the context that i've been traumatized in Roller and that is not ok and i need

you guys to listen to what happened and try not to be defensive or slip reality around to minimize feeling bad".

Issues 6.1.1.16 and 7.1.1.16: "On 8 October 2017 C sent a letter to R2, R3, R5 and R1's team and raised concerns about health and safety when she wrote 'I'm not sure we are much ahead of TOG in being prepared to do this work in a way that won't cause harm in a fragile country like Zimbabwe, I worry about the impact to the team….' (paragraph 53 GoC)"

295 Ms Jennings' response to these issues was in the following paragraphs of her closing submissions:

> '107. Ms AB emailed Ms F alone on 8 October 2017 saying Ms F could decide "if/when to send it out to everyone" (p2674). This was an email related to Ms AB's personal situation. There was no disclosure of information here but rather an expression of vague concern that the team was not prepared to do the work in Zimbabwe and about the possible impact on the team; talking about stress and 'vicarious trauma' (p2675).
>
> 108. Ms AB was not involved in the preparation for Zimbabwe and had no idea as to what planning had taken place relating to such matters. Ms AB did not likely believe any such information was in the public interest; it centred around her. Neither did this amount to a protected act for the purposes of s27(2) EqA 2010.'

296 We have set out the first part of the email at pages 2674-2675 in paragraph 134 above. The part of the email that was relevant here was this (which was on page 2675):

> "I'm not sure my recently sent TOG reflection was very clear and I want to clarify, as somewhat of a matter of urgency-- I'm not sure we are much ahead of TOG in being prepared to do this work in a way that won't cause harm in a fragile country like Zimbabwe. I worry about the impact to the team, and our experience in DC of not being able to hold a healthy somatic container or identify the dynamics in the room, or to process them afterwards in ourselves, and everyone ended up sick. I worry about vicarious trauma, which is no joke- and I learned that the hard way (I learn a lot of things the hard way, and I implore you all not to do it that way). I worry about the fallout for TOG of our inattention to those issues, and what that means for our continued work with them.
>
> I 100% do not like saying this but i think we need to seriously consider pulling out of Zimbabwe and focus on building our own capacity and sorting out some of the dynamics on our own team. I don't know what that means for cashflow but it sounds like there could be opportunities in Hawaii, etc, that carry less risk to ourselves and others. Also, perhaps we do something

domestically (as Zand mentioned), look for investment, capacity building grants, etc. I think we need to do some untangling of ourselves before we proceed to helping others untangle. That is my personal opinion and you are free to disagree, of course."

297 That passage was predominantly about issues arising from the application of the EqA 2010. The suggestion that not having sorted those issues within the team was likely to "cause harm in a fragile country like Zimbabwe" was in our view fanciful. No reasonable person could have concluded in our view that the health or safety of any individual was likely to be endangered by the team going to Zimbabwe by reason of the dynamics in the first respondent's team in October 2017. Thus, while we accepted that there was in the email at page 2675 a protected act within the meaning of section 27 of the EqA 2010 and a protected disclosure within the meaning of section 43B(1)(b), we did not accept that there was such a disclosure within the meaning of section 43B(1)(d) in that email.

Issues 6.1.1.18 and 7.1.1.18: "On 19 October 2017 C wrote numerous emails to R2 about his behaviour and explaining why it was abusive and harmful to her (paragraph 67 GoC)"

298 Ms Jennings' response to these issues was in the following paragraphs of her closing submissions:

> '109. The tribunal has had sight of this email chain between Ms AB and MR D (pp2835-2827). It is the same one that was sent to Ms F on 25 October 2017. There was no protected disclosure here and this email exchange was purely personal: Ms AB did not likely believe this was in the public interest.
>
> 110. Although Ms AB refers to a sexual relationship with Mr D and the booking of a hotel room, she also states that she "went along with it" because she liked him (p2826). She refers to being "horribly harmed by him", but gave the reasoning for this as him saying "go fuck yourself" and not liking it when she challenged his ideas. She referred to "abuse", but gave the reasoning for this as telling her not to "catch feelings" and then ignoring or discounting her ideas as her boss (see (pp2825-31).
>
> 111. Just as there is nothing amounting to a protected disclosure, there is nothing in these emails which could amount to a protected act for the purposes of s27(2) EqA 2010."

299 We concluded that the claimant's emails at pages (reading the email backwards, as it had to be) 2835-2827 were predominantly highly personal but that it was possible to see in them several glancing references to things which could properly be regarded as related to the working relationship between the claimant

and Mr Hassan. One example was these words of the claimant on page 2831, written on 19 October 2017:

> "I emailed Cari and told her you told me to go fuck myself and I almost had a panic attack, that was over a month ago and she didn't do anything. I see her go quiet quiet [sic] and mute and small around you too."

300 Thus, we concluded that assuming that a protected act could be done in the course of a highly personal conversation, the claimant did such an act in that conversation. However, Mr Hassan's response in the email on the same page, sent on the same day, ended in this way, which suggested that he did not take those words amiss:

> "All I know is I care about you deeply. You are my friend and you are saying I hurt you. I am deeply sad and depressed about that because I set out to support and help you. I set out to see if we can fight these fights together and not with each other. In that I seem to have failed spectacularly.
>
> All I can do is keep saying sorry, keep asking you to forgive me and keep trying.
>
> I am sorry."

<u>Issues 6.1.1.19 and 7.1.1.19: "On 24 October 2017 C sent email to R2, Ms Caldwell and later to R1's team 'reiterating her health and safety concerns and ethical concerns' (paragraph 70 GoC)"</u>

301 Ms Jennings' response to these issues was in the following passage of her closing submissions:

> "112. On 23 October 2017, Ms AB emailed Ms F alone saying she had been thinking about the need for "trauma informed practice". She advised that the team get training on trauma, victimisation and psychological first aid for their work in Zimbabwe and asked Ms F to "think through different scenarios" as to what might happen in a lab setting in Zimbabwe with their participants and "vicarious trauma" for attendees and staff members. She mentioned that she thought members of the team were "overwhelmed" (pp2765-8).
>
> 113. Ms F replied to this email explaining that a lot of Ms AB's points had been talked about in preparation for the Zimbabwe trip (p2764). Ms AB replied on 24 October 2017 saying "That's good re: the training… I have some concerns in general about where the team is at in having humility about our role as interveners…" (p2762).
>
> 114. There was nothing in these two emails which amounted to a disclosure of information for the purposes of s43B(1) ERA 1996.

> Neither is there anything within them which could amount to a protected act. It is of note that Ms AB was not involved in the preparation [f]or Zimbabwe and had no idea as to relevant health and safety measures put in place. Ms AB did not likely believe any such information was in the public interest. Instead, this email was sent in the context of continued disagreement and the Respondents not engaging with Ms AB in the way she wished. These emails relate to the ongoing dispute (another five were sent on 24 October 2017 before a response was received) and such matters relating to Zimbabwe preparation appear to be an attempt to 'keep her hand in'. This did not amount to a protected act for the purposes of s27(2) EqA 2010."

302 Ms Jennings might have been right to refer to an email sent on 23 October and not, as claimed in issues 6.1.1.19 and 7.1.1.19, 24 October 2017, as the only email of the latter date which could have been meant was the one at pages 2762-2763, which looked like an email of complaint rather than a protected disclosure within the meaning of section 43A of the ERA 1996. The email did, however, refer to Mr Hassan (on page 2762) as "someone who is unwilling to admit his abusive behaviour" and continued in the same vein on the next page, including by referring to Mr Hassan's treatment of women. The only part of the claimant's email at pages 2765-2768 which concerned Mr Hassan's behaviour was this (on page 2767):

> "I think this is all applicable in figuring out how the team could relate to what has happened to me- i.e. to mobilize support and communicate to me when that will be happening and for how long (social, financial, health care), stop the harming that continues to occur (Zaid is refusing to take responsibility even up to now, and continues to gaslight me, i.e. doubling down on abusive behaviour), and so on."

303 Given that factor, and having reviewed the claimant's email at pages 2765-2768 with care, we agreed that it was neither a protected disclosure within the meaning of section 43A of the ERA 1996 nor a protected act within the meaning of section 27 of the EqA 2010. We accepted, though, that the email of 24 October 2017 at pages 2762-2763 was a protected act within the meaning of section 27 of the EqA 2010.

<u>Issue 7.1.1.21: "On 28 October 2017 C emailed R's and former colleagues stating her concerns that their recent actions will harm people in their work as they do not understand trauma, power dynamics and gendered violence, knowledge which is essential for them to work with vulnerable groups without perpetuating harm (paragraph 70 GoC)"</u>

304 This was responded to by Ms Jennings in the following paragraphs of her closing submissions.

'118. On 28 October 2017, Ms AB emailed the Respondents a threatening letter. This was sent amongst a barrage of emails following the 25 October 2017 letter. In this email Ms AB suggested the team did not understand trauma and did not appear to "have spent any time thinking about power dynamics, or gendered violence". She suggested that taking "this level of skill and understanding into a context like Zimbabwe" would be catastrophic. She said they had fucked up her life, were cowards, lacked integrity and that they would have their "reckoning" (p2817-8).

119. As with the 23 and 24 October 2017 emails, there was nothing in this email which amounted to a disclosure of information for the purposes of s43B(1) ERA 1996 and the loose reference to concern regarding the work the Respondents were undertaking in Zimbabwe was not a genuine concern in the public interest. Ms AB's expression was entirely focussed on her own predicament and in the context of a threatening email in which she said "It would be easy for me to shut this all down…" (p2818). There is nothing within this email which could amount to a protected act.'

305 We agreed that the email at pages 2817-2818 was threatening. It was distinctly abusive. By way of example, there was this single-line paragraph in the middle of page 2817:

> "What arrogance. What delusion. What utter blinding bullshit."

306 However, it was capable of being a protected act within the meaning of section 27 of the EqA 2010, since it included this passage:

> 'This is how entire countries have been razed into the ground: with the goodest of good intentions. White people, great men, heroes' journeys, disaster masculinity, missionairies of modernity. Here you go to save the day. The white saviour industrial complex. What a world we live in. What did I say at TOG? "Are we going to let humans go extinct because of the feelings of white people?" Yes we are.
>
> You know who knows what to do about all of this? Me. Me, the person you were paying 50-70% of the guys on the team. Me, the person making a fifth of the CEO who spent 3 months making me feel like subhuman garbage, but he told me I'm pretty so I guess that's ok. Oh he is so fucking talented and he pays our salaries so it's ok.
>
> Cari says you are going to get trained in this stuff- you know who could have trained you? Me.
>
> "Chelsey we can't pay you anymore, because keeping you around makes us feel bad about fucking up so badly. You are being so mean to us and

> our egos are fragile so we have to discard you. Instead we will pay a bunch of other people to teach us the things you have been trying to teach us from the time you arrived.”’

307 We observe at this point, however, that the claimant was not rejected by the respondents: she rejected the respondents because she could not achieve her desired salary level of $5,000 USD per month. Thus, what the claimant said in the email at pages 2817-2818 was in our judgment unbalanced and inaccurate. We say that having read the email with care and as a whole. By way of further illustration, on page 2818, the claimant wrote this:

> “It sounds like you all are going to have your reckoning. I’m not sure if I’ll have to be the one to provide it- and I could, for I am very creative and resourceful and I am not a pathetic coward or a doormat.
>
> No name calling, is that right Zand?
>
> Here: I think you are all cowards. I don’t think you should be doing this work at all if you are going to be such cowards. Not that you are just acting like cowards, but possibly that you have cowardly souls. Peoples’ lives are at stake. People are suffering. People are starving. This is not a game, made for you to make a profit and feel warm and fuzzy inside about consuming peoples’ pain.
>
> Have some fucking integrity. And if you can’t, go to work in a bank. Sell cheap plastic shit in dollar stores. Sell arms to little children and make them fight wars over oil and gold. Use the spoils to become a philanthropist. Have a fancy dinner on the rooftop of a 5 star hotel and give yourself some humanitarian awards. Hire some pretty girls for the afterparty and get them drunk and have your way with them.
>
> You guys are the Uber of the humanitarian sector. Congratulations.”

<u>Issues 6.1.1.21 and 7.1.1.22: “On 6 November 2017 C emailed R2, R3 and R5 and said she wanted to make a ‘formal harassment complaint’ (paragraph 76 GoC)”</u>

308 The claimant stated the desire to make “a formal harassment complaint” in the email at page 2873, which was sent on 6 November 2017. The email was headed “Time’s up” and was in these terms:

> “Dear Roller MT,
>
> I would like to make a formal harassment complaint. I have been advising you about these issues for several months now, and nothing has been done. Furthermore, I have been retaliated against in multiple ways for raising these issues, including being removed from my job altogether, told

> I was exaggerating, and then being ignored. This has led to serious ramifications to my health and well-being.
>
> Please advise me of your complaint procedure, who will be contacting me, and whether an independent third party investigator has been secured.
>
> Thank you,
>
> Chelsey"

309 Ms Jennings' response to the proposition that that was a protected act and a protected disclosure was this (in paragraph 116 of her closing submissions):

> 'Simply referring to an intention to make a "formal harassment complaint" does not amount to a disclosure of information and did not amount to a protected disclosure. Neither did it amount to a protected act for the purposes of s27(2) EqA 2010.'

310 We agreed that the email was not protected disclosure within the meaning of section 43A of the ERA 1996, but disagreed that the email was not a protected act within the meaning of section 27 of the EqA 2010.

Issue 7.1.1.23: "On 15 November 2017 C emailed the R's and described in detail how R2 had sexually assaulted her and repeatedly traumatized her in the 3 months she worked for R1, and that she had evidence of R2 inappropriately touching a colleague and that R2 had admitted to abusing other women, that R2 was lying and had manipulated them into punishing C, and that they were legally obligated to investigate and that they had fired C for speaking up (paragraph 76 GoC)"

311 Ms Jennings' response to this issue was in paragraph 120 of her closing submissions, in which she acknowledged that this was "capable of being a protected act" within the meaning of section 27 of the EqA 2010, but asserted that it was not such because it was false and made in bad faith "namely in anger and retaliation at the breakdown of Ms AB's personal relationship with Mr D and her professional relationship with C Limited". After a discussion with EJ Hyams when he pointed out that it had not been pleaded that the claimant had acted in bad faith in making her assertions of breaches of the EqA 2010, Ms Jennings did not press the bad faith point.

312 The claimant did not refer in her witness statement to any email of 15 November 2017 sent by her to the respondents, and there was no such email in the bundles before us. Paragraph 76 of the grounds of complaint referred to the email of 6 November 2017 which we have set out in paragraph 308 above. In the circumstances, we did not accept that the claimant had sent any email of the sort claimed in issue 7.1.1.23.

Issue 6.1.1.22 and the second issue number 7.1.1.22: "C notified the Respondents of her intention to file an Employment Tribunal claim and did so on 4 Feb 2018"

313 We accepted what Ms Jennings said in paragraph 117 of her closing submissions about the claimant's claims to this tribunal: that it was clearly a protected act within the meaning of section 27 of the EqA 2010, but it was not a protected disclosure within the meaning of section 43A of the ERA 1996 because (we concluded) the claimant could not reasonably have believed that it was in the public interest for her to make her claims to the employment tribunal. In fact, nothing turned on this, since detrimental treatment for making a claim to an employment tribunal is clearly victimisation within the meaning of section 27 of the EqA 2010, so if we concluded that the claimant was treated detrimentally because she made her claims to this tribunal then her claim of detrimental treatment for the making of a protected disclosure would be superfluous.

The claimant's claims of detrimental treatment within the meaning of section 47B of the ERA 1996 and section 27 of the EqA 2010

Introduction

314 In her opening response to the claimant's claims of detrimental treatment for protected acts and protected disclosures, Ms Jennings said this in her closing submissions:

> "121. It is not known which alleged detriment links to which alleged protected act and/or protected disclosure. As such, the Respondents make broad submissions as to causation below. Where the detriments are relied on for PID or victimisation alone, the same is noted.
>
> *6.4.1-10 and 7.2.1-10 are identical detriments;*
> *6.4.12-14 and 7.2.13-15 are identical detriments;*
> *6.4.17 and to 7.2.18 are identical detriments;*
> *6.4.19 and 7.2.20 are identical detriments;*
> *6.4.21 and 7.2.22 are identical detriments;*
> *6.4.18 is a PID detriment only; and*
> *7.2.11, 7.2.19, 7.2.23-27 are victimisation detriments only.*
>
> 122. The tribunal is again referred to the Respondents' Note on the Law. Many allegations do not amount to detrimental treatment and even where they may appear so at first, pursuant to *Cornelius v University College of Swansea* [1987] IRLR 141, many actions were taken (or not taken) in order to protect the Respondents' position. Further, even if any detriment is made out, Ms AB's case cannot succeed on causation; the facts and timeline do not support any such contention."

315 What Ms Jennings did not do is refer to the possibility that action was taken in response to the manner in which the claimant made some of her assertions, as considered in *Martin v Devonshire Solicitors* in the manner described by us in paragraphs 166-167 above. That did not preclude us from concluding that detrimental action was taken because of such manner. If the claimant had been present at the hearing on 8 and 9 November 2021, or even if she had merely put before us written closing submissions, then we would have sought her input in this regard. However, her complete refusal to continue to participate in the proceedings on the basis that it would be contrary to her health to do so, meant that we applied the principles in *Martin v Devonshire Solicitors,* but with caution.

316 A number of the claimed acts of detrimental treatment were also claimed to be harassment within the meaning of section 26 of the EqA 2010 and/or direct discrimination against the claimant because of her sex within the meaning of section 13 of that Act. Other claimed acts of detrimental treatment for the doing of a protected act or making a protected disclosure were not the subject of any other claim. We saw no alternative to considering each claim of detrimental treatment individually, which is what we now do.

Issues 6.4.1 and 7.2.1: claimed berating by Mr Hassan of the claimant on 15 July 2017

317 This claimed detrimental treatment occurred (as we understood the matter) in the course of the WhatsApp conversation to which we refer in paragraphs 266 and 267 above. We came to the clear conclusion that what Mr Hassan said during the course of that conversation was in no way said “because” or “on the ground that” the claimant had referred to the possibility of breaches of the EqA 2010, including by Mr Hassan. We add that we saw Mr Hassan as being much more willing to accept that he might have been guilty of unconscious direct sex discrimination (not harassment, as he never accepted that he had harassed the claimant) than many others might have been. In our judgment he was acutely sensitive to the possibility that he had discriminated against the claimant and others because of their sex unconsciously, and while he might on occasion have been initially resistant to a criticism of the claimant’s of his own conduct, he did not seek to dissuade her from repeating the criticism to others, or him: far from it.

Issues 6.4.2 and 7.2.2: Mr Hassan’s conduct towards the claimant on 16 August 2017 discussed in paragraphs 97, 98 and 191 above; issue 1.1.9

318 We had no doubt at all that Mr Hassan’s conduct towards the claimant on 16 August 2017 discussed in paragraphs 97, 98 and 191 above was not detrimental treatment done because (or on the ground that) the claimant had previously referred to the possibility of breaches of the EqA 2010.

Issues 6.4.3 and 7.2.3: the conduct of 26 August 2017 discussed in paragraphs 194-196 above (issue 1.1.14)

319 Given what we say in paragraphs 194-196 above, and in any event, having stood back and asked ourselves when returning to this claim of detrimental treatment about Mr Hassan's motivation in saying the things that he did on 26 August 2017, we concluded that what the claimant claimed in paragraphs 6.4.3 and 7.2.3 of the agreed list of issues happened (it was precisely the same as what was in paragraph 1.1.14 of that list, which we have set out as the heading to paragraph 194 above) did not in fact happen, since we concluded that Mr Hassan did not "[insinuate that] he would end [the claimant's] employment".

320 In any event, we concluded that what Mr Hassan said in the course of the WhatsApp conversation of 26 August 2017 discussed in paragraphs 194-196 above was in no way said because, or on the ground that, the claimant had referred to issues relating to sex discrimination.

Issues 6.4.4 and 7.2.4: the conduct discussed in paragraph 197 above; issue 1.1.15; alleged making light of harassing behaviour

321 Our finding number (1) in paragraph 197 above meant that this claim could not succeed, but in any event we were completely satisfied that what Mr Hassan said in the course of the WhatsApp conversation of 14 September 2017 which it was claimed was detrimental treatment for whistleblowing and victimisation was not that: it was not said to any extent because (within the meaning of section 27 of the EqA 2010) or on the ground that (within the meaning of section 47B of the ERA 1996) the claimant had made an allegation of one or more breaches of the EqA 2010. In what follows, if we say that we concluded that something was not done "because (or on the ground that)" the claimant had said or done something, we are referring to those sections of those Acts in the same way as we do in the preceding sentence.

Issues 6.4.5 and 7.2.5: the conduct (issue 1.1.18) discussed in paragraphs 200-201 above

322 We had no doubt that what Mr Hassan said what he said in the manner discussed in paragraphs 200-201 above was not said to any extent because (or on the ground that) the claimant had referred to the possibility of sex discrimination.

Issues 6.4.6 and 7.2.6: "On 23 September 2017, R2 threatened to quit or kill himself if C continued to be upset by his treatment of her (paragraph 37 GoC)"

323 This was also issue 1.1.19, which we discuss in paragraphs 118-120 above. Given our conclusion in paragraph 120 above that Mr Hassan did not threaten to commit suicide on 23 September 2017, this claim could not, and did not, succeed.

Issues 6.4.7 and 7.2.7; 6.4.8 and 7.2.8; and 6.4.9 and 7.2.9: a repeat of issues 1.1.21, 1.1.24 and 1.1.25

324 We have set out the factual background to issues 6.4.7/7.2.7, 6.4.8/7.2.8 and 6.4.9/7.2.9 in paragraphs 205-217 above. They were all about what Mr Hassan said in the WhatsApp conversations referred to in those paragraphs. We were completely satisfied that what Mr Hassan said in the course of those conversations was in no way done because, or on the ground that, the claimant had implied that there had been one or more breaches of the EqA 2010.

Issues 6.4.10 and 7.2.10: "On 18 October 2017, R2 told C he was thinking of killing himself, making C feel pressured to drop her complaint (paragraph 66 GoC)"

325 This was a repeat of issue 1.1.26, which we have considered in paragraphs 221 and 222 above. Given the factual background to which we refer there, it was a distinct possibility that Mr Hassan did, by referring to his dream in which he had "arranged to kill [himself] in 3 days on a weekend when no one was home" do something which he would not have done if the claimant had not asserted implicitly that there had been a breach of the EqA 2010. The email at page 2835 continued:

> "Then I called you and we had a chat and I told you it was all ok. I was calm and fine and there was no need to panic but that I was done. The dream was peaceful.
>
> I am thinking about it. [What "it" was, was unclear, as the email chain was truncated, and it was not included anywhere else in the hearing bundle or the claimant's additional bundle.]
>
> I told Cari today. [Again, it is not clear what Mr Hassan told Ms Caldwell about that day.]
>
> I don't think I can afford to because I have no money but I don't really think I am cut out to be a CEO. I'm good at some things being a CEO isn't one of them. I think I would rather work alone.
>
> Night night".

326 However, by then all that the claimant had done was to assert that she should be paid more than was on offer from the first respondent and that there was some sort of pay inequity in her not being offered more. The claimant had not then made any concrete assertion about Mr Hassan's own conduct towards her, and they had in fact only three weeks before had (as we have found: see paragraphs 121-125 above) fully consensual sexual intercourse. As we say in the preceding paragraph above, we could not see the email to which Mr Hassan's email of 18 October 2017 at page 2835 responded. The email at page 2835 was apparently was sent in the course of a highly personal conversation which it appeared occurred outside the course of Mr Hassan's employment. In those circumstances, we were not persuaded on the balance of probabilities that the email was to any extent detrimental treatment because the claimant had asserted

that there had before then been a breach of the EqA 2010, or that there might be such a breach in the future.

Issue 7.2.11: " R2 went to Dr Claudia Herbert, a UK psychologist and told her that C had fabricated her claims. R2 took notes and on 18 October 2017 the R's emailed the notes to C's colleagues and/or professional sphere, including Nathan Heintz, Alexander Craig and Sarah Forrester stating that Dr Herbert had diagnosed C as being borderline personality, narcissist and sociopath and there was no point in trying to negotiate or communicate with C"

327 Ms Jennings' response to this allegation was in paragraph 141 of her closing submissions, which was in these terms:

> "Ms AB has no idea what Mr D told Dr Herbert – her allegation is pure speculation. It is correct that Mr D's notes of this meeting were emailed to Ms F. There is nothing to suggest the reason for this was because Ms AB had done an alleged protected act or disclosure. It is correct that Ms F then sent these notes to the team along with her own therapist notes on 25 October 2017 (p2799-804). The complained of action was done by Ms F, who is no longer a party to these proceedings. There is no evidence as to why Ms F did this other than to share information both she and Mr D had obtained in trying to make sense of the situation."

328 We agreed with that analysis in its entirety. We concluded that the reason for the conduct was as stated in the final sentence of that paragraph: that both Mr Hassan and Ms Caldwell were trying to make sense of the situation. Mr Hassan told us in oral evidence that he thought that he was the claimant's friend when he went to see her in Calgary in November 2017, and accepted that evidence. In those circumstances, we concluded that the claim stated as issue 7.2.11 was not well-founded in that it was not detrimental treatment within the meaning of section 27 of the EqA 2010.

Issues 6.4.12 and 7.2.13: 'R2 subjected C to an emotional tirade for relaying Ms. Forrester-Wilson's reports of R2 non-consensually touching and flirting with her, and said that Ms. Forrester-Wilson was lying, that she was "a kid," and that he planned to professionally punish her (paragraph 28 GoC)'

329 This was a repeat of issue 1.1.17. We have stated our factual findings about it in paragraphs 109-117 above. That which we found Mr Hassan actually did was in our view in no way detrimental treatment because the claimant had asserted that he had breached the EqA 2010 in his conduct towards Ms Forrester-Wilson.

Issues 6.4.13 and 7.2.14: "C's complaints were ignored by R2, R3 and R5 and they refused to conduct any investigation into the reported misconduct of R2 (paragraph 75 GoC)"

330 This was a very general allegation. Ms Jennings' response to this claimed detriment was in paragraph 132 of her closing submissions, which was in these terms:

> "This factual allegation is dealt with above at paragraph 87. There is nothing to suggest a causal link between this allegation and any protected disclosure and/or act. As noted above, Ms AB did not report anything concrete against Mr D until November 2017, by which time she was sending multiple, highly personal, threatening emails to the Respondents and they were in discussions regarding reaching an agreement. They chose not to proceed with formally investigating her complaint. This was not because of any alleged protected act and/or disclosure, but in order to protect their position."

331 Paragraph 87 of Ms Jennings' closing submissions responded to issue 2.1.19, which we have considered in paragraphs 242-245 above. We agreed with what Ms Jennings said in paragraph 132 of her closing submissions but we went a little further: we concluded that the fact that the respondents did not investigate the claimant's complaints made after 7 October 2017 when she had rejected the offer of a new contract with the first respondent was not detrimental treatment within the meaning of section 27 of the EqA 2010 or section 47B of the ERA 1996 because it was the result only of

331.1 the way in which the claimant's complaints multiplied and expanded, with the claimant (1) saying on 16 October 2017 that she was "in a blind rage" (see paragraph 244 above), which was in our view irrational in the circumstances, and (2) first revealing to Ms Caldwell that she (the claimant) and Mr Hassan had had a sexual relationship only after the claimant realised that the respondent had concluded that it would cease to offer a new contract to her (see paragraph 148 above), and

331.2 the fact that the respondent could see a need to protect its position in regard to the claimant's plainly planned future litigation.

<u>Issues 6.4.14 and 7.2.15: "R2 refused to review their pay levels and denied pay equity issues (paragraphs 47-50 GoC)"</u>

332 Ms Jennings' response to this complaint was paragraph 133 of her closing submissions, which was as follows:

> "There was a denial of pay equity issues in the first instance on the basis that two women were being paid more than two men. This was expressed to Ms AB as soon as she raised it (p2466). It was agreed that there could be a discussion as to pay equity and pay levels, but any such open book conversation could not happen in the immediate aftermath of 6 October 2017 because of the imminent trip to Zimbabwe and the stress the team was under in that regard. Both Mr D and Ms F explained this to Ms AB

(pp2497; 2559). There was no refusal to review pay, but a 'parking' of the issue until they were able to consider it properly. It is of note that there was in fact [an] immediate review of Ms AB's pay, as she was offered an increase to $4,000 (p2519). She did not want this; she wanted $5,000 (pp2662, 2512). There was no detrimental treatment here."

333 We saw that at page 2559 Mr Hassan said (as part of a WhatsApp conversation of 6 October 2017):

333.1 "I would suggest that it will take us till Jan to get to the place you want us to get to" and

333.2 "I don't agree with opening up the decision for what to offer you to the whole team. Or What to offer anyone".

334 That was said in the course of this passage in the WhatsApp conversation on page 2559:

"06/10/2017, 13:54:10: Zaid: I don't agree with opening up the decision for what to offer you to the whole team
06/10/2017, 13:54:20: Chelsey Rhodes: Why?
06/10/2017, 13:54:28: Zaid: Or what to offer anyone
06/10/2017, 13:54:37: Zaid: Because we are juggling a shedload of factors
06/10/2017, 13:54:58: Zaid: And we have to survive first
06/10/2017, 13:55:14: Zaid: And at the moment we have a $130k deficit just to break even
06/10/2017, 13:55:23: Zaid: I don't believe in democracy
06/10/2017, 13:55:26: Zaid: Just saying
06/10/2017, 13:55:32: Zaid: I don't mind having conversations
06/10/2017, 13:55:58: Zaid: But I'm not handing over decision making to the team - none of you are liable - the three directors are liable
06/10/2017, 13:56:25: Zaid: I don't mind we all talking it through
06/10/2017, 13:56:41: Zaid: But it's not happening to open it up - especially not today.
06/10/2017, 13:56:54: Zaid: I'm quite upset at this request
06/10/2017, 13:57:07: Zaid: Its really disruptive and stressful
06/10/2017, 13:57:37: Zaid: It's like we are sitting round doing nothing - without a massive load of deliverables that are time sensitive
06/10/2017, 13:57:52: Zaid: So you need to decide what you want to do
06/10/2017, 13:57:57: Zaid: Let me know please?
06/10/2017, 13:58:13: Zaid: Do you want me to share with Cari and Angie and Leo your request?
06/10/2017, 13:59:00: Chelsey Rhodes: It's just a request Z. I need to decide before Monday and i feel i dont have all of the info to do so
06/10/2017, 13:59:25: Zaid: Well I can't do it - I can give you any info you want".

335 Ms Caldwell's conversation with the claimant about pay in the WhatsApp exchange of the same day (at page 2497) included the very sympathetic statements in this exchange (all textual errors being in the original):

> "10/6/17, 7:48:14 AM: Cari: so let's have the conversation and walk it through but i think we can't. do all this right now of course, AND I feel there is also understanding what's happening there is incredible stress on the team and i realize that that can sound like the typical -urgency excuse for not looking at things but that is realyl where we are
>
> 10/6/17, 7:49:43 AM: Cari: I'm worried that this will seem like a pattern - you raise seomthing and get pushed down and I guess i want to emphasise that we want to raise and need to make decisions fast
>
> 10/6/17, 7:49:59 AM: Cari: so it really is fine if the set up isn't right then we shouldn't rush it
>
> 10/6/17, 7:50:02 AM: Cari: we can figure zim out
> 10/6/17, 7:51 :04 AM: Chelsey Rhodes: Yes. And i have incredible stress too and i dont have savings, assets, i can't afford a dentist, ive never bought a piece of furniture in my life. I had to file a lawsuit with the bc supreme court from the dc airport to deal with a violent thing that happened to me. I have to pay 200 for therapy today. I need to buy basic things like clothes and shoes and a proper suitcase.
>
> 10/6/17, 7:52:47 AM: Cari: yes, really understand and so lets get you set up, we're in the middle of the conversation about what you need and where you want to be re pay so let's continue that and then decide.
>
> 10/6/17, 7:52:54 AM: Chelsey Rhodes: I cant metabolize any more stess and i cant deal with gender bullshit anymore or be asked to wait longer. That is how I'm feeling
>
> 10/6/17, 7:56:14 AM: Cari: ok that is ok and understand if you don't want to accept the contract rigth now until you have answers, fair enough. What I want to be clear on (numbering for clarity not because i'm arguing) 1) we are not an organization that can promise no gender dynamics right now today 2) we are offering to explore it, we want to hear it and want to figure it out and ideally we want your help to work with it in our system and our client work and 3) if it feels too unsupportive right now then please let's press pause and get it right. if you do feel that we can have those covnersations and get to a good place and you feel able to go to zim then lets put the dates in for the conversations and figure out exactly when its happening, but it won't be before you would need to go."

336 We concluded that there were in those circumstances no facts from which we could conclude in the absence of an explanation from Mr Hassan that the way in

which the claimant's demands for an increase in pay were responded to by him was to any extent detrimental treatment because, or done on the ground that, the claimant had impliedly relied on the EqA 2010 in regard to pay. In fact, having heard and seen him give evidence, we were satisfied at least on the balance of probabilities that his response had nothing to do with that implied reliance.

Issues 6.4.17 and 7.2.18: "R2, R3 and R5 held secret meetings facilitated by a company Advisor (who concealed that she was providing therapy to R3 and R5 for the 2016 assault) in which they divulged details of C's reports of abuse and medical information to all of her colleagues, and said she was lying/ had fabricated the complaints against R2"

337 Ms Jennings' response to this issue was in paragraph 137 of her closing submissions, which was in these terms:

> "There were no secret meetings facilitated by a company advisor in which the Respondents divulged details of Ms AB's reports of abuse and medical information to her colleagues. It is correct that there was one meeting with a counsellor to facilitate the team moving forward after the breakdown in working relationship with Ms AB. It is also correct that Mr D said Ms AB was lying about her complaints during this meeting. There is nothing to suggest that the reason for this meeting was anything other than to facilitate a discussion about the issue that had arisen. The tribunal heard frank evidence from Mr D as to the reasons for his lying; he considered that if he admitted the sexual relationship, people would also believe he had assaulted her and he feared backlash from Ms F regarding her view that there should never be a romantic relationship in the workplace. This was not because of any alleged protected act or protected disclosure."

338 The claimant dealt with this part of the claim in paragraph 589 of her witness statement, which was a description of a WhatsApp conversation that she had with Mr Heintz on 1 November 2017, which was at pages 2852-2861. The first part of paragraph 589 of the claimant's witness statement was this:

> 'In Whatsapp messages on 1 November 2017, I wrote to Nathan Heintz, "Now there are secret meetings happening about me? Nathan? I have been pacing and crying all day. Why can't you tell me anything? Why is no one ever telling me anything? This is horrible… why can't you share?" Mr. Heintz wrote, "In order to allow for honesty and safety and full open sharing in the group we made agreements for confidentiality." I wrote, "Safety for who? Can you see how harmful this is to me? I asked you all to stop harming me." I continued, "That further isolates me. It is totally crazymaking. It is unsafe for ME. Was zaid there? Did he admit to anything? Who facilitated? Who was present? You don't think I deserve any info after a month of silence? I can't take this for very much longer. I am barely hanging in." Mr. Heintz wrote, "Myrna [Lewis] facilitated."'

339 The claimant then reported Mr Heintz confirming that it was only one meeting that Ms Lewis facilitated.

340 Thus, there was one "secret" meeting only. It was "secret" for the reason reported by Mr Heintz, which we regarded as being accurate. The meeting occurred after the respondents' attempts to persuade the claimant to enter into a new contract with the first respondent had ended. The claimant's criticism of the respondents for holding a meeting was in the circumstances not objectively well-founded: she had no rational basis to suggest that it "further [isolated her]" or that it was somehow wrongful. The claimant had, she wrote, asked the respondents and other employees of the first respondent to "stop harming [her]". Holding a meeting to facilitate the team moving forward without the claimant had nothing to do with harming her. We have already stated (in paragraph 85 above) our conclusion about the real reason why Mr Hassan initially denied that he had had a sexual relationship with the claimant.

341 In those circumstances there was nothing from which we could conclude in the absence of an explanation from the respondents that the holding of the meeting with Ms Lewis at the end of October 2017 was to any extent detrimental treatment done because, or on the ground that, the claimant had impliedly relied on the EqA 2010 in any way. We therefore concluded that the holding of that meeting was not detrimental treatment of the claimant within the meaning of section 27 of the EqA 2010 or section 47B of the ERA 1996.

Issue 6.4.18: "R2, R3 and R5 instructed C's colleagues to stop communicating with C and ignore her (paragraph 74 GoC)"; and issue 7.2.19: "In October/November 2017 R2, R3 and R5 instructed C's colleagues, including Nathan Heintz, Alexander Craig and Sarah Forrester, to stop communicating with C and ignore her and told them C was mentally ill and that she had done this before and it was a pattern for C (paragraph 74 GoC)"

Issues 6.4.19 and 7.2.20: "R3 and R5 ignored C's communications and/or her requests for help after she raised complaints in October 2017 (paragraph 75 - 79 of GoC)".

342 These four allegations are all about the same thing, and therefore can sensibly be considered together. Ms Jennings' submissions on them were in paragraphs 138, 139, 142 and 143 of her closing submissions. This is what she said in those paragraphs:

> "*6.4.18 (PID detriment only) – Rs instruction to stop communicating with Ms AB*
>
> 138. In November 2017, it is correct that Mr E requested Ms AB's previous colleagues not communicate with her. This was not an instruction. These two emails can be seen at p2889 and supplemental bundle p359. The reason for this was as explained in those emails, "Any communication you may have with her has the potential to disrupt

[reaching agreement… It feels like we're getting closer to a resolution here…". The context of these emails was Ms AB sending multiple threatening emails with allegations against all of the Respondents and there being ongoing discussions regarding reaching an agreement. The Respondents were acting purely to protect their position at the time. This was a changed position since October 2017 when the Respondents had told the same people they were free to communicate with Ms AB as they saw fit (p2747). This change in position was not because of any protected act or protected disclosure (p2746).

6.4.19 and 7.2.20 – Mr E and Ms G ignoring C

139. Ms F accepts that it was agreed between the Respondents that she would be the contact for responding to Ms AB. By not replying to Ms AB directly, Mr E and Ms G cannot be held to have been ignoring her. Having one point of contact on the management team cannot be viewed reasonably as a detriment. There is nothing to suggest that the reason for this decision was any protected act or disclosure as opposed to an administrative mechanism. Further, Mr E did in fact communicate with Ms AB around this time regarding settlement discussions (e.g. pp2879, 2923).

7.2.19 (victimisation detriment only) – October/November 2017 instruction

142. Ms AB claims that employees were instructed to stop communicating with her, were informed that she was mentally ill and that she had made similar allegations before. There is nothing to suggest the reason for this was that Ms AB had done a protected act.

143. There is clear evidence as to why the instruction not to communicate came: there were settlement discussions ongoing and it was feared that parallel conversations could derail the same. This is discussed above at paragraphs 138 and 139. Further, there was never a suggestion that Ms AB was "mentally ill". Mr Heintz accepted under cross-examination that the tone of any such conversation was limited to Mr D relaying Dr Herbert's assessment of Ms AB as possibly having a personality disorder. Such comments were made by Mr D as that was how he best understood the unusual situation. Lastly, it is factually accurate that Ms AB had made complaints of sexual assault against a previous employer."

343 We agreed with those submissions in their entirety except that the reference in paragraph 139 to page 2923 was an error, and we could see nothing in the vicinity which was a communication from Mr Eisenstadt to the claimant. The explanation for what happened was precisely as stated in those paragraphs of Ms Jennings' closing submissions. We concluded that the matters which were

the subject of issues 6.4.18, 6.4.19, 7.2.19 and 7.2.20 were not detrimental treatment within the meaning of either section 27 of the EqA 2010 or section 47B of the ERA 1996 because they were all done in the course of responding to the claimant's allegations of wrongdoing and her intended claim to this tribunal, and went no further than it was reasonable to do in the circumstances.

Issues 6.4.21 and 7.2.22: "R2 did not report the complaint by Ms. Forrester-Wilson (that he had non-consensually touched her and flirted with her) to the rest of the Management Team so that they could investigate it appropriately, intervene, and support Ms. Forrester-Wilson"

344 Given what we say in paragraph 117 above, Ms Caldwell was informed by Mr Hassan that he had a concern about "misinterpretation" by Ms Forrester-Wilson of conduct on the part of Mr Hassan as "sexual advances". That suggested very strongly that the claim in paragraphs 6.4.21 and 7.2.22 of the agreed list of issues was not well-founded factually. The manner in which the issue was stated was contentious, since it assumed that Ms Forrester-Wilson had complained that Mr Hassan had "non-consensually touched ... and flirted" with her.

345 Ms Jennings' response to this issue was in paragraph 140 of her closing submissions, which was as follows:

> "It cannot be said that this was a detriment to Ms AB. There was no complaint by Ms Forrester Wilson. Ms AB did not raise the issue with Mr D in the context of reporting a complaint, but rather within a broader conversation about her own insecurities. The fact this was not relayed to the management team was because a) there was no knowledge of any actual complaint; and b) because to Mr D's mind he had resolved any misunderstanding at the time. There is nothing to suggest the reason for this was any protected act or disclosure."

346 In the light of our findings of fact in paragraphs 109-115 above, we accepted that submission in its entirety (except and to the extent that it failed to take into account the fact that Mr Hassan had plainly told Ms Caldwell something about the situation), although we thought that the first sentence was particularly apt. That is because it was odd to suggest that if it had happened, Mr Hassan's not reporting Ms Forrester-Wilson's complaint to the rest of the first respondent's management team was a detriment to the claimant done because, or on the ground that, the claimant had relied in some way on the EqA 2010. Moreover, since we found that Ms Forrester-Wilson had not made a complaint, and did not want any action taken, there can have been no detrimental treatment of the claimant through Mr Hassan not reporting a complaint made by Ms Forrester-Wilson to the rest of the management team. In addition and in any event, by the time of the event described by Mr Hassan in paragraphs 87 and 88 of his witness statement, which we have set out in paragraph 110 above, the claimant's references to the EqA 2010 had been very general, and as we say in paragraph 317 above, "we saw Mr Hassan as being much more willing to accept that he

might have been guilty of unconscious direct sex discrimination (not harassment, as he never accepted that he had harassed the claimant) than many others might have been".

347 In those circumstances, we found no facts from which we could conclude in the absence of an explanation from Mr Hassan that whatever he did in regard to Ms Forrester-Wilson's response to him was to any extent detrimental treatment because, or done on the ground that, the claimant had impliedly relied on the EqA 2010 in any way. In any event, having heard oral evidence from him, we concluded that whatever he did in regard to Ms Forrester-Wilson's response to him was not detrimental treatment of the claimant done because, or on the ground that, the claimant had impliedly relied on the EqA 2010 in any way.

Issues 7.2.23, 7.2.24, 7.2.25, 7.2.26 and 7.2.27

348 These final five issues were added as a result of the permission granted by EJ Hyams to do so to which we refer in paragraph 15 above. The application to amend to add them was made significantly out of time: it was made on 18 May 2020, and the dates of the claimed detrimental conduct were, respectively,

348.1 15-16 January 2018 (the claims stated in the first two issues; the reference in paragraph 7.2.24 of the list of issues, which we have set out in the heading to paragraph 366 below, to 15-16 January 2017 was plainly an error);

348.2 5 March 2018;

348.3 29 March 2018; and

348.4 January 2019.

349 All of those new claims concerned conduct which was a direct result of the fact that the claimant had made it clear that she was going to make, or had made, a claim to an employment tribunal. Thus, there was a possibility that they were not detrimental treatment because of the principles discussed in the passage of the speech of Lord Bingham in the *Derbyshire* case which we have set out in paragraph 165 above. The claimant put before us no evidence about the reason why she had waited so long before seeking permission to add those claims. We nevertheless considered them in order to see whether there was something which might justify them being made so long outside the primary time limit. We therefore now turn to them.

Issue 7.2.23: "On 15 - 16 January 2018 the R's emailed each other and Terry Mazany to jointly craft an official statement about C which they disseminated to people in their shared professional sphere including The Omidyar Group, containing the following "We appointed lawyers who investigated. There is no merit to any of her claims….We subsequently discovered that she is a serial litigator. We have spoken to previous

employers who told us this is a 'parallel case'. We have considered taking legal action for extortion and defamation"."

350 Ms Jennings' response to this claim was in paragraph 144 of her closing submissions, in which she dealt also with the claim stated as issue 7.2.25. For reasons which will be apparent from that issue, she was right to deal with them together, and we do so too. Issue 7.2.25 was as follows.

Issue 7.2.25: 'On 5 March 2018 R's sent out the official statement about C (referred to at 7.2.23 above) to the parties shared professional sphere including Rob Ricigliano at The Omidyar Group, stating the following "She attempted to negotiate a pay increase citing pay equity issues escalating to harassment claims; …We appointed lawyers who investigated. There is no merit to any of her claims….We subsequently discovered that she is a serial litigator. We have spoken to previous employers who told us this is a 'parallel case'. We have considered taking legal action for extortion and defamation"'

351 Paragraph 144 of Ms Jennings' closing submissions was in these terms:

> "*7.2.23 and 7.2.25 (victimisation detriment only) – Rs statement regarding Ms AB*
>
> Ms AB accepted this was an assumption on her part. It is correct that the Respondents drafted a statement regarding Ms AB. An example is seen at p2949. This statement was only sent to the Respondents' contacts who contacted them regarding allegations Ms AB had made. Ms F confirmed this under cross-examination. Ms AB accepted she sent multiple emails to the Respondents' contacts making very serious allegations, including saying she had been discriminated against, treated violently by Mr D, suggesting he had a history of abuse and that C Limited had covered it up (e.g. pp2954, 2957, 2961, 2962). The Respondents' statement was a clear attempt to mitigate the destruction Ms AB was seeking to impose on Mr D personally and on C Limited more broadly. Again under cross-examination, Ms F accepted this was the reason for the same. There is nothing to suggest the reason for this was because of any alleged protected act."

352 The first of the documents in the bundle to which Ms Jennings there referred included this passage on page 2955 (which was part of an email dated 15 February 2018 to a Mr Aubrey Yee of Hawaii Leadership Forum; it was in fact repeated at page 2957; we have added bold font and underlining in several places):

> "I was offered a permanent position at Roller, but **I was fired** after I reported sexual harassment (including a sexual assault that happened on a TOG consulting trip in July 2017) by Zaid Hassan, among other issues including fairly severe bullying and verbal abuse (e.g. telling me 'go fuck yourself' when I brought up issues of sexism- even though that was my job, etc). **I eventually couldn't take it anymore and basically had a breakdown,**

and reported everything to Cari Caldwell who is the Director of Practice. I was deleted from the Roller website and all internal comms platforms and had my staff email cut off within the hour. That evening I was sent a letter from Cari and the Management Team saying I no longer worked for Roller. There was no investigation done at all. The termination letter was sent in the midst of a health emergency, which they were well aware of.

Zaid has an admitted history of sexism, assault, and abuse that I have in writing. He told me he was in therapy with a 'close friend' of his who he assaulted. His wife has accused him of abuse. Another female Roller staff member mentioned his sexualized behaviour. Multiple female clients have complained about his sexist behaviour. The Roller Management Team is covering everything up and I guess they think that will make it go away."

353 At page 2961, in an email dated 16 February 2018 sent to a Ms Karen Grattan, the claimant wrote (and we have added bold font and underlining in the following passage in several places):

"A brief summary- Zaid assaulted me on a TOG trip to DC on July 10th, after we were stranded by that fire that grounded all planes in DC (not sure if you remember) and he booked a single hotel room for us to stay in, unbeknownst to me. He continued to harass and verbally abuse me throughout my time with Roller, and I attempted to put my head down and do my work. **I was offered a permanent contract and accepted it, and was set to go to Zimbabwe with the team in October**. I brought up pay discrimination issues (I was being paid 50-70% of the guys on the team) and Zaid's behaviour, and he flew into a rage and I basically reached my breaking point. **I then reported all of the issues to Cari Caldwell, including the sexual assault, which resulted in me being deleted from the website and all internal comms platforms within the hour.** I was sent a letter that evening saying I no longer worked for Roller. This letter was sent during a health emergency that Cari was well aware of since she had been attempting to support me.

I have filed a complaint at the UK Employment Tribunal alleging a lot of things- the campaign of sexual, harassment and bullying, harassment by Zaid towards other female staff, pay inequity, etc. I am waiting to hear back. The entire Roller Team has been instructed not to speak to me. I am being punished and retaliated against for Zaid's own behaviour, which is obviously illegal.

This has been one of the most difficult and devastating things I have ever gone through. I am experiencing PTSD and depression and have had thoughts of suicide. I have tried reaching out to Roller's advisors, and to clients such as yourself (through Brenna). No one has acknowledged my [the rest of the email was not in the bundle]".

354 On page 2962 there was the email of 5 March 2018 to Mr Terry Mazany of CCT to which Ms Jennings referred in paragraph 144 of her closing submissions. The email was in these terms:

> "Hi Terry,
>
> I am attaching the legal claim that details the abuse directed at me by Roller- particularly Zaid.
>
> You can let me know if you think this is appropriate behaviour for a CEO or leader of anything, let alone a social change organization.
>
> You and your fellow Advisors to Roller are the closest thing the org has to a Board of Directors or any type of accountability mechanism. I ask that you please consider ethical action and make sure the rest of Roller's Advisors are aware of how they have acted, and that they continue to refuse any accountability. By continuing to collaborate with Roller and promote their work, you are complicit in their illegal, harmful, and unethical actions.
>
> Sexual abuse allegations are beginning to sweep the charitable sector. Since we have access to some of the most vulnerable people in the world through our work, and there is very little recourse should certain women or girls be victimized, we have a duty to address such behaviour and the enabling actions of executives who often cover it up and blame the victims.
>
> Thank you,
>
> Chelsey"

355 The claimant's assertions in those communications were so far from the facts as we have found them to be that they (the assertions) were in our judgment plainly such as to justify a strong response, not least because the assertions had yet to be the subject of a determination by this tribunal, but also because they were plainly defamatory in the non-legal sense of the word: they would not be defamatory as far as the law of England and Wales was concerned if they were true, but they certainly were such as to cause serious harm to the reputations of the persons about whom they were made. The claimant must have known that, which is why she sent the communications in question to their recipients. The claimant plainly was out to do as much damage as she could to the financial interests and reputations of the respondents. She must on the facts as we have found them have known that the allegations of sexual assault by Mr Hassan were not true, but there were two statements which were objectively verifiably wrong and which the claimant must have known were wrong. The first one is made twice. In the passage set out in 352 above, the claimant wrote:

> "I was fired after I reported sexual harassment".

356 That was not true, as the claimant was not dismissed: as we record in paragraphs 136-145 above, she refused to accept an offer of a new contract.

357 Even more obviously untrue, given our findings in those paragraphs, was the first emboldened passage set out in 353 above, which we now repeat:

> "I was offered a permanent contract and accepted it, and was set to go to Zimbabwe with the team in October."

358 The claimant was not cross-examined on that statement in that document, and we ourselves did not see its significance until we were deliberating. Thus, the claimant was not given an opportunity to say why she wrote that when she had not accepted the contract which was on offer, and when she was not "set to go to Zimbabwe with the team in October" precisely because she had not signed the contract which was on offer, or otherwise stated that she accepted the offer.

359 The second clearly untrue statement was the second emboldened statement in the passages set out in paragraphs 352 and 353 above, namely, respectively

359.1 "I eventually couldn't take it anymore and basically had a breakdown, and reported everything to Cari Caldwell who is the Director of Practice. I was deleted from the Roller website and all internal comms platforms and had my staff email cut off within the hour."

359.2 "I then reported all of the issues to Cari Caldwell, including the sexual assault, which resulted in me being deleted from the website and all internal comms platforms within the hour."

360 That was untrue because the sequence of events, as we say in paragraphs 146-148 above, was that the claimant was cut off from the first respondent's internal communications platforms and had her staff email address deleted before she sent her email at pages 2825-2835 referred to in paragraph 148 in which the (veiled) assertion of sexual assault by Mr Hassan was made.

361 In addition, we could see no place where Mr Hassan had (as claimed in the third emboldened part of the passage of the claimant's email set out in paragraph 352 above) admitted in writing a "history of sexism, assault, and abuse".

362 There would in those circumstances in our view be no detrimental treatment within the meaning of section 27 of the EqA 2010 if the respondents simply responded in measured terms to the claimant's written assertions about them. The responses about which the claimant complained did not include one at page 2949 (so that that part of paragraph 144 of Ms Jennings' closing submissions was mistaken). There was an example of the statements that were made to those to whom the claimant had written at page 2942. It was sent by Ms Caldwell to Mr Ricigliano and Ms Grattan on 16 January 2018. It was in these terms.

> "Hi Rob and Karen,
>
> This is our statement re Chelsey.
>
> Chelsey Rhodes worked for Roller Strategies for 3 months in 2017 as a contractor. At the end of this period she was offered a contract with a pay rise which she refused to sign. She attempted to negotiate a pay increase citing pay equity issues escalating to harassment claims. We appointed lawyers who investigated. There is no merit to any of her claims. She repeatedly expressed how supported and cared for she felt during her time with us. We subsequently discovered that she is a serial litigator. We have spoken to previous employers who told us this is "a parallel case." We have considered taking legal action for extortion and defamation. Ultimately we feel that any such escalation is harmful to Ms Rhodes despite being in our interest. We are sad that such a breakdown has occurred despite our best efforts and care in trying to resolve this matter over the last four months. We will be taking no further action.
>
> Please let me know anything further you need from me to support this.
>
> Again, we are really sorry this issue has impacted TOG.
> Cari"

363 By the time that that statement was sent, Mr Hassan knew (see page 2424) that the claimant had on 3 October 2017 filed "the lawsuit" which she had been working on shortly before then. Page 2424 was part of a WhatsApp conversation between the claimant and Mr Hassan. At the bottom of the page the claimant wrote:

> "the lawsuit was served today. there's like a cascade of stuff stretching back to the ewb stuff and it all hit the fan in October".

364 The "ewb stuff" was, to the knowledge of Mr Hassan as shown by the document at page 2672, the subject of a settlement agreement. There, Mr Hassan wrote to Ms Caldwell on 7 October (the year was not stated; in the index it was said to have been 2017):

> "I'm talking to George Rotor tomorrow night
>
> He works for the Mozilla Foundation. Anyways I'll talk to him tomorrow. Personally sounds like nonsense to me. EWB and her signed a settlement. I spoke to the current CEO Boris and he said that she has violated the terms of their settlement a bunch of times in minor ways. I don't really think it makes any difference what she is claiming."

365 The following day, someone, and it appears that it was Mr Hassan, although he wrote in paragraph 150 of his witness statement that it was Ms Caldwell, wrote the text at page 2673. It was in these terms (which the claimant set out in paragraph 538 of her witness statement, saying that the message was sent by Mr Hassan to Ms Caldwell on 8 October 2017):

> "Hey just got off the phone with George. Basically he re-iterated what happened at EWB which is a consensual relationship. Apparently a year and a half after she stopped working for them they realized she had been overpaid and got in touch with her to ask about it and that when she said that she couldn't believe they were asking her and that she was harassed by Mike. They conducted an internal investigation - she declined to speak to the investigator - who are EWBs lawyers, the guy Russ I spoke to and then claimed the investigation was a cover up. So with George she has been sniping at him on twitter for a while. He said he has been ignoring it and also that it's gotten to the point where his employers are asking him about it. He also said that he plans to go back to Canada ... and that he can't just block her on twitter. He basically said that he wants to enter the public sector and that he has to deal with this. I told him my and our context, many similarities obviously. He said that a defamation suit in Canada has to demonstrate defamation ie her tweeting to her 500 followers isn't necessarily sufficient to damaging but that her sending the ET claim probably meets the criteria - also that it has to meet the criteria of being in the public good. The fact that this is the third time she has done it is likely to meet that criteria. We talked about not really wanting to go down that route and what she actually wants - and if there was any way of actually getting her what she wants. My opinion was that it's actually impossible and that there is probably no solution other than due process ie a lawsuit in Canada that gets to the point where she is liable for criminal charges which leads to her stopping. He said he is going to speak to his lawyer and get back to me later this week. That's it.
>
> Btw I am not in favour of the lawsuit route at all.
>
> It's an extremely ugly option. But curious what you all make of this update."

366 In paragraph 12 of his witness statement (which we have set out above in paragraph 70 above, but which we now repeat for the sake of convenience) Mr Hassan said this (and we accepted this evidence):

> "On May 15 [2017] I spoke to Mike Kang on the phone and informed him that we're hiring the Claimant for a short-term contract. Mr Kang warned me against this and wanted to give me details of what happened with the Claimant, but I said I didn't want to hear."

367 It was not in dispute that the claimant came to know Mr Kang while she and he worked for EWB. The claimant's own evidence on what happened after she had done so was in paragraph 15 of her witness statement, which was in these terms:

> "In 2013 I began speaking and writing more publicly about the problems with EWB, and other critics of the organization got in contact with me. This put pressure on EWB and they eventually arranged a mediation. They brought the 'independent investigator' Russell Groves as their counsel. They pressured me into a non-disclosure agreement in exchange for a $15,000CAD settlement, and assured me that they would address the organizational issues I had raised."

368 The claimant had already, by 16 January 2018, been making damaging statements about the first respondent (see paragraph 194 of Mr Hassan's witness statement, which we have set out in paragraph 155 above which, as we there, we accepted). By the time of the statement sent on 5 March 2018 the claimant had sent the emails to which we refer in paragraphs 352 and 353 above. In those circumstances, saying that the claimant was a serial litigator was mild in comparison with the strength of the claimant's assertions against Mr Hassan and even if the claimant had not actually made a claim against Mr Kang and EWB, she had plainly entered into a settlement agreement with them.

369 We concluded for the above reasons that what the respondents did which was the subject of the claims stated in issues 7.2.23 and 7.2.25 was not detrimental treatment within the meaning of section 27 of the EqA 2010. That was because

369.1 it was done in support of the respondents' position in advance of defending the claims made to this tribunal, and

369.2 it was a measured response to highly damaging (and as we have now found untrue) assertions made by the claimant about the respondents to these claims, and

369.3 it was a response to the manner in which the claimant had made the assertions to which the communications which were the subject of issues 7.2.23 and 7.2.25 responded.

370 Each of those three reasons was a sufficient answer to the claims stated as issues 7.2.23 and 7.2.25. In those circumstances, it was in our judgment not just and equitable to extend time for making them, and they were outside the tribunal's jurisdiction.

<u>Issue 7.2.24: 'On 15-16 January 2017 R2 emailed R3 about the 'Draft CR statement' referred to at 7.2.23 above, and cc'd R5 and Ms Caldwell the next day the following "I know we are defaming her by calling her a serial litigator but it's a calculated choice".'</u>

371 This claim added nothing to the claim stated as issue 7.2.25. We therefore concluded that it was not just and equitable to extend time for making it, and therefore it was outside the jurisdiction of the tribunal.

Issue 7.2.26: 'On 29 March 2018 R2 emailed R3, R5 and Ms Caldwell reminding them he'd had C diagnosed by Dr Claudia Herbert as borderline personality, narcissist and sociopath and that according to Dr Herbert there was no way of settling with C. R2 added that C was "*unemployable*", "*perfecting the art of being a victim*" and that approaching C to settle puts them in "*a ping pong match with a crazy person*". R2 then suggested that they should prepare and send C litigation papers in Canada and say they will file them if C does not settle and suggest "*We actively monitor her social media streams and maybe even pay someone to track her social media activity more tightly …. We may even want to take more aggressive action on this front just to send a signal pre-settlement*"'

372 In response to this claim, Ms Jennings said this in paragraph 146 of her closing submissions:

> 'The tribunal has had sight of this email at pp2971-4. Mr D did not say he had Ms AB diagnosed by Dr Herbert. The contents of that email are Mr D's opinion as to the reason for the situation regarding Ms AB's pay escalating. He says "Here are my notes on how I understand the situation and a proposal. Skip to the end of the email if you don't want any analysis". This email was Mr D "trying to make sense" of the situation and share his thoughts. He went on to set out his view as to the options going forward, including engaging in litigation in Canada. There is nothing to suggest this email was because of any alleged protected disclosure or act.'

373 We saw that among other things, Mr Hassan said this in his email at pages 2971-2974:

> 'I'm not trying to tar CR in any way. I'm just saying that this is the analysis that fits my experience most closely. And for all intents and purpose we might as well be dealing with this type of personality.
>
> In particular one of the claims made is that the best indicator of a sociopathic personality is the pity play.
>
> My experience of CR in this context is that she alternates between pity plays and attacks.
>
> Regardless I think it's helpful to know one more thing about sociopathic personalities that impacts this issues.
>
> There are always more than two people involved in sociopathic interactions. There's the sociopathic personality and the empath that's the target and what are referred to as "apaths'' (short for apathetic).

> Apaths are people that raise their hands and step back saying "I don't know," and they can't or won't understand what the empaths experience is. Their actions inadvertently reenforce the sociopaths claims. Sociopathic personalities go around the empaths circles to try to recruit apaths.
>
> So part of what I believe CR is doing is to try to recruit more and more apaths to side with her claims. And the more apaths she manages to recruit the more confusion she sows and the more control she exerts. The goal is to exert control more than anything else.
>
> According to Dr Claudia Herbert there is no way of settling with her.
>
> CH said that she craves control and a settlement means she loses control. She told me in October that any time we come close to a settlement the goal posts will change. This aligns with my experience of trying to settle with her twice now.
>
> The stream of demands that were made from October onwards represent some of the moving goalposts of demands that could be made on us should we try to negotiate a settlement.
>
> CHs advice was to ignore her saying engaging with her is "toxic and splitting" uh huh. This didn't work because it is now free to file an ET and she did.'

374 Plainly, what Mr Hassan did in sending the email was done in the course of responding to the claims before us (albeit as amended subsequently). What he did was either covered by litigation privilege or it was plainly not detrimental treatment within the meaning of section 27 of the EqA 2010. In those circumstances it was not just and equitable to extend time for making this part of the claim, and it was accordingly outside the jurisdiction of the tribunal.

<u>Issue 7.2.27: 'In January 2019 the R's contacted Medium and reported several pieces of C's writing for "copyright infringement" in order to have them removed, which impacted C's ability to get writing jobs. One of the articles was 'Ghosts of Systems Past' which had never been published becaused [sic] the R's deemed it below their standards (para 27 of GoR). R2 also previously said everything written for R1's blog was to be considered open source and creative commons.'</u>

375 The claimant was (we saw from page 3086) on 9 January 2019 informed by Medium that the "Ghosts of Systems Past" article "was reported as copyright infringement in accordance with the Digital Millennium Copyright Act" and that Medium had "removed the post."

376 The email which Mr Hassan sent seeking the article's removal was at pages 3095-3096. It sought the removal also of the claimant's report of 16 July 2017 at

pages 2675-2680 to which we refer in detail in paragraphs 130-134 above. It was in our view not detrimental treatment to seek the removal of that document. That is for the following reasons. The document accompanied the internet post at pages 2989-2999 to which we refer in paragraph 26 above and on page 2991, the claimant had written this in relation to the night of 10-11 July 2017:

> "That night in the room Zaid touched me without my consent in a way that amounted to sexual assault. Afterwards I cried and was clearly traumatized. Zaid seemed frightened and pleaded with me to stop crying, rubbing my back and saying 'Please, please.' I tried to pretend nothing bad had happened, and went to sleep."

377 In those circumstances, permitting the document at pages 2675-2680 (to which we re-referred ourselves when considering this issue) to remain on the post could have been seen as an implicit acceptance that there was sexism in the operations of the first respondent and by implication that Mr Hassan was sexist in practice.

378 We did not have a copy of the "Ghosts of Systems Past" document before us. We therefore could not judge to what extent permitting it to remain on the internet could have been used against Mr Hassan in the course of these proceedings.

379 The claimant knew how to make a claim on 9 January 2019 when she was informed about the removal of that article from her website post on Medium. She put no evidence before us to explain let alone justify her delay of 16 months in seeking permission to add a claim about that removal.

380 In those circumstances we concluded that it was not just and equitable to extend time for making the claim stated in issue 7.2.27, and it was therefore outside the jurisdiction of the tribunal.

The issue of whether or not the claimant was in breach of the restricted reporting and anonymity orders referred to in paragraph 3 above

381 While EJ Hawksworth had (as we say in paragraph 9 above) said that the question whether or not the claimant was at any time in breach of the restricted reporting and anonymity orders referred to in paragraph 3 above would be "considered at the full hearing", that was not a matter for us. Rather, it was a matter for determination by a magistrates' court in the event of a prosecution for a breach of section 11 of the Employment Tribunals Act 1996. We accordingly did not determine whether or not the claimant was in such breach.

In conclusion

382 In conclusion, none of the claimant's claims succeeded. We accordingly dismissed those which had not already been dismissed.

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Employment Judge Hyams

Date: 6 December 2021

SENT TO THE PARTIES ON

14/12/2021

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FOR THE TRIBUNAL OFFICE