EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100691/2017

Heard in Glasgow on 26 and 27 February 2018; 8,9,12 and 13 March 2018 and 1,2 and 3 May 2018, members' meetings 4 May and 12 June

Employment Judge: Robert Gall
Members: Elizabeth Farrell
John Hughes

Mrs Lisa Chalmers — **Claimant In Person**

Airpoint Ltd — **First Respondent Represented by> Mr D McKinnon - Solicitor**

Andrew Whyte — **Second Respondent Represented by:- Mr D McKinnon - Solicitor**

David Hughes — **Third Respondent Represented by:- Mr D McKinnon - Solicitor**

E.T. Z4 (WR)

Katy Marshall **Fourth Respondent**
Represented by:-
Mr D Mckinnon -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claim

(1) of discrimination, the protected characteristic being sex, under The Equality Act 2010, specifically Sections 13, 19, 26 and 27, is unsuccessful.

(2) of constructive unfair dismissal in terms of Section 95 (1) (c) of The Employment Rights Act 191 unsuccessful .

(3) for pay in respect of holidays accrued but untaken at time of termination of employment in ternis of the Working Time Regulations 1998 and in terms of the contract o. loyment, a term introduced by custom and practice, between Mrs Chalmers and the respondents is unsuccessful.

REASONS

1. This was a case heard over various days in Glasgow. Mrs Chalmers appeared on our own behalf. During her evidence in chief her son acted as a representative. He asked questions of her so that her evidence in chief could be obtained through that mechanism. Thereafter, whilst he observed the case, Mrs Chalmers conducted cross-examination of the respondents' witnesses. She also made submissions in support of case.

2. Mr MacKinnon appeared* for the respondents. The respondents led evidence from Mr Whyte, Mr Hughes and Ms Marshall.

3. It is relevant at this point to mention various parties who did not give evidence but were mentioned in evidence.

- David Horsley. He is now an employee of the respondents, having commenced employment 26 September 2016. Prior to that he had been involved with the respondents on a consultancy basis. His role is as IT manager.
- Hiten Parmar. He is a business developer with the respondents. He works in Leicester.
- Louis Middleton also works in sales for the respondents. He is the stepson of Mr Whyte.
- Adam Birr, a colleague of Mrs Chalmers and someone to whom she pointed as being a male comparator who had obtained training from the respondents when she had not as a female, she said.
- Gordon McAllister. A colleague of Mrs Chalmers.
- Anju Rajain. She and Mrs Chalmers were the two females who worked for the respondents.
- Mustafa Khan, who was a colleague of Mrs Chalmers.

4. Mrs Chalmers' case was that there had been acts of sex discrimination. Those acts were said to have constituted direct discrimination in terms of Section 13 of the Equality Act 2010 ("EQA"), indirect discrimination in terms of Section 19 of EQA, harassment in terms of Section 26 of EQA and victimisation In terms of Section 27 of EQA. Mrs Chalmers also said that she had resigned from employment in circumstances where she was entitled to do so. She advanced a claim of constructive unfair dismissal in terms of Section 95 (1) (4 of the Employment Rights Act W96 ("ERA">. She brought a claim against the limited company and also, in relation to discrimination, against Mr Whyte, Mr Hughes and Ms Marshall as individuals. The respondents denied that there had been any discriminatory actings. They

denied that there had been fundamental breach of contract entitling Mrs Chalmers to resign and successfully to claim constructive unfair dismissal.

5. The hearing was to deal only with liability. If Mrs Chalmers was successful, then a further hearing on remedy would take place.

6. The following are the relevant and essential facts as admitted or proved. References to the respondents are references to the first respondent, unless otherwise stated.

Background

7. Mrs Chalmers commenced work with the respondents on 5 January 2015. She was employed as business support manager. She carried out some work on HR for the respondents. That was however a small element of her role. Her hours of work were 8:30am until 13:30, between Monday and Friday. She resigned by letter of 3 March 2017. A copy of that letter appeared at pages 436 and 437 of the bundle.

8. The respondents work from two bases. One is in Leicester. One is in Glasgow. At the time when Mrs Chalmers was employed with the respondents, there were 15 people employed by the respondents. 11 of those were based in Glasgow. The majority of the staff, particularly in the Glasgow office, work as software developers. The respondents work with various customers, including in particular police forces throughout the UK. They provide the customers, including the police forces, with mobile apps for use to streamline jobs and gain efficiencies. The sales and marketing function of the respondents is based in Leicester. They have been trading since 2003.

9. There were two female employees of the respondents during the time of the employment of Mrs Chalmers. Mrs Chalmers was one, Anju Rajain was the other. Ms Rajain was a software developer.

10. Mr Whyte is the main driving force behind the respondents. He is the managing director and has been in that role since 2004. Mr Hughes was Mrs Chalmers' line manager. He has been employed by the respondents for some nine years. Ms Marshall is employed by Law At Work Ltd ("LAW"). She is an HR consultant. She assisted the respondents with investigation and determination of the grievance lodged by Mrs Chalmers.

11. The respondents' financial position in 2012 was such that they entered into a voluntary arrangement with their creditors. They survived this difficulty and remained in business. In 2015 and in 2016 their financial position was very difficult. The survival of the respondents as a company was in doubt during those years. Mr Whyte injected approximately £400,000 of his personal funds to keep the company alive. He gave personal guarantees in relation to liabilities of the respondents.

Payment of salary to Mrs Chalmers

12. A copy of the offer of employment to Mrs Chalmers made by the respondents on 22 December 2014 appeared at pages 266 to 268 of the bundle. At page 266 clause 3 appears. It states that:-

> *"Sa/aries are to be paid on or about 26 of each month to your nominated bank account. "*

13. Mrs Chalmers took up employment on this basis. During her time of employment with the respondents her salary was paid on 26 or 27 of the month save for two occasions. The two occasions in question were in March and August 2016. On both of those occasions the respondents made payment of salaries later than the 27 of the month. All employees were affected Uv the same way at those times ie that the salary for aU the employees was paid on the same date. Payment was made in March 2016 on 29 March. In August of that year payment was made on 30.

14. The respondents sent an email to their employees on 26 August 2016 explaining that there was going to be a delay in payment such that, with the bank holiday weekend involved, the funds would reach the bank account of each employee on 30 August.

15. The email from the respondents appeared page 204 of the bundle. It came from Mr Whyte. It said that if any issue was caused then any employee so affected could contact Mr Whyte who would arrange to talk to them individually. Mrs Chalmers did not reply to this email. Mr Khan made contact with Mr Whyte and explained that he had direct debits to be paid which were dependent upon funds being in his bank account prior to 30 August. Mr Whyte arranged that an advance of £500 was given to Mr Khan to meet the situation.

16. Due to limits imposed by the bank on the total payments permitted to be made by the respondents, salaries to employees often had to be paid in two tranches, some employees being paid in the first tranche, some in the second. The respondents determined who was in the first tranche and who was in the second tranche by reference to the date when an employee had joined the services. They paid in the first tranche those who had been employed longer than those who were in the second tranche. Ms. Rajain was in the first tranche. Mrs Chalmers was in the second tranche. There were male employees in each of the tranches of payment. Mr Whyte and his wife were generally paid in the second tranche at his instigation, although they were the longest serving employees. Occasionally they were paid as part of the first tranche. Mrs Chalmers did not know anything of payment in tranches when she resigned.

Finding in fact and law

17. The timing of payment of salary to Mrs Chalmers, other than in the months of August and March 201 6 was not a breach of contract by the respondents. The late payment in March and August was not an act of discrimination in that all members of staff, both male and female, were paid at the same time.

Mrs Chalmers being paid in the second tranche of payment was not an act of sex discrimination given that Ms Rajain was paid in the first tranche. Any claim founded upon an alleged breach of contract said to have occurred by the payment of salary by the respondents to Mrs Chalmers being late can only be founded upon the late payments made in March and August 2016. The claim being presented to the Tribunal was preceded by an application to ACAS for the Early Conciliation Certificate. That application to ACAS was made on 1 March 2017. The claim was presented to the Tribunal on 25 April 2017. If this was an act of discrimination, it has been brought out of time. Given the decision by the Tribunal that this was not an act of discrimination, any possible extension of time through that being viewed as being just and equitable or any argument that this act by the respondents was part of discriminatory conduct extending over a period, are not relevant matters. No evidence was advanced as to why it might be just and equitable to allow such a claim to proceed, if late. There was no basis advanced on which it was said to have been not reasonably practicable to have presented a claim of constructive unfair dismissal within three months of either of the late payments. The breach had in any event been affirmed.

Alleged Ostraclsatlon

18. On 27 October 2016 Mr Whyte sent an email to all staff stating that payment of salary would be made into their bank accounts during the course of that day. A copy of this email appeared at page 206 of the bundle. The email recognised that the contracts of employment with the employees referred to payment being made *"on or around* (sic) *26 of the month".* It recognised payment on 26 as being the aim of the respondents. It went on to say that if staff members had direct debits set to go out on 26 of the month that were dependent upon salary payments, it might be worth *"pushing them back a couple of days to allow for unseen delays with payroll"*. It also said that if anyone had any queries they should get in touch with Mr Whyte.

19. Mrs Chalmers replied to that email just over thirty minutes after it was sent to her. Her email read as follows: -

"Andy,

I find this response very disappointing. This continual waiting to be paid is stressful and demeaning. I am not willing to be put in the position of having to make special requests to receive my wages. I have earned them and expect (as I have a right to expect) payment in full on or before payday. I wish to register my disappointment with the continual late payment of my wages and to make clear that I don't find this acceptable. On or around the 26th has meant after the 26th or after banking hours in 16 of the 21 pay packets I have had at Airpoint. This doesn't work for me.

As you have made clear that this is how you intend to go on, I have no alternative than to consider my position."

20. Mrs Chalmers sent a copy of this email to her husband's email address and also to her home email address. This was as she considered it to be an important email.

21. Mr Whyte replied to the email from Mrs Chalmers at 13.47 on 27 October. He confirmed that money was now in Mrs Chalmers' bank. In that email he confirmed that he was available to discuss the position with Mrs Chalmers if she wished to do that. Mrs Chalmers replied by email of 28 October. She set out the dates of payment of salary to her. She stated that salary had been credited to her bank account on 27 of the month in each month between January 2015 and September 2016, save for payment in March 201 6 when payment was made on 29 of the month and in August 201 6 when payment was made on 30 of the month.

22. Mr Whyte was based in Leicester. He had contact with Mrs Chalmers as and when required. There was a weekly call, known as a "priorities call", between Glasgow and Leicester involving various parties including Mrs Chalmers and Mr Whyte. It was conducted by way of telephone conference call with there being no visual element to the call.

23. In the period November 2016 to end January 2017 there was more limited contact between Mrs Chalmers and Mr Whyte than had been the case in some previous periods. Although Mrs Chalmers viewed this as being a reaction by Mr Whyte to her email of 27 October referred to above, this was not so. In the period between November 2016 and end January 2017 Mr Whyte was occupied to a great extent by cash flow issues on the part of the respondents. He was concerned about a contract which the respondents had with Avon and Somerset Police which was potentially at risk due to circumstances within that police force. That was a substantial contract for the respondents. He was also concerned with putting together and submitting a tender to Kent police. That was another potentially large contract as far as the respondents were concerned. These elements all occupied his time and energy to a significant extent in the period mentioned. Mrs Chalmers was not involved with Mr Whyte in these areas of work. His contact with Mrs Chalmers was greatest when projects in which she was involved were active. That was not so at this point. There was nothing of significance which Mrs Chalmers sought to have Mr Whyte deal with in the period in question and which he ignored and, in particular, deliberately ignored. Insofar as he did not respond to any communication from Mrs Chalmers in this period, that was is due to pressure of other work, including pressures caused by the financial position of the respondents which was somewhat perilous.

24. When in Glasgow, Mr Whyte made contact with Mrs Chalmers. He did this ee 43 ~~December 201 6.~~ He enquired as to how she was -at that poinL He sought to meet with her to carry out a one-to-one ("121") on 14 and 15 December. Mrs Chalmers was unavailable to meet on those dates. He attended in Glasgow when the 121 with Mrs Chalmers took place on 12

January 2017. At that one-to-one, forthcoming work for Mrs Chalmers was discussed with her.

25. As mentioned, Mrs Chalmers' line manager was Mr Hughes. Mr Hughes is quite an intense focused individual. He can be perceived as being grumpy. He is not particularly "people focused".

26. Mrs Chalmers and Mr Hughes sat next to one another. There was no barrier whether by way of baffling or otherwise between their respective areas of desk.

27. There was a limited amount of "social chat" between Mrs Chalmers and Mr Hughes until around October 2016. Thereafter any such social chat diminished substantially. Interaction between them continued. It was however directed to dealing with work issues as they arose. Each regarded the other as being somewhat cooler towards them than they had been prior to this time. There remained contact between them however. Business issues were discussed between them in this time as and when required.

Finding In fact and law

28. Mrs Chalmers was not ostracised in the period between the end of October 2016 and her date of resignation. Any reduction in contact between her and Mr Whyte was due to a combination of the position in which the respondents and Mr Whyte found themselves financially and in relation to elements of current and potential work during that time. She was not ostracised by Mr Whyte or by Mr Hughes. Any reduction in contact between Mr Whyte and Mrs Chalmers or between Mr Hughes and Mrs Chalmers was unrelated to the protected characteristic of sex. It was not caused by or in any way linked to the fact that she had raised what she regarded a late payment of salary in October.

Client call with Hampshire and Thames Valley Police

29. Hiten Parnnar was the Account Manager in relation to a contract between the respondents and Hampshire and Thames Valley police. Calls took place between the respondents and those clients on a regular basis. They took place in the morning. Mrs Chalmers was able to be party to those calls due to them taking place in the morning. She ceased work at 1pm.

30. The client then altered their internal arrangements and wished to manage the call themselves. As a result, around 9 November 2016 they requested that the calls take place each Friday at 14.30. Mr Parmar explained to them the preference of the respondents which was that the calls remain timed for the morning when Mrs Chalmers could take part in them. The client however insisted that the calls were moved to the time in the afternoon as that suited them better. The respondents accepted that the clients had the right to choose the timing of the call and went along with the preference of the client. This meant that Mrs Chalmers could not take part in these calls.

Finding in fact and law In relation to alteration of time of client call

31. This was not an act of any of the respondents. None of the respondents initiated this change. For commercial reasons, the respondents agreed to the request of the client. There was no act of discrimination.

Priorities Call 2 December (Allegation by Mrs Chalmers that she was laughed at)

32. On 2 December 201 6 a priorities call took place. Mrs Chalmers participated. Mr Whyte also took part in this call.

22

33. Mrs Chalmers was the driving force behind a tax credit claim by the respondents in connection with research and development investment by them. It was anticipated that around £80,000 would be received by the

respondents. It had been hoped that the funds would be received in mid September 2016. They had not however materialised at that point. Receiving funds of that order was very important to the respondents given their perilous financial position.

34. During the priorities call Mrs Chalmers enquired as to progress with the tax reclaim. She asked for an update. Mr Whyte laughed. He then said that the matter was still with HMRC. His laughter was not directed towards Mrs Chalmers. Rather, it was a laugh of frustration or exasperation at the fact that the delay in having the claim dealt with and resolved was so extensive. Others who participated in this call did not notice laughter directed towards Mrs Chalmers nor did they feel awkward or embarrassed at any point during the course of this section of the call. The tax reclaim was ultimately obtained by the respondents in December 2017, the figure which they received been less than £20,000.

Finding in Fact and Law

35. There was in course of this telephone call no discriminatory conduct. The reaction of Mr Whyte to the topic being raised was not caused by or linked to the sex of Mrs Chalmers. He did not laugh at Mrs Chalmers.

Christmas Party 2016

36. The respondents organise a social occasion each Christmas. That has comprised those members of staff who were able so to do meeting for a drink and going together for a curry. It is not always been possible for all members of staff to attend. In 2015, for instance, Mr Whyte was unable to attend.

37. The respondents do not generally organise the Christmas event until quite close to the date when it may be held. They look to bring together for that event all staff if possible, including those based in Leicester.

38. During the course of the priorities call on Friday 2 December 2016 organisation of the Christmas party was mentioned. Mr Whyte said that he was to be in Glasgow between Monday 12 and Wednesday 14 December. Mr Whyte expressed a preference that the party be on Tuesday 13 December. There was no specific agreement that the party would take place that evening. That however was the favoured date. No one, including Mrs Chalmers, said during the course of the telephone call on 2 December that this date was not possible for them. Mr Hughes was asked to organise the party. It was not a task which he regarded as being a priority. He sent an email with a calendar invitation on the basis that the party would be on Tuesday 13 December.

39. Staff members replied to the invitation sent by Mr Hughes. He received those replies during the afternoon of 2 December and during the course of Monday 5 December.

40. In the interim, following upon the discussion on 2 December flights were booked for Mr Parmar and Mr Middleton from Leicester to Glasgow. They were to travel on the morning of 13 December. Those flights were booked in the afternoon of 2 December. Copies of the emails confirming the flights appeared at pages 212 and 213 of the bundle. Hotel bookings for the night of 13 December were also made for Mr Whyte, Mr Middleton and Mr Parmar. Those bookings were made in the evening of Monday 5 December, unknown at that point to Mr Hughes. All the relevant emails appeared at pages 214 to 219 of the bundle.

41. After those flights and hotel bookings had been made, and in course of catching up with emails late in the evening of 5 December, Mr Hughes co-ordinated the replies he had received to the calendar invitation he had sent on 2 December. Mrs Chalmers had said that she would not be able to attend on Tuesday 13 December but that she would be able to attend on Monday 12 December. Ms Rajain had replied stating that she would be able to be present from 7:30pm on 13 December due to another commitment and that she could attend the full evening if the party was held on Monday 12

December. Mr Horsley had said that he could attend on 13 December but had a preference for Monday 12 December. Mr Khan said that he would not be able to attend on 12 December but could attend on 13 December. All others were content with 13 December and were flexible in relation to Monday 12 December.

42. Mr Hughes summarised this information and sent an email to Mr Whyte timed at 23.04 on 5 December. A copy of that email appeared at page 220 of the bundle. By the time this email was sent, unknown to Mr Hughes, the flights and hotel bookings had been made. There had been no discussion between Mr Whyte and Mr Hughes in relation to the party or the date to be set for it after the priorities call but before this email was sent.

43. Mr Whyte saw the email from Mr Hughes on Tuesday 6 December. The flights which had been booked were for the morning of 13 December. As mentioned, those flights were for Mr Parmar and Mr Middleton. The hotel accommodation for those two gentlemen was booked for the evening of 13 December. Had the flights been rearranged, there would have been relatively significant expense for the respondents. Mr Whyte took the view that switching the party to Monday evening was not desirable. It would result in the party taking place on a day when he had set off extremely early in order to drive from Leicester to Glasgow. Rearrangement of flights and hotel accommodation would be required, with consequent expense. In addition he was aware that Mr Khan could not attend on Monday. Mr Whyte replied to the email from Mr Hughes of 5 December on 6 December at 07:18. That email said:-

> *7 thought we were all agreed on Tuesday so booked Louis and Hiten's flights and hotels.*
>
> *Travelling up on the Monday was over double the price.*
>
> *I'm booked in from Monday to Wednesday. Sorry that not everyone can make it but we have committed to the Tuesday. Hope that's okay."*

44. It then transpired that Ms Rajain was to be involved in transporting her son to an athletics event on 13 December. She therefore said that she could no longer attend the Christmas party.

45. By email of 7 December Mr Whyte sent Mrs Chalmers and Ms Rajain a copy of his email of 6 December sent to Mr Hughes and set out above. He said that he was not aware that his email had not been communicated. He went on to say:-

> "I'm *really sorry if this means you are not able to attend but as you can see we have committed significant cost to getting us all together on Tuesday have understood you were also available (sic). I'll see you on Monday and will bring some mince pies to get into the Christmas spirit!"*

46. Mr McAllister sent an email on 8 December to Mr Whyte and Mr Hughes in relation to Christmas party. He said: - ,

> *"How about we go out for lunch on Wednesday instead?*
>
> *Nothing is booked yet and everyone is in Wed lunchtime, (although I'm not sure when Hiten and Louis are flying out)*
>
> *And for those who want to go out for an Xmas drink on Tuesday night they can!"*

47. Mr Whyte replied: -

> *"Can we stick to a night out on Tuesday please?*
>
> *"I don't think we have enough time to take time out on Wednesday as we have a lot of product and project discussion to get through whilst Hiten and Louis are in Glasgow*

I'll work through an agenda for the 3 days but despite adding time in I think it's still going to be intense!"

48. A copy of that email exchange between Mr McAllister and Mr Whyte appears at page 223 of the bundle.

49. Mr Whyte decided that to change the Christmas night out to Wednesday lunchtime would see unacceptable inroads being made into working time at a point when there was a lot of work to get through. The decision he reached was that the Christmas party would proceed on Tuesday 13 December. It did proceed on that evening. As had occurred in previous years, those who were available to attend met for a drink and went on for a curry to the same venue as had been the case in the preceding year.

50. On 12 December Mr Whyte arrived in Glasgow between 10am and 10:30am, having driven from Leicester. He greeted the staff in general and said that he planned to carry out 121s with everyone that afternoon. Mrs Chalmers however did not work in the afternoon.

51. On the morning of 13 December Mr Whyte was in Glasgow. He approached Mrs Chalmers. He asked her how she was. Mrs Chalmers said that she was not particularly happy as she felt ignored and undermined. Mr Whyte said that he was not ignoring her but rather had been very busy. Mrs Chalmers said that he had managed to have contact with others. Mr Whyte said that there was nothing he could say to that. Mr Whyte then said to Mrs Chalmers that it was a pity about the Christmas party, referring to her inability to attend it. Mrs Chalmers said she was very disappointed about that. The discussion took place in the open office, although it was prior to others arriving. Mr Whyte said at that point that it was *"just the way it is"* He said this as he did not wish to get into an argument or further discussion about the matter at that point. He was conscious that he had seen some people to carry out 121s and was looking to meet with Mrs Chalmers for that purpose. Mrs Chalmers did not pass any remark as to her view being at that holding the Christmas party in circumstances where she and Ms Rajain as

the two female members of staff were unable to attend it would potentially be discriminatory. Had she made such a statement Mr Whyte would have taken HR or legal advice upon the point. At an earlier stage in her employment Mrs Chalmers had raised with Mr Whyte the potential for a reasonable adjustment. At that point Mr Whyte took advice.

52. There were no women present at the Christmas event, notwithstanding Ms Rajain having initially been free to attend for the meal, as the circumstances of Ms Rajain changed, as mentioned above.

53. On Wednesday 14 December Mrs Chalmers was working from home. Mr Whyte became aware of that. He was therefore unable to hold the 121 on Wednesday. He assumed that Mrs Chalmers would be present in the office on Thursday 16 December. He stayed on in Glasgow and came into the office on Thursday 16 December intending, amongst other matters, to meet with Mrs Chalmers for her 121. It was not specifically scheduled for 16 December as any 121 with a member of staff was organised on a pretty informal basis as work circumstances permitted. The 121 with Mrs Chalmers did not happen on 16 December as Mrs Chalmers was not present in the office that day. Mrs Chalmers and Mr Whyte met for her 121 on 12 January 2017 in Glasgow.

Finding In Fact and Law

54. The decision to set the date for the Christmas party so that it took place on Tuesday 13 December was not an act of discrimination of any type. The decision to adhere to the date of Tuesday 13 December was similarly not an act of discrimination of any type.

Proposed Hardware Refresh

55. Over a two-year period the respondents had considered upgrading PCs in the office. The majority of the respondents' employees are software

developers. The respondents were of the view that those employees were being impaired in carrying out the function by the age and performance of PCs currently in place.

56. A review was undertaken and specification provided in December 2016. Prior to that in the previous two reviews Mrs Chalmers had been included and was due to receive a new PC in line with developers. Funds however had not appeared and the proposals could not be carried out for that reason. A further review was carried out therefore in December 2016 in relation to possible hardware refresh. David Horsley had responsibility for the IT infrastructure. He was tasked with determining what the appropriate specification might be for new PCs. It was recognised that there would be a cost associated with this refresh. The view of the respondents was that if there were gains or benefits to productivity of the software developments, the hardware refresh should take place. Those considerations of costs as against gains or benefits from any refresh also applied to other users within the respondents' organisation, such as Mrs Chalmers. The respondents decided, reasonably, to give priority to purchasing and supplying new computer equipment to employees who were software developers.

57. Mr Horsley and Mr Hughes were not part of the group of software developers. It was therefore determined that they would not receive the same specification as would the software developers. Mrs Chalmers similarly was not a software developer. The result of the survey by Mr Horsley was the suggestion made in relation to Mrs Chalmers that she receive a better performing PC but that there was no requirement to have the same level of hardware as the software developers were to have. Mrs Chalmers would have a significant and powerful computer as part of the proposed refresh.

58. On 19 December 2016 Mrs Chalmers met with Mr Hughes and Mr Horsley. Mrs Chalmers was disappointed at the proposal made in relation to her own PC. She said she wished a laptop. She said she required to have sole use of a laptop rather than to share a laptop. This was as she was concerned

about hygiene. Mr Hughes suggested use of cleaning materials for laptops. Mrs Chalmers was not happy about that. It was suggested that the best of the hardware no longer required by developers if the refresh went ahead could then be used by Mrs Chalmers. She was not happy about that suggestion. She explained difficulties which she was having with use of her computer as it was. She said that it crashed on a regular basis and also froze regularly. She explained as to the memory of a computer required by her and that she used spreadsheets.

59. Mr Hughes and Mr Horsley were concerned that Mrs Chalmers might be emphasising any difficulties which she was having as a means of trying to press her case for a new PC or update in software. As funds were in tight supply, the respondents had concluded that they would respond to need as they saw it rather than to agree to the view of any particular employee simply as that employee was unhappy or was assertive in support of their own position.

60. Mr Horsley and Mr Hughes wished to ascertain what the nature was of the problems which Mrs Chalmers had referred to, namely her computer freezing and crashing. It is a generally recommended step in that circumstance that the use made of the computer experiencing that problem is analysed through accessing monitoring software. This might reveal issues with use or with programs being run. It would help determine the nature and extent of any issue. It would also allow assessment of the use made of the computer by Mrs Chalmers and therefore potentially what use might be required by her in the future. It would help establish the extent and authenticity of difficulties Mrs Chalmers said she was experiencing.

61. Mr Hughes and Mr Horsley said to Mrs Chalmers that they would put monitoring software onto her then current computer. Mrs Chalmers was unhappy about this. Her view was that lots of employees complained and indeed that the respondents encouraged employees to report any computer issues to them. She regarded herself as being subjected to monitoring because she had complained. The monitoring was however in order to

establish the nature and extent of any difficulty being experienced by Mrs Chalmers with her computer in order that consideration could be given to its resolution, whether by replacement or substitution of a PC or otherwise.

62. As it transpired, just as with previously scoped refreshes, the refresh being discussed at the end of 2016 did not in fact proceed as there were insufficient funds to enable it to be carried out.

63. After the meeting on 19 December Mrs Chalmers had little, if any, social interaction with Mr Hughes. Formerly she had spoken across the desk to him from time to time. That no longer occurred. Any discussions or dialogue between Mr Hughes and Mrs Chalmers were limited to business matters and were as and when required. The relationship became somewhat frosty. Mr Hughes said to Mr Whyte around this time that he was experiencing difficulty as there had been what he regarded as a marked change in Mrs Chalmers' behaviour towards him. Mr Whyte said to continue as things were and it would then be seen if this would pass.

64. Mr Hughes was absent from work between Christmas and New Year holiday purposes. He returned after New Year and met with Mrs Chalmers on 9 January 2017.

Finding In Fact and Law

65. The decision in December of 2016 not to include Mrs Chalmers in the group of employees to receive a hardware refresh was not a discriminatory act of any type by or involving any of the respondents.

Fridge

66. Mrs Chalmers met with Mr Hughes on 9 January 2017 to discuss work and any other issues.

67. One of Mrs Chalmers' responsibilities was organising the work of the cleaners of the office and liaising with them.

68. Prior to the Christmas break Mr Hughes had been concerned to note that the door of the fridge would not close as it was frosted over. He was of the view that the fridge required to be cleaned. He was aware that Mrs Chalmers was the person who dealt with the cleaners. He therefore raised this topic with Mrs Chalmers and asked that she organise cleaning of the fridge.

69. Mrs Chalmers duly spoke to the cleaners and organised with them the cleaning of the fridge.

70. When this had occurred, Mr Hughes was of the view that the appropriate standard of cleanliness had not been achieved. He spoke with Mrs Chalmers around 20 January 2017. He asked Mrs Chalmers whether he had missed the cleaners attending or whether indeed they had been to clean the fridge at all. He did not expect Mrs Chalmers to clean the fridge nor it did he suggest that at anytime. Mrs Chalmers duly organised attention from the cleaners to ensure that the fridge was appropriately cleaned. The interaction between Mrs Chalmers and Mr Hughes in relation to this matter was functional and business-like.

Finding in Fact and Law

71. There was no act of discrimination in relation to the fridge cleaning, whether in relation to the request to organise that or in relation to the request to ensure that the standard of work by the cleaners was adequate.

Clear-Up of Older Mobile Phones

72. The respondents had in their possession a number of older mobile phones. Mr Horsley was in charge of IT. These mobile phones were not being

utilised by the respondents and were not in fact their property. They belonged to various police forces who were customers of the respondents.

73. Mrs Chalmers was the only dedicated administrative support person based in the respondents' office in Glasgow. One of her roles was to liaise with customers. The phones in question required either to be recycled or potentially returned to their owners. Mrs Chalmers had some knowledge of clients, and contact within clients, which made her involvement in this role of contacting the customers in relation to this project appropriate.

74. At the meeting on 9 January 2017 Mr Hughes asked Mrs Chalmers to establish who some of the phones should be sent to and to where they should be sent. As it transpired, Mr Horsley had some information upon this point which he passed to Mr Hughes. Mr Hughes did not transmit that information to Mrs Chalmers and she was not therefore able to complete this task. Mr Horsely completed it.

Finding In Fact and Law

75. There was no discriminatory act in this request of Mrs Chalmers made by Mr Hughes.

121 between Mrs Chalmers and Mr Whyte,

76. Prior to Christmas at the time when Mr Whyte was in the Glasgow office he had, in addressing staff, gone through a slide presentation. Mrs Chalmers however had not been present at that time. Mr Hughes had however gone through the slides with Mrs Chalmers after that. As set out above, the 121 between Mrs Chalmers and Mr Whyte had not taken place prior to Christmas. Mr Whyte however remained keen to hold that 121 with Mrs Chalmers and to go over with her proposed projects, including one related to monitoring and measuring of productivity. Mrs Chalmers was interested in participating in and helping with delivery of this proposed project.

77. A 121 was arranged between Mrs Chalmers and Mr Whyte for 12 January 2017.

78. At this 121 Mrs Chalmers informed Mr Whyte that she was upset at the way she felt she had been treated by Mr Hughes. She said to Mr Whyte that she felt demeaned and that she had been asked to undertake projects which she found demeaning. She referred to the request made to her to organise return of the mobile phones to the appropriate police forces. She said that she was not happy that she had been asked to manage the cleaning of the fridge. She said that in the latter conversation when Mr Hughes asked to organise cleaning of the fridge it had been, in her view, "on the tip of his tongue" to ask her to clean the fridge herself. She was also unhappy that Mr Hughes regarded the cleaning of the fridges as having been done unsatisfactorily and that he had spoken to her a number of times to try to ensure that the cleaning was appropriately carried out. She said to Mr Whyte that she felt berated by Mr Hughes.

79. Mrs Chalmers also said to Mr Whyte that Mr Hughes had made derogatory remarks about women project managers and that she had been offended by that. In fact however, Mr Hughes complained about the work of project managers in general. He regarded them as not understanding or appreciating the IT or software side of the job with which the respondents were tasked in contracts. Some of the project managers happened to be female. His criticisms or frustrations were not however directed exclusively or in the main against female project managers. They were directed against project managers irrespective of sex. On one occasion Mr Hughes had been critical in a meeting of people within Avon and Somerset Police who were dealing with a particular matter. He regarded them as going against his advice. He voiced his opinion. His issue was however with the position of the client, who happened to be represented by a woman, rather than being an issue because of or associated with the fact that the representative was female.

80. There was also in the 121 a general discussion as to wage costs. Mr Whyte said to Mrs Chalmers, as he had said to others at different times, that the team were expensive. His view was that he could out-source the work which his team carried out but that he had a productive, highly skilled team, albeit an expensive one. That was however his preferred situation.

Allegation of General Attitude of David Hughes towards Women

81. Mrs Chalmers said in her 121 to Mr Whyte that her view was that Mr Hughes was sexist. At this meeting, Mrs Chalmers was upset. At its conclusion, Mr Whyte said he would tackle this with Mr Hughes.

Actings of Mr Whyte following 121 with Mrs Chalmers

82. After the 121 between Mr Whyte and Mrs Chalmers Mr Whyte met with Mr Hughes. He raised with Mr Hughes the views expressed by Mrs Chalmers as to Mr Hughes' attitude towards women in general, his approach to Mrs Chalmers in relation to the cleaning of the fridge and his attitude, as Mrs Chalmers perceived it, to female project managers. He had this conversation with Mr Hughes the same day he had met with Mrs Chalmers.

83. Mr Hughes was astounded and shocked that Mrs Chalmers held this view. He explained the reasons why he had asked Mrs Chalmers to organise cleaning of the fridge. He denied that it was on the tip of his tongue to ask Mrs Chalmers to clean the fridge herself. He said that whilst he was irritated and frustrated from time to time by the views of project managers and their demands, the comments he made were not directed at females but rather at those who held the position of project manager. He accepted that he had "vented" in the office about project managers if views expressed by them in his view risked failure in the project.

84. Having met with Mr Hughes on 12 January, and having heard his explanation and answer to the points raised by Mrs Chalmers, Mr Whyte was unsure as to what to do next with the complaint of Mrs Chalmers. He

did not report back to Mrs Chalmers following his meeting with Mr Hughes. He had not reported to Mrs Chalmers on that meeting prior to Mrs Chalmers lodging her grievance on 27 January.

Salary review

85. Mrs Chalmers' contract of employment states in paragraph 3 the following:-

"Performance and salary reviews take place annually in autumn each year with effect from the following January. The award of and amount of any salary increase will be at the discretion of Airpoint Ltd."

86. When Mrs Chalmers commenced employment with the respondents she negotiated her salary with them. On the basis of working five mornings per week, the respondents proposed a salary of £16,666 per annum. Mrs Chalmers negotiated this such that the figure ultimately agreed was £19,000 per annum.

87. The respondents struggled to survive in the period to 2017. There been considerations in particular approximately half way through 2016 as to possible redundancies within their staff. The accountant for the respondents had urged Mr Whyte to make some redundancies. Mrs Chalmers' position was mentioned in that regard. Mr Whyte had resisted there being any such redundancies, including therefore the potential redundancy of Mrs Chalmers.

88. The respondents had not given pay rises for some four years prior to January 2017. They were concerned to retain good software developers and the team which they had in place at that point. Mr Whyte therefore met on 12 January 2017 with a recruitment consultant, Mr Brown ± with whom he discussed whether salaries should be adjusted. This comprised a review of salaries. It extended to discussion of the salary paid to Mrs Chalmers.

89. On this review, it was determined that Mrs Chalmers would not receive an increase. The view which Mr Whyte took, after discussion with Mr Brown, was that Mrs Chalmers' salary was at or above market level. Mr Horsley also did not receive a salary increase. He had re-joined the respondents in 2016. The view taken, upon review, was that it was not appropriate to increase his salary at that point. The view was also taken that it was not appropriate to increase the salary for Hiten Parmar having reviewed his position.

90. Mr Whyte's view, as previously mentioned, was that the team which he had employed was expensive. His opinion was that he could out source the work carried out in particular by software engineers at a reduced cost, approximately half the wages which he paid to staff. He made that comment on occasion. He also set out his view however that it was worth retaining good staff by making payment at the rate at which staff were then paid. Mr Whyte did not comment to Mrs Chalmers that he could obtain someone to do her work, saying that this involved completion of absence sheets, at half her salary. Mrs Chalmers' role extended beyond that function. She was valued by the respondents who intended that she continue working for them. When Mr Whyte met with Mrs Chalmers for the 121 on 12 January 2017 he discussed with her a particular project being work to be carried out by Mrs Chalmers. Mrs Chalmers was happy with this proposed work. She did not however commence that role due to events set out in this Judgment and her absence on sick leave from 27 January 2017.

91. Since her resignation, the respondents have replaced Mrs Chalmers in her role as business support and office manager. HR was an element of the workload of Mrs Chalmers when employed by the respondents. It was not a particularly meaningful or a large element of workload. The respondents now obtain HR advice from LAW.

92. Decisions, upon review, of salary of personnel within the respondents were taken looking to market conditions, the financial position within the

respondents and salary levels in the marketplace for the post occupied by the particular individual.

Finding In Fact and Law

93. The decision of the respondents that, upon review, the salary of Mrs Chalmers would remain as it had been prior to review in January 2017, was not an act of discrimination. It was not, in particular a "punishment" for Mrs Chalmers raising any complaint or concern about the timing of payment of wages.

Training Course Proposal ■Seminar

94. In course of the 121 Mr Whyte had talked with Mrs Chalmers about seeking an uplift in performance from employees within the respondents, particularly in light of the investment in hardware and software which was being contemplated.

95. By email of 13 January 2017 Mrs Chalmers received an invitation to a briefing for business owners from Peninsula HR. Managing performance was one of the elements to be covered in the seminar. The seminar was scheduled for 25 January, was to last for a half day and was free.

96. The procedure to be followed in relation to attendance at any such seminar was that Mrs Chalmers would seek consent of her line manager, Mr Hughes, to attend.

97. By email of 13 January 201 7, Mrs Chalmers emailed Mr Hughes. The email stated that she had been invited to the seminar and that she would like to attend it. It went on to say: -

"It covers some things like contract changes that may be needed for the performance assessments that Andy wants to introduce.

Thanks

Lisa"

98. Mrs Chalmers heard nothing in response from Mr Hughes. Mrs Chalmers did not raise the fact that Mr Hughes had not replied to her with him. She did not send him a reminder email. She did not speak to him about this topic. She sat some 4 feet from Mr Hughes unseparated by any partitioning or baffling.

99. Mr Hughes receives a substantial volume of emails each day. He had overlooked this particular email. He did not intentionally ignore it

100. On 23 January Mrs Chalmers emailed Mr Whyte. That email read: -

"hi Andy,

I've been invited to this free HR seminar and would like to go as it covers contract changes and performance management that should be useful.

I've had no reply from David and it is on Wed, can I go please?

Thanks

Lisa"

Mr Whyte did not reply.

101. A copy of these emails appears at pages 248 to 251 of the bundle.

102. By email of 25 January Mrs Chalmers wrote to Mr Hughes, copying Mr Whyte. She deliberately made the heading of that email *"Investing in Glasgow's Digital Future"* as she believed it would catch the eye of Mr Hughes and that he would therefore open it and read it. The heading on the

emails in relation to the Peninsula Seminar had been *"Peninsula HR Seminar January 25, 2017 - Golden Jubilee Conference Hotel - Glasgow"*

103. Mrs Chalmers' email of 25 January, timed at 12:49, said

"Hi All,

I have been invited to this business breakfast next week and would like to attend. There is no cost. I missed out on completely free HR training today on performance management that would have been extremely useful to my role because both of my requests for your permission to attend received no response whatsoever.

To prevent this happening again, I will assume that it is fine for me to attend unless I hear otherwise from you.

Thanks

Lisa"

104. The following day at 16:23 Mr Hughes sent an email to Mr Whyte in relation to the email of the preceding day from Mrs Chalmers. He said he planned to send an email back to Mrs Chalmers. He set out the terms of that proposed reply. He sought confirmation from Mr Whyte that Mr Whyte was happy that what Mr Hughes was saying in the email was appropriate.

105. By email timed at 16:39 on 26 January, Mr Whyte replied to Mr Hughes stating that he was happy with his proposed email. He went on to say to Mr Hughes that he had not responded to the email from Mrs Chalmers on the same subject *"as I assumed she would talk to you. Probably best to talk to her as well."*

106. The email which Mr Hughes then sent to Mrs Chalmers read:-

"Hi Lisa,

Sorry I missed your email from the 13th about the HR seminar yesterday. As you know I have been quite busy and as we sit next to each other, I would expect you to raise anything that I have not had time to address on email in person. As you know I am always happy to make time to talk over anything that needs my attention.

Regarding the business breakfast next week please could you give me some more information about what it is about and how it will help you?

Please don't assume it is fine for you to attend meetings out of the office without getting confirmation. If you need something from me that I have not had time to review in email please ask me in person."

A copy of these emails appears at page 252 of the bundle.

107. A colleague of Mrs Chalmers, Adam Birr, was requested by the respondents to attend a course in January 2017. This came about in circumstances where Mr Whyte had reviewed the requirements which were being placed upon the respondents in submitting bids for work. Mr Whyte had sent to Mr Hughes on 12 November 2016 an email which appeared at page 210 of the bundle. That set out the possibility that ISO certification would be required by the respondents. Mr Birr was mentioned as being someone who might lead, in the view of Mr Whyte, on compliance, service management, support and in- service delivery. Mr Whyte set out his thinking that Mr Hughes could focus on new functionality, projects and new customer implementation. Mr McAllister could focus on creating the product.

108. It was pursuant to this line of thought that discussion took place between the respondents and Mr Birr in relation to his attendance at an ITIL foundation course. The booking followed a discussion with Mr Birr at his 121. There was a cost to the respondents in booking a place on the course for Mr Birr, that cost being £500.

Finding In Fact and Law

109. The absence of reply to Mrs Chalmers in response to her request to attend the free seminar with Peninsula came about as a result of an oversight by Mr Hughes in that he did not see or absorb the content of email and did not reply to it. There was no discriminatory act or omission. The fact that Mr Birr went on a course was unrelated to the fact that he is a man, just as the oversight of the email from Mrs Chalmers was unconnected with the fact that Mrs Chalmers is female.

Grievance

110. In response to the email set out above which Mr Hughes sent to Mrs Chalmers on 26 January regarding her proposed attendance at the breakfast seminar, Mrs Chalmers sent to Mr Hughes an email on 27 January timed at 07:53. She copied that email to Mr Whyte. The email read:-

"David,

Thanks for your reply. As you say, you are busy, as are we all. However you did find time to castigate me on the state of the fridge cleaning 4 days in a row, but not answer any of my work emails.

I do not find you approachable of late, your manner is aggressive and unhelpful. As such, I prefer to have a written record of work instructions.

My work is mostly ignored and I have been excluded both from the Christmas night out and from the hardware refresh, neither of which is acceptable to me and both of which may be discriminatory.

It is a great pity that I'm being asked to work under such unprofessional conditions.

> As *such, please regard this email as an official grievance and kindly inform me of the process to take this further"*

A copy of this email appears at page 255 of the bundle.

111. Soon after receiving this email Mr Whyte telephoned Mrs Chalmers. He was annoyed by the terms of the grievance. He was to a degree frustrated and irritated. In particular this was due to his view that as Mrs Chalmers sat next to Mr Hughes she should be able to talk with him about a matter such as her potential attendance at the free seminar. It seemed unreasonable to Mr Whyte that Mrs Chalmers had not spoken to Mr Hughes in relation to attendance at the seminar and obtaining a reply to her email.

112. Notes taken by Mrs Chalmers around the time of the call between herself and Mr Whyte appeared at pages 258 to 260 of the bundle. Mr Whyte's recollection of the telephone call appears in the notes taken of an interview with him by Ms Marshall, those notes appearing, in relation to this aspect, at page 372 of the bundle.

113. In course of the call Mrs Chalmers reiterated that in her view Mr Hughes was being nasty and disrespectful and unpleasant towards her and that she had told Mr Whyte that Mr Hughes had a problem with women, including female project managers. She went over with Mr Whyte the fact that she had told him that in her view Mr Hughes was trying to bully her over the fridge cleaning. She said to Mr Whyte that Mr Whyte had said that he would investigate these matters and come back to her. She asked Mr Whyte what he had done about it. Mr Whyte said that he was uncertain as to what to do about it. He had by this time spoken with Mr Hughes but had not taken the matter further in any regard. Mrs Chalmers raised the issue she had with the Christmas party and the computer refresh. Mr Whyte said that in his view Mr Hughes was perfectly reasonable and had never been aggressive or a bully in all the years that Mr Whyte had worked with Mr Hughes. Mr Whyte stated that he had never seen any behaviour of that type from Mr

Hughes. Mrs Chalmers replied that it might be the case that Mr Whyte wished to *"get rid of* Mrs Chalmers as an employee. Mr Whyte stated that that was not so and that if he had wanted to get rid of Mrs Chalmers he would have taken that step in the summer. He said to Mrs Chalmers that he had been *"working my bollocks off to try to keep the team together, including you"* for 2 years. Mr Whyte did not wish Mrs Chalmers to resign. The call concluded with Mr Whyte saying he would need to take advice in relation to the grievance lodged by Mrs Chalmers.

114. When the call finished, Mrs Chalmers was upset. Mr McAllister had appeared in the office by that point. He noticed Mrs Chalmers was upset and offered to go for coffee with Mrs Chalmers to talk about this.

115. In course of that coffee with Mr McAllister, Mrs Chalmers mentioned a few things which had made her upset. She said to Mr McAllister that one of those was that Mr Whyte had said he could find someone at half the price of Mrs Chalmers. Mr McAllister was aware that Mr Whyte would sometimes make a comment on the basis that he could find developers to do the job of those currently employed by him more cheaply, going on to say that there was no way that he would do that as he was investing in the team. Mr McAllister could see how a comment such as that was open to interpretation. The view which Mr McAllister had was that anything which had been said to Mrs Chalmers as she relayed that to him was not anything other than thoughtlessness. He said that to Mrs Chalmers. These comments of Mr McAllister are narrated in the notes of the interview which he had with Ms Marshall, those notes appearing at pages 323 to 325 of the bundle. A copy of those notes was sent to Mr McAllister. He did not reply to the email inviting his comments upon those notes, whether revising them, taking exception to them or agreeing them.

Finding in Fact and Law

116. The reaction of Mr Whyte to submission by Mrs Chalmers of the grievance was not an act of discrimination of any type.

Allegation of smirking

117. When Mr McAllister and Mrs Chalmers returned to the office after coffee, the regularly held priorities call was in progress. Mrs Chalmers entered the room where the staff in Glasgow who were participating in the call were present. Mr Hughes was there. Mrs Chalmers was conscious that she had been crying and that, in her view, that might have shown itself in her face which she regarded as being red. As Mrs Chalmers entered the room where the call was taking place, Mr Hughes noticed her arrival. He acknowledged that through a nod or smile. Mrs Chalmers regarded Mr Hughes as having smirked at her. He did not.

118. After a further 10 minutes, Mrs Chalmers left the call while it was still in progress. She collected personal items from her desk and from the kitchen. She left the respondents* office to go home. Prior to so doing she sent an email to Mr Whyte. A copy of that email appeared at page 257 of the bundle. It read:-

"Andy,

I am too upset at the treatment I have received this morning and rm going home. This whole incident has been stressful and unfair and as you know, I cannot take risks with my disability"

119. Mrs Chalmers was then absent from work through ill health from that time until time of her resignation and termination of her employment, that resignation being by letter of 3 March 2017 from Mrs Chalmers. A copy of her letter of resignation appeared pages 436 and 47 of the bundle.

Grievance Investigation

120. Mr Whyte considered the fact that Mrs Chalmers had lodged a grievance. He decided that it was appropriate that a third party be involved in handling

the grievance. He instructed LAW to carry out the investigation. He also confirmed to LAW that LAW was to determine the outcome of the grievance.

121. Katy Marshall was the member of the LAW team appointed to deal with investigation of the grievance and to decide its outcome. She did this independently, collecting statements from those who she considered could assist based on her own consideration of the grievance and the statement of Mrs Chalmers as given to her. She obtained documentation as she considered appropriate in order to consider that as part of the grievance.

122. Ms Marshall firstly met with Mrs Chalmers. She met with her on 13 February 201 7. No other person was present at the meeting. Mrs Chalmers had been given the opportunity to be accompanied. Her proposed companion was unavailable to attend, however. Mrs Chalmers chose to proceed with the meeting notwithstanding that.

123. Mrs Chalmers recorded this meeting, unknown to Ms Marshall. She made no comment to Ms Marshall about recording the meeting nor did she reveal that she had recorded of the meeting until after Ms Marshall supplied Mrs Chalmers with her notes of the meeting. Ms Marshall explained at commencement of the meeting that she would be taking notes, typing as the meeting progressed and that she would produce a summary of the meeting rather than a verbatim record of it. She confirmed that she would send that to Mrs Chalmers in order that Mrs Chalmers could read through the notes, adding anything she wished to add in or anything which she felt Ms Marshall should have put in the notes but had not. A copy of the notes prepared by Ms Marshall appeared at pages 302 to 310 of the bundle. A copy of the notes prepared from the tape-recording by Mrs Chalmers appeared at pages 336 to 356 of the bundle. Mrs Chalmers highlighted differences between the tape-recorded record of the meeting as transcribed by her and the notes as prepared by Ms Marshall. She added her own comments on any differences. The result of Mrs Chalmers' comparison between the notes of

Ms Marshall and the recording of the meeting and her categorisation of any differences appeared at pages 135 to 160 of the bundle.

124. Ms Marshall captured the points being made by Mrs Chalmers in her grievance and summarised them such that she had the important and relevant information provided by Mrs Chalmers noted down in order to be able to assess the validity of the different elements in the grievance. Insofar as there were any omissions or summaries provided by Ms Marshall in her notes which were not in Mrs Chalmers' view reflective of the emphasis which Mrs Chalmers placed upon matters, those were not critical to the assessment made by Ms Marshall or to the outcome of the grievance.

125. Mrs Chalmers sent to Ms Marshall on 20 February 201 7 the version of the notes which she had prepared. Her email in that regard read:-

> *"It has taken me 15 hours (3 full working days) to make the corrections necessary to transform your purportedly "impartial" and "professional" version of this grievance hearing record into one that is factually accurate".*
>
> ***Not one of the 1303 (One thousand three hundred and three) errors, omissions, or complete inventions that I was required to correct was In my favour.***
>
> *I do not find the imposition of a full 3 days of work when I am medically unfit to work to be an acceptable or reasonable burden to have placed upon me, especially when the taking of an accurate record was offered by you as part of your service. I was left with no alternative than to undertake this major task or risk having a completely inaccurate and unrepresentative record of the hearing stand.*
>
> *I consider this misrepresentation to have been a cynical ploy, calculated to take advantage both of the fact that I was unrepresented at the hearing*

and of the facts that I was visibly upset and known to be under great strain attending a grievance hearing chaired by an external consultant whilst signed off with a medical diagnosis of work-related stress.

I was assured both at the beginning and at the conclusion of the meeting that the record taken by Law at Work would be accurate and the process would be impartial. It was neither.

I do not agree your version of the notes (14/2/1 7) and having given you my corrected version (20/2/1 7) attached, state that I require both copies remain and be on the record of my treatment during this process.

I look forward to your confirmation that this has been actioned."

126. The reply from Ms Marshall was sent on 21 February. It read: -

"Please be assured that it was not my intention to take advantage of you and I appreciate that you feel very stressed at the moment. I did give you options for alternative dates to meet where you could have been accompanied but you chose to attend the meeting on Tuesday of your own accord - in fact you specifically asked for this date. During the meeting I feel I was compassionate and give you several opportunities to break when you were upset.

I am extremely concerned given the points that you have raised and although I appreciate you are stressed, I feel that the tone of your email is unnecessary, in particular as it questions my professionalism. I have read through a little of your updated note and although I agree it is more detailed than my own I do not agree that my note is inaccurate. I explained la you at the grievance hearing that my notes would not be a verbatim record - and the notes themselves state this. I am unsure what part, or parts, you feel were a complete invention. All of the key issues you raised are recorded in my note.

I will review your version over the next few days and let you know by the end of the week if I accept them but given the notes appear to be verbatim in the parts I have managed to read, could you confirm whether you recorded our conversation? I would not have thought that you would not have done this (sic) *without telling me you were doing so, so apologies for asking, but I am unsure how else you would be able to remember precise wording of a two-hour meeting as you didn't appear to be taking any notes. If you have recorded our conversation could you please forward your recording to me so that I can assess whether your transcribe is accurate.*

Finally, to reiterate, I have been tasked with investigating and responding to your grievance and I am impartial and unbiased. My investigation will be rigourous and I have been given the authority by Airpoint to reach any outcome I see fit. It is my understanding that everyone at Airpoint is keen to see you return to work and they hope this will be possible. I will continue my investigations and should be able to provide an outcome to you by the beginning of next week. However, if you feel you wish to discuss anything with me I'm happy to discuss with you prior to then"

A copy of these emails appears at pages 334 and 335 of the bundle.

127. In her investigation process, Ms Marshall spoke with those she considered relevant. She spoke with Mr Whyte, Mr Hughes, Mr Horsley, Mr Parmar, Ms Rajain and Mr McAllister. In speaking with Ms Rajain Ms Marshall asked about late payment of salary. Ms Rajain said that this had happened once or twice. Ms Rajain confirmed that an issue she had with childcare vouchers was resolved. She said that she did not feel that she was treated differently as a woman. She also said that when she asked for flexibility the respondents gave it to her and that she got the support she needed and had always been supported by people. A copy of the notes of the interview with Ms Rajain appeared at page 365 of the bundle. Ms Marshall did not speak

with Mr Birr, believing that she had relevant information from other witnesses in relation to any event involving Mr Birr.

Finding in Fact and Law

128. The notes prepared by Ms Marshall were a genuine attempt to reflect matters aired and discussed during the meeting with Mrs Chalmers. They were an accurate summary of the key points in the meeting. The decision taken by Ms Marshall as to interview, the conduct of the resultant meetings and the taking of the notes by Ms Marshall, whether in her interview with Mrs Chalmers or in the interview with others which she conducted, did not constitute an act of discrimination of any type. Ms Marshall conducted those interviews and reached the conclusion she did in a reasonable and proper exercise of her role as investigator and decision maker in relation to the grievance. The investigation she did was a reasonable one.

Grievance Outcome

129. Ms Marshall considered the grievance lodged by Mrs Chalmers and the points made in it. She considered the interviews she held with Mrs Chalmers and with the others mentioned above. She had regard both to her own notes of the meeting with Mrs Chalmers and to the notes of that meeting provided by Mrs Chalmers. She drew upon both in reaching the conclusion which she did.

130. Prior to releasing a copy of the grievance outcome to Mrs Chalmers Ms Marshall sent an email to Mr Whyte providing him with an advance copy of the outcome letter. The grievance outcome was sent to Mrs Chalmers on 28 February by email timed at 16:32. The email giving Mr Whyte advance sight of the grievance outcome was sent to him on February 2047 at 15:18. A copy of those emails to Mr Whyte and to Mrs Chalmers appeared pages 419 and 420 of the bundle. The email from Ms Marshall to Mr Whyte read: -

u I have finished drafting the outcome of Lisa's grievance and wanted to forward it to you before I send it on to her. I'm afraid it is long but she raised a lot of issues and I felt each issue had to be responded to. I have not found in her favour, as you will see when you review. I want to send it to her before close of play today so if you could come back to me with any comments this afternoon that would be great.

In terms of what happens next, I asked Lisa last week if she would like to meet to discuss my findings. She did not respond. When I return to the office on Thursday I will try to contact her and see what her position is."

131. A brief call then took place between Mr Whyte and Ms Marshall. Ms Marshall had reached her view by this point and was not seeking approval for the report before its dispatch to Mrs Chalmers. She would not have altered the outcome even had Mr Whyte asked her to do that. Mr Whyte accepted the work by Ms Marshall and the grievance outcome.

132. Mrs Chalmers asked Ms Marshall for the notes of her meetings with others. She did this by email sent to Ms Marshall at 17:05 on 28 February, having received the grievance outcome. Ms Marshall replied stating that this was not a disciplinary situation and that there was no requirement for her to provide the notes of any meeting to Mrs Chalmers. She said that she was quite willing to answer any questions Mrs Chalmers might have. In reaching this view and also in conducting the interviews with colleagues of Mrs Chalmers, Ms Marshall was conscious that Mrs Chalmers remained an employee of the respondents at this point and that it was intended that she return to work with them. Ms Marshall saw it is important that she did not inflame the situation as between Mrs Chalmers and her colleagues. Her view was that she could gain information from the colleagues of Mrs Chalmers by raising points with them in a manner which ensured she obtained information without putting specific quotes of Mrs Chalmers* comments to her colleagues.

133. During the discussion on 13 February 2017 between Ms Marshall and Mrs Chalmers Ms Marshall gained a clear sense that there was doubt as to whether Mrs Chalmers would return to work with the respondents. In a passage which appeared in the notes at page 158 of the bundle the following exchange occurred, KM being Ms Marshall and LC being Mrs Chalmers: -

KM - Given the things you've said it seems clear to me that you don't feel as if you could return?

LC - No I don't. I could never have any confidence that I had a future. I really think and this is the honest place that I am at, I think as soon as these complaints are time-barred, I will be made redundant.

134. There then followed a without prejudice discussion between Ms Marshall and Mrs Chalmers. The resolution of the dispute did not prove possible.

Decision on Grievance

135. The letter confirming the outcome of the grievance appeared at pages 422 to 430 of the bundle. The different elements of the grievance appeared in different numbered paragraphs under a heading summarising what aspect of the grievance was being dealt with at that point. Those were then addressed by Ms Marshall and her findings were set out. She did not uphold any element of the grievance lodged by Mrs Chalmers.

Finding In Fact and Law

136. The investigation of and decision upon the grievance of Mrs Chalmers preceded any protected act by Mrs Chalmers. The investigation and decision not to uphold Mrs Chalmers' grievance could not therefore constitute acts of victimisation under EQA. If the Tribunal is wrong in its view and there was a protected act under EQA prior to the investigation of or determination of the grievance of Mrs Chalmers, the Tribunal was

satisfied that the investigation and the decision made in relation to the grievance did not either individually or together constitute a detriment because Mrs Chalmers had done a protected act or something which Ms Marshall believed to have been a protected act. Ms Marshall was of the view that the grievance centred around training. Whilst discrimination had been mentioned in the grievance, Ms Marshall had no awareness that sex discrimination was being suggested in the grievance intimation as having occurred.

Sick Pay

137. The grievance lodged by Mrs Chalmers did not extend to any complaint by her as to payment to her of Statutory Sick Pay ("SSP").

138. The respondents keep a note of absence of employees. They manage employee absence using a system known as the Bradford scale. This measures frequency and pattern of absence. Any decision as to sick pay paid to an employee absent on leave is unrelated to the Bradford score of an employee.

139. Mrs Chalmers was the only person within the respondents' organisation who was absent for any length of time. The respondents paid Mrs Chalmers full salary for just over the first 2 weeks of absence from the end of January 2017. There was no provision in the contract of Mrs Chalmers in relation to sick pay. The respondents had not previously been in the position where an employee had had substantial time off such that any question arose as to non-payment of salary. No one had previously been off, in particular, for a period in excess of two weeks.

140. Mr Whyte sought advice from LAW as to payment to Mrs Chalmers of SSP. This was in course of 22 February 201 7. He spoke with Miss Welsh and Ms Wood of LAW. He was advised to check the contract for Mrs Chalmers and also to check any previous practice with other employees. He did so. He

did not receive any assistance from previous practice or from any provision in the contract of Mrs Chalmers. On the basis therefore that payment of full period had been made for just over two weeks, that there was no sign of Mrs Chalmers imminently returning to work, that the cash position of the respondents remained a matter of concern to Mr Whyte and that there was a risk of setting a precedent or custom and practice if Mrs Chalmers was paid full pay for a period beyond 14 days, (the time of absence at that point), Mr Whyte took the decision that payment to Mrs Chalmers of full pay be limited to that period with Mrs Chalmers then moving to SSP thereafter.

141. A colleague of Mrs Chalmers, Mr Birr, had taken individual days off to support his wife who sadly was affected by breast cancer. He was given compassionate leave so to do. He took single days off over a period of time. He received full pay during those days. This was a situation which was different to that of Mrs Chalmers in relation to the reason for and pattern of time absent from work.

142. In course of the grievance meeting with Mrs Chalmers Ms Marshall asked Mrs Chalmers what her sickness entitlement was. Her thinking in raising this was that she was aware of situations where someone in her position hearing a grievance might be able to put forward a proposal that pay for a period be continued at the point where the grievance was being heard as that might ease stress strain on the individual employee. Mrs Chalmers was however paid until 14 February at full pay. Ms Marshall did not suggest to Mr Whyte that the respondents cease full pay after two weeks and that Mrs Chalmers move to payment at the rate of SSP.

143. There was an email exchange between Mr Whyte and Ms Marshall on 24 February regarding Mrs Chalmers. This exchange was unknown to Mrs Chalmers at time of her resignation. A copy of the emails exchanged appeared in the bundle at pages 394 to 400.

Finding in Fact and in Law

144. Moving Mrs Chalmers to SSP from full salary was not in any sense an act of discrimination. The consequent reduction in monies received by Mrs Chalmers did not constitute a breach of contract or unauthorised deduction from wages.

Access to Computer

145. The grievance of Mrs Chalmers did not extend to exclusion by the respondents of Mrs Chalmers from use of her workplace computer system. This exclusion occurred after the grievance had been submitted.

146. It occurred in circumstances where Mrs Chalmers was absent from work through illness. The respondents wished to have access to Mrs Chalmers' work email account as she was managing arrangements for interviews with prospective graduates on behalf of the respondents. The respondents wished to know those arrangements. Given that Mrs Chalmers was absent from work with work related stress, the respondents were of the view that it was better that Mrs Chalmers did not carry out any work as that might exacerbate her stress.

147. The respondents took advice upon the position and reset the email password of Mrs Chalmers. This meant that Mrs Chalmers could not access her work emails. The respondents did not supply the new password to Mrs Chalmers as they were of the view that it was better from her point of view if she did not access work emails when off ill through work related stress. They had no expectation that she would continue to work whilst absent through illness.

148. Ms Marshall was involved in drafting a reply on behalf of the respondents to cover both the issue of sick pay and access by Mrs Chalmers to her computer. A copy of that exchange between the respondents Ms Marshall appears at pages 394 to 400 of the bundle.

Finding in Fact and Law

149. The decision to change the password such that Mrs Chalmers was no longer able to access her work computer system for email during her absence was not an act of discrimination of any type.

Findings In Fact and Law in relation to Protected Acts under EQA

150. Mrs Chalmers alleged 3 protected acts had occurred.

151. In relation to the first of those, the conversation which Mrs Chalmers had with Mr Whyte on 13 December 2016 was not one in which Mrs Chalmers made an allegation that there had been a contravention of EQA. It was not therefore a protected act in terms of EQA.

152. Secondly, the grievance submitted by Mrs Chalmers to the respondents on 27 January 2017, which appears at page 255 of the bundle, did say that the exclusion of Mrs Chalmers from the Christmas night out and from the hardware refresh "may be discriminatory". It referred however to Mrs Chalmers finding Mr Hughes unapproachable of late and to his manner being aggressive and unhelpful. Mrs Chalmers was experienced in HR. She is articulate and well educated. There was in the grievance no complaint or allegation that someone had contravened EQA.

153. The final alleged protected act detailed by Mrs Chalmers was that of presenting the Tribunal claim. That act was a protected act in terms of EQA.

Questionnaire

154. Mrs Chalmers wrote on 24 April 2017 to both Ms Marshall and Mr Whyte. She set out questions which she wished addressed by them. A copy of those letters appears at pages 453 to 455 of the bundle (the letter to Ms Marshall) and pages 456 to 459 of the bundle (the letter to Mr Whyte).

155. No answers were given by either Ms Marshall or Mr Whyte to the questions addressed to them. Ms Marshall replied on 28 April in a letter which appeared at page 462 of the bundle. Her position was that she did not regard the questions posed as being relevant or appropriate at that stage. She denied that there had been victimisation or discrimination.

Holiday Pay

156. In her letter of resignation, Mrs Chalmers said in a passage which appeared at page 4'7 of the bundle. "*I have calculated the Holiday pay I am owed to 4.17 days.* She believed this to be an accurate calculation. Holiday pay calculated on the basis of this entitlement was paid by the respondents to Mrs Chalmers.

157. When 'Mr Horsley left employment with the respondents the strict calculation of his holiday leave entitlement to that date was 15.75 days. He had taken 15 days of leave. Mr Horsley wrote to Mrs Chalmers who dealt with this type of HR matter within the respondents' organisation setting out his calculation and making the assumption that 15.75 days of accrued leave would be rounded down to 15 days when calculation of monies due to him was being made. There would, on that basis, be no amount due to him in respect of holidays. Mrs Chalmers replied to that email stating that holidays for someone leaving were rounded up and accordingly 15.75 days would be rounded up to 16 days. This meant that he was due payment for one day of leave accrued but untaken at time of ending of his employment. A copy of the emails exchanged between Mrs Chalmers and Mr Horsley appeared at page 196 of the bundle.

158. Mrs Chalmers wrote to Mr Derry on 24 June 201 6. He dealt with the payroll for the respondents. Mrs Chalmers said to Mr Derry that Mr Horsley would be owed at the time of his departure from employment with the respondents 1 day's annual leave to be added to his final salary. Mr Derry replied saying

that he would note that. Mrs Chalmers then wrote to Mr Horsley by email of 27 June 2016 stating: -

> *"To see the below,* (sic) *against my expectations it seems that you will indeed get your final days salary next month."*

159. A copy of these emails appears at pages 193 and 194 of the bundle. This was the only instance in which anyone had had holiday pay rounded up when they left employment with the respondents. Mr Whyte was not aware of this rounding up having occurred.

Finding in Fact and Law

160. There was no custom and practice to round entitlement to holiday pay up to provide the employee with holiday pay for a full number of days as opposed to the accurate calculation of any proportionate amount of days of leave due but untaken at time of termination of the employment. Mrs Chalmers therefore received from the respondents the appropriate sum due to her by way of pay in respect of holiday leave accrued but untaken at time of termination of her employment.

Constructive Dismissal Claim

161. Mrs Chalmers resigned on 3 March 201 7. A copy of her letter of resignation appeared at pages 436 and 437 of the bundle.

162. In that letter Mrs Chalmers set out in detail the incidents and events which she regarded as having occurred and as constituting sex discrimination. She detailed other events which she said had occurred and which she alleged were fundamental breaches of contract She concluded this element by stating:-

> *"The conduct of Andy Whyte, Katy Marshall & Airpoint following the submission of the Grievance was in itself Discriminatory (Victimisation), and this, coupled with the biased & unfair handling of the Grievance process, subsequent refusal to share investigation notes, and unlawful deduction of salary demonstrated to me clearly that mutual trust & confidence had been irretrievably breached and left me with no choice but to resign".*

The reference to unlawful deduction from salary related to the reduction in payment to Mrs Chalmers to SSP.

163. Mrs Chalmers resigned as, in her view, there had been a last straw. That was the conduct of the grievance investigation and the subsequent grievance outcome. She regarded those events as, in themselves, constituting a fundamental breach of contract and in addition being the last straw building on the other acts omissions set out in her letter of resignation. It was her view that many of those other acts were in themselves fundamental breaches of contract.

164. Reference is made to the findings of fact in this Judgment as to the events and incidents relied upon by Mrs Chalmers to support her basis in law for resignation and the claim of constructive dismissal.

165. Mrs Chalmers raised in the letter of resignation the fact that details of her salary, sick pay and her personal address had been disclosed to LAW. The disclosure of information related to salary and sick pay was in the context of advice being sought. It did not amount to a breach of the implied term of trust and confidence. Similarly, disclosure of the email address of Mrs Chalmers was made to LAW in circumstances where the work email account for Mrs Chalmers was no longer going to be accessible by her. Passing on her home email account, through which the respondents communicated were able to communicate with her, was not a breach of the implied term of trust and confidence.

Issues

166. The issues which the Tribunal required to determine involved consideration of much material. Those issues however are, in summary,

(1) Was there discrimination of any or all types as claimed by Mrs Chalmers by any or all of the respondents? Mrs Chalmers alleged discrimination in the forms of direct discrimination, indirect discrimination, harassment and victimisation. The protected characteristic is that of sex.

(2) Was there a fundamental breach of contract by breach of an express or implied term of the contract, in particular the implied term of trust and confidence, such that Mrs Chalmers was entitled to resign, whether on the basis of one such fundamental breach or on the basis of a number of breaches of contract ending with a last straw?

(3) Was Mrs Chalmers due any monies by way of holiday pay in respect of leave accrued but untaken, with the amount of leave included in that calculation being "rounded up"?

Applicable Law

167. In terms of EQA sex is a protected characteristic.

168. In terms of section 13 of EQA direct discrimination occurs where one party discriminates against another because of a protected characteristic by treating the other person less favourably than they would treat others. A comparator, real or hypothetical is therefore appropriately considered. In terms of section 23 of EQA there must be no material difference between the circumstances relating to each case when one party is compared to the other. A comparator therefore must be someone, real or hypothetical, who is in the same position as Mrs Chalmers save for the protected characteristic.

169. Section 19 of EQA sets out the position in respect of indirect discrimination. Indirect discrimination occurs if a person applies a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of another person. The section goes on to state that the PCP is discriminatory if the person applies it, or would apply it, to those with whom someone does not share the characteristic, it puts or would put people with whom the potential claimant shares the characteristic at a particular disadvantage when compared with persons with whom such a person does not share that characteristic, it puts or would put the potential claimant at that disadvantage and the alleged discriminator cannot show it to be a proportionate means of achieving a legitimate aim.

170. It can be seen therefore that it is necessary for a claim of indirect discrimination to be successful that persons who share the protected characteristic of Mrs Chalmers are placed at a disadvantage. There must therefore be, as an essential ingredient of a claim under Section 19, evidence that, in this case, persons with the same protected characteristic as Mrs Chalmers are put at a disadvantage as a result of the PCP involved. There therefore requires to be what might informally be labelled "group disadvantage". That however does not require to involve all members of the group being placed at a disadvantage.

171. Often there is statistical evidence to show the impact of a PCP on those sharing the same protected characteristic as Mrs Chalmers.

172. Indirect discrimination requires that there be a causal link between the PCP and the particular disadvantage suffered by the group and also the individual. It does not require a causal link between the protected characteristic and the less favourable treatment. ***(Essop and others v Home Office (UK Border Agency) and another case 2017 ICR 640).***

173. Section 26 of EQA states that for harassment to have occurred the alleged discriminator must have engaged in unwanted conduct related to a relevant

protected characteristic in circumstances where the conduct has the purpose or effect of violating the dignity of the potential claimant or of creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. The perception of the potential claimant must be taken into account in deciding whether conduct has the effect mentioned, as must the whole circumstances of the case and whether it is reasonable for the conduct to have that effect. The test is therefore in part subjective and in part objective.

174. For a claim of victimisation to be successful, the terms of section 27 of EQA must be met. The potential claimant must have done a protected act or be believed to have done or potentially to be in circumstances where they may do a protected act. Victimisation occurs if the alleged discriminator subjects the potential claimant to a detriment because the potential claimant has done the protected act or the alleged discriminator believes that this has occurred or that a protected act may be done.

175. Section 27 of EQA details what are protected acts for the purposes of the victimisation claim. Those are

"(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."

176. The Tribunal therefore requires to consider whether a claimant has established that there has been a protected act. It then requires to consider whether a detriment has been suffered, in this case, by Mrs Chalmers at the hands of the alleged discriminators. The Tribunal also has to consider

whether there is a causal link between the detriment and the protected act. That can be established by way of inference.

177. In considering whether there has been a protected act in terms of Section 27 (d), the circumstances of the case must be considered. It is not necessary that EQA is mentioned by name. The case ***of Durrani v London Borough of Ealing EAT0454/12 ("Durran I")*** involved a complaint by an employee to his employer that he had been ***'discriminated against".*** The Employment Tribunal found that this referred to perceived general unfairness rather than detrimental treatment based on race. This decision was upheld by the EAT. An allegation simply of discrimination may however be enough to constitute a protected disclosure. It will depend on context and also the awareness of a claimant such as Mrs Chalmers of appropriate language which might be used in making a claim of discrimination. The case of ***Fuilah v Medical Research Council and another EAT0586/12*** is helpful in that regard.

178. Section 136 of EQA details the situation which applies to a claim of discrimination. It is recognised that an admission of discrimination will almost certainly not be made. Plain and clear evidence of discrimination is unlikely to be found. Inferences generally require to be drawn, providing always that facts exist from which such inferences can be drawn. The burden of proof lies upon a claimant, in this case Mrs Chalmers, in the first instance. If however there are facts from which the Tribunal could decide, in the absence of any other explanation, that the alleged discriminator has contravened the provision of EQA concerned, then the Tribunal must hold that the contravention occurred. That is not however the case if the alleged discriminator shows that they did not contravene the provision.

179. A Tribunal is not required to take a 2 stage approach in determination of whether discrimination is taken place. This is confirmed in the cases of ***Martin vDevonshlres Solicitors [201 1] ICR 352 (("Martin")*** and ***Hewage v Grampian Health Board [2012] ICR 1054,*** The case of ***Hewage*** was determined by the Supreme Court. It confirmed that the statutory burden of

proof provisions only come into play where there is room for doubt as to the facts necessary to establish discrimination. Where a Tribunal can in its Judgment make findings on the evidence one way or another as to whether discrimination took place, the burden of proof provisions of EQA are not of relevance.

180. In ***Martin,*** the EAT confirmed that the burden of proof provisions have no bearing where a Tribunal "/s *in a position to make positive findings on the evidence one way or another, and still less when there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law".*

181. The case of ***Laing v Manchester City Council and another 2006 ICR 1519*** *("Laing")* sees the EAT state, *"if [the Tribunal] is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious [racial] discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it is nothing to do with [race]".*

182. In ***Gay v Sophos pic EAT 0452/10*** the EAT noted the decision in ***Laing.*** It confirmed that it was now very well established that a Tribunal was not obliged to follow the 2-stage approach. If a Tribunal therefore makes clear finding that the acts said to have been discriminatory were motivated by non-discriminatory considerations, then it follows that the burden of proof, even if it had transferred to the respondent, has been met and that discrimination did not occur.

183. In ***Ayodele v CltyLink Ltd and anor 201 7 EWCA Civ 1913, CA*** , the Court of Appeal ~~confirmed~~ that in adiscnwinatim case, beforea tribunal can start making an assessment, the claimant has to start the case, otherwise there is nothing for the respondent to address and nothing for the Tribunal to assess. A respondent does not have to discharge the burden of proof unless

and until the claimant has shown a *prima facie* case of discrimination that needs to be answered. What must be considered at the first stage is all the evidence, not just that given by the claimant.

184. *The shifting burden of proof rule in Section136 of EQA applies to *"any proceedings relating to a contravention of the Act* . It therefore applies to all claims of discrimination, victimisation and harassment under EQA. A Tribunal must keep in mind the balance between a claimant being able to advance a claim of discrimination on the one hand and a respondent not facing a potentially successful claim on the basis of *"bare assertions"* by a claimant.

185. If facts are found from which discrimination in contravention of the EQA could be found to have occurred, then it is for the respondents to persuade the Tribunal, on the evidence, that there has been no contravention of EQA. For that to occur, the Tribunal must be satisfied that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That is confirmed in the case of /gen ***v Wong [2005] EWCA Civ 142 ("Igen").***

186. The case of ***Madarassy v Nomura International pic [2007] ICR 867*** is an important one in this area of law. In that case, Lord Justice Mummery said that: -

> *"There is probably no other area of the civil law in which the burden of proof plays a larger part than in discrimination cases. Arguments on the burden of proof surface in almost every case. The factual content of the cases does not simply involve testing the credibility of witnesses on contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in Igen v Wong meets these criteria. It does not need to be amended to make it work better"*

187. In a case of harassment, under Section 26 (1) (a) of EQA, for success, the conduct in question must be related to a relevant protected characteristic. The terms of Section 136 of EQA with the "shifting burden of proof apply. A claimant needs to establish on the evidence that the conduct in question could be related to the protected characteristic. The nature of the conduct is then considered, applying a subjective and objective test as mentioned above.

188. Section 136 of EQA also applies to claims of indirect discrimination. In such a claim, however, a claimant must show that a PCP applied puts, or would put him or her (and also others sharing his or her protected characteristic) at a particular disadvantage. This requirement is, in effect, a requirement that a claimant establish on the facts a *prima facie* case of discrimination. If that occurs then it is for the respondent to show objective justification.

189. For success in her claim of indirect discrimination, Mrs Chalmers therefore required to show that there was a PCP, that the relevant PCP disadvantaged women in general and that there was disadvantage to her.

190. The requirements for a successful claim of victimisation are set out above. If there is a protected act, followed by detriment then a *prima facie* case of discrimination will be made out, **provided that** there is evidence from which a Tribunal can infer that a causal link exists between the protected act and the detriment.

191. It is possible that evidence does not support discrimination having occurred prior to investigation of a complaint by an employee but that a failure to carry out an investigation appropriately constitutes either a detriment or is in itself an act of discrimination. Evidence must support any such finding. In this case it was alleged that such a failure constituted an act of victimisation under EQA. If the complaint is as to discrimination, an inadequate investigation or handling of that complaint does not however see it automatically follow that the inadequate investigation or complaint handling was discriminatory. The inadequate investigation or complaint handling, if

found to have occurred, may have been for a variety of reasons. A claim exists if the causal link is established. This would occur if the complaint would have been dealt with differently had it been from an appropriate comparator, for example. *(Eke v Commissioners o) Customs and Excise [1981JIRLR 334 ("Eke")).* A further relevant case is that of *Conteh v Parking Partners Ltd [201 1] iCR 341 ("Contdh").* Irt that case a complaint was not dealt with adequately due to a fear on the part of the manager conducting the enquiry as to scaring the client away. In circumstances where the Tribunal held that the reason for the manager's in action was nothing to do with the protected characteristic there was no liability in terms of Section 27 of EQA.

192. A Tribunal appropriately considers individual allegations and also whether there is a cumulative effect which might inform it and which might form a proper basis for a finding of discrimination.

Constructive Unfair Dismissal

193. A claim of constructive unfair dismissal is possible in terms of Section 95(1) (c) of the Employment Rights Act 1996 ("ERA").

194. There is implied into a contract of employment, a term that both parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. This principle emerges from the case of *Malik v Bank of Credit and Commerce International Limited (in compulsory liquidation) [1997] ICR 606 ("Malik").*

195. There will be ups and downs in any employment relationship. A Tribunal is to consider "an *employer's conduct as a whole and to determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with if (Woods, V WM Car Services (Peterborough) Ltd [1981] ICR 666) ("Woods").*

196. The well-known case of ***Western Excavating (ECC) Ltd V Sharp [1978] ICR 221 ("Western Excavating")*** confirms that, in the words of Lord Denning:-

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. "*

197. A breach of the implied term of trust and confidence is, as confirmed in ***Morrow v Safeway Stores pic [2002] IRLR 9 ("Morrow"),*** properly viewed as being a breach of a fundamental term of the contract of employment.

198. ***Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 ("Buckland")*** underlines that a Tribunal, in assessing whether there has been a breach of the implied term of trust and confidence entitling an employee to resign, requires to consider what is said to have been a breach of that term on an objective basis.

199. For a claim of constructive unfair dismissal to be successful it must be the breach by the employer which, in part at least, caused the employee to resign. An employee must also resign within what is viewed as a reasonable time of the breach. If delay is involved, there comes a point where the employee will be held to have affirmed the contract and thereby to have lost the right to make a claim of constructive dismissal.

200. An employee may resign due to what is considered by that employee to have been a "last straw". That last straw need not be anything of huge or fundamental significance. It does not require in itself to be a breach of contract ***(Lewis v Motorworld Garages Ltd [1986] ICR 157 ("Lewis")".*** The "last straw" must however contribute, even if only to a slight degree, to

the breach of the implied term of trust and confidence. This is confirmed in ***Omllaju v Waltham Forest London Borough Council [2005] ICR 481 ("Omilaju").***

201. If breach of an express term of contract is alleged, a Tribunal requires to consider whether the term alleged to be in the contract is in fact present there. It then requires to consider whether there has been a breach of that express term and whether any such breach is a fundamental breach of contract entitling an employee to resign and to claim constructive unfair dismissal.

202. It may be that the behaviour of an employer does not constitute a fundamental breach of contract yet, nevertheless, builds towards a picture and a set of circumstances in which it can be claimed that the overall behaviour of the employer is such that the employee is entitled to resign and to claim constructive unfair dismissal by virtue of "a number of straws" and the occurrence of an act constituting the last straw.

203. The employee must then resign in response, in part at least, to the behaviour of the employer. Resignation must occur within an undefined but reasonably proximate time of the acts said to warrant it. If that is not so then, as detailed in the case of ***Western Excavating,*** the contract may be held to have been affirmed notwithstanding any such breach. A Tribunal can however, in certain circumstances, consider past affirmed breaches when a last straw in alleged ***(Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA C IV 978 ("Kaur").***

Holiday Pay

204. It is possible for an employee to have a right or entitlement established by custom and practice rather than through any express contractual provision. If custom and practice is relied upon, then, if it is disputed by the employer that there was any such custom and practice, it is for a claimant to establish that with the Tribunal. Mrs Chalmers required to lead evidence to show that

there was repeated application of a particular provision. For something to occur once does not establish custom and practice. That is confirmed in the case of ***Walne v R Oliver Plant Hire Limited [1977] IRLR 434.***

Submissions

Submissions for Mrs Chalmers.

205. Mrs Chalmers had helpfully prepared written submissions. They were extensive, well-constructed and thorough. A copy is attached to this Judgment as Appendix 1. In the submissions, reference was made to case law as well as to statute, the EHRC code and the ACAS code of practice. Copies of the cases referred to were provided. The Tribunal was grateful to Mrs Chalmers for the time she had taken to produce her submission.

206. What follows is a brief summary of the submissions made by Mrs Chalmers. The Tribunal considered the ''full version" of her submissions.

207. The Tribunal was urged to prefer the evidence of Mrs Chalmers over that of the witnesses for the respondents. It was submitted that both Mr Hughes and Mr Whyte were, in the workplace, not the people they had presented as in the Tribunal room. They had significantly modified their behaviour. They were in reality bullies. The Tribunal should accept that Mr Hughes had an issue with women and that that had manifested itself in relation to Mrs Chalmers. Issues were raised with regard to evidence given by both Mr Whyte and Mr Hughes as to a discussion between them said by each to have taken place on 12 January, but which had taken place later, it was submitted. It could be established the discussion had occurred at a date later than they said as the incident they had discussed had not happened by 12 January. Mr Whyte was also shown, Mrs Chalmers said, to have been unreliable in his evidence as to ownership of the respondents and as to the mechanics of payment of salaries in batches.

208. As far as Ms Marshall was concerned, there were numerous errors in the grievance outcome she had authored. She had not been able to explain errors and why she had taken particular decisions during conduct of the investigation. Any reasonable person would, when carrying out the investigation, have taken steps mentioned by Mrs Chalmers in her submissions. It had been accepted by Ms Marshall that some aspects of her notes were inaccurate when the recorded version was compared with her notes.

209. Mrs Chalmers then detailed the matters upon which she relied both to support the claim of discrimination, the protected characteristic being sex, and the claim of constructive unfair dismissal. She set out reasons why she regarded the particular elements as constituting either discrimination or something which contributed to or determined her decision to resign, or both.

210. The elements referred to were

- late payment of wages
- ostracism after late wages complaint
- laughed at on conference call 2 December 201 7
- excluded from Christmas party
- hardware refresh
- fridge cleaning
- monitoring software
- mobile phone clear-up
- exclusion from wage rises
- belittling named women project managers in public

- failure to act on/prevent continuance of complaints of harassment
- exclusion from training
- failure to have a grievance policy, written or otherwise
- abusive call made to claimant directly following submission of grievance
- smirked at for having been upset
- failure of duty of care in not addressing stress and upset, nor foreseeing its impact
- breaches of Mrs Chalmers' data protection rights and resultant stress and upset
- the manner in which LAW and the 1st 2nd and 4th respondents misrepresented their contractual relationship to Mrs Chalmers from 6 February 201 7
- the manner in which Ms Marshall conducted the grievance hearing on 13 February 2017
- without prejudice discussion without notice or representation
- misrepresentation in grievance notes
- grievance not investigated properly
- sick pay cut to SSP
- shut out of all work systems and email access cut off without notice
- failure to investigate/address work related stress complaint
- grievance decision biased and unfair

- refusal to share grievance investigation notes and witness statements
- constructive unfair dismissal
- failure to answer ACAS questions of discrimination
- unfair deduction from claimant's holiday pay made on 25 March 2017
- other detriments caused by and inextricably linked to constructive dismissal/victimisation, being loss of employment, income and status, loss of pension benefits and loss of training opportunities.

Late Payment of Wages

211. Mrs Chalmers said that the evidence supported her position that she had been paid in the second batch or tranche of employees because she was a woman. Mr Whyte had confirmed in evidence that he did not understand she was reliant upon her wages. Whilst the respondents said that Ms Rajain was paid in the 1st tranche, they had not produced banking information to support this. It might be the case therefore that Ms Rajain was paid in the 2nd tranche. If that was correct it would mean that all the women employees were paid in the 2nd tranche. The Tribunal should draw an inference from the failure by the respondents to produce banking records.

212. In addition to there being discriminatory conduct by the respondents there had been a failure to observe the terms of the contract in that payment had not been made on 26 of the month and on two occasions had been made some days after 26 of the month.

213. Mrs Chalmers referred to case law and in particular *Igen.* There was *prima facie* evidence that she had been treated less favourably than a relevant comparator. The burden of proof had transferred to the respondents. They had not shown that there was no sense whatsoever of the decision being

made on grounds of sex. The actions of the respondents were either direct discrimination or indirect discrimination. The could be no legitimate aim in paying staff late. The respondents therefore could not argue against liability if indirect discrimination was found to have occurred.

214. In relation to constructive unfair dismissal, the impact of the respondents' behaviour was of significance, not their intentions. Failure to be paid on time in accordance with the contract was a fundamental breach of contract, said Mrs Chalmers.

Ostracism after late wages complaint

215. Communication between Mr Whyte and Mrs Chalmers had decreased over the period from the end of October until 27 January when Mrs Chalmers lodged a grievance. The respondents had not produced any email traffic or telephone records to confirm that this was not so. The Tribunal should draw an inference from this that Mrs Chalmers was ostracised. Mr McAllister had complained, said Mrs Chalmers. He was not ostracised. The Tribunal should consider both conscious and unconscious bias. Ostracising of Mrs Chalmers was also a ground of constructive dismissal on the basis of it being a breach of mutual trust and confidence.

Laughed at on conference call 2 December 2017

216. There was an admission of laughter by Mr Whyte. He had not explained his laughter. The context was that Mrs Chalmers had been ostracised, she said, for approximately 6 weeks at that point. The laughter was humiliating and offensive. That was the purpose to it. It was a detriment. The case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 387 ("Shamoon")*** was referred to in this regard.

Exclusion from Christmas Party

217. The facts in relation to the Christmas party were that only men attended it. It had, said Mrs Chalmers, been deliberately arranged, so that that result occurred. The Tribunal should not believe Mr Hughes evidence that he had not communicated with Mr Whyte until flights and hotel accommodation and flights had been booked. The flights in any event could have been rearranged. Alternative arrangements could have been made for Mr Parmar and Mr Middleton to travel with Mr Whyte. The party could have been held on Wednesday lunchtime with drinks potentially on Tuesday evening. It could have been held on Monday evening. Mr Whyte was not an appropriate comparator as he was the decision maker. He had not asked the preceding year for the party date to be changed, He simply could not or did not wish to attend at all.

218. The Tribunal was urged to accept that Mrs Chalmers had alerted Mr Whyte to the fact that proceeding with the party could be discriminatory in circumstances where no female staff member was able to appear. Despite that, the party had been held on the Tuesday evening when only males could attend. This was discriminatory behaviour. It was also an act which contributed to the claim of constructive unfair dismissal on the basis of there being a breach of mutual trust and confidence.

219. The intimation to Mr Whyte that holding the party might be discriminatory was a protected act, said Mrs Chalmers. The case of ***Aziz v Trinity Street Taxis Ltd 1988 ICR 534*** was referred to by Mrs Chalmers. She also referred to the case of ***Swlggs and Others v Najarajan 1999 UK HL 36.*** In that case it was said that if the protected act had a significant influence on the outcome then discrimination was made out.

Hardware refresh

220. The Tribunal was reminded by Mrs Chalmers of the earlier proposed hardware refreshes. She was to receive a new computer in both of those

anticipated refreshes. This time she was not to receive a new computer. The real reason for the exclusion was that she was being punished for making what she referred to as the complaint of sex discrimination on 13 December, that being in relation to the potential decision to proceed with the Christmas party notwithstanding absence of women at it.

221. Exclusion from the hardware refresh was also a breach of mutual trust and confidence and therefore contributed to the ability of Mrs Chalmers to resign and claim constructive unfair dismissal, she submitted. The case of ***Anya v University of Oxford and another CA 22 Mar 2001*** highlighted that the Tribunal should assess the totality of the evidence on any material issue. The pool for comparison should not include those had no interest in the advantage or disadvantage, thereby excluding Mr Horsley who did not wish a new computer, preferring to spend any allocation of the money to him on the new server backup drive equipment. For the latter point, Mrs Chalmers referred to the case of ***Rutherford v Secretary of State for Trade and Industry 2006 IRLR 151*** as authority.

Fridge cleaning

222. Mrs Chalmers said that Mr Hughes had associated her with cleaning the fridge because she was a woman. He had made a veiled threat that she should clean the fridge herself by saying to her that he did not want to have to ask her to clean it. The Tribunal should accept that this remark was made. There had been a breach of mutual trust and confidence contributing to resignation and a successful constructive unfair dismissal claim, argued Mrs Chalmers. The actions of Mr Hughes constituted harassment in terms of section 26 of EGA. Feeling demeaned could be a detriment. This was a relevant point in relation to this and other elements of the claim. Reference was maae to tne case er ***moyntny v vans a t_unaon fvrro irust zuut> UKEAT0085.***

Monitoring software

223. Mrs Chalmers said that the decision to monitor software on her computer was done to harass and victimise her. If, as the respondents said, she was to receive an old computer, why was her then current computer to be monitored other than as an act of harassment or victimisation. This was an act of the respondents through their employees and the respondents had vicarious responsibility for it.

224. This decision was also an element contributing to the constructive unfair dismissal.

Mobile phone clear-up

225. Mrs Chalmers said that she was asked to do this as she was a woman. Mr Hughes associated women with cleaning, hence the reason she was asked rather than Mr Horsley who had made the mess. Her role was business support manager. This was both harassment and a contributing factor to the resignation of Mrs Chalmers and therefore part of constructive dismissal claim.

Exclusion from wage rises

226. Others had received a wage rise. Mr Whyte said that he had unilaterally reviewed her salary however, said Mrs Chalmers, there was no evidence of that. He had said to her that she was expensive. The Tribunal should accept that evidence rather than the version of that conversation given by Mr Whyte. In assessing credibility the Tribunal should have regard to the position of the respondents as set out at page 182 E of the bundle. It was said there that Mr Whyte had told Mrs Chalmers that market information advised him that she was expensive for the role she was carrying out. This contradicted the evidence from Mr Whyte to Tribunal that he had not said to her that she was expensive.

227. In reality the reason for withholding a salary increase to Mrs Chalmers was that it was victimisation for what she said was a sex discrimination complaint made on 13 December i.e. the reference to holding the party being potentially discriminatory.

228. This act by the respondents was also something which contributed to her resignation and therefore part of the constructive unfair dismissal claim.

Belittling named women protect managers In public

229. Mrs Chalmers said that the Tribunal should accept that Mr Hughes had made these remarks and that they were directed towards women rather than to project managers. Mr Hughes had denied making remarks about women project managers. Mr Whyte accepted that Mrs Chalmers had reported to him that Mr Hughes had said “These women are not technical, they have no idea how to be project managers".

230. Mrs Chalmers said that her perception was that she was included within this derogatory definition. She was a woman project manager. This was therefore harassment. It was also a factor contributing to the circumstances in which she had resigned.

Failure to act on/prevent continuance of complaints of harassment

231. There was a contradiction between the evidence of Mr Whyte and Mr Hughes as to how they had spoken to one another after Mrs Chalmers had spoken with Mr Whyte regarding what she said was the behaviour of Mr Hughes. Mr Whyte said he had spoken face-to-face with Mr Hughes. Mr Hughes said they had spoken on the telephone. No action had been taken however to remedy a resolve the working relationship with Mrs Chalmers. The Tribunal should keep in mind that harassment is defined through the eyes of the person claiming harassment, said Mrs Chalmers. The harasser

was personally liable for their own actions having regard to the terms of Sections 110 (1) (a) (b) (c) and 110 (2) of EQA.

232. Reference was made by Mrs Chalmers to the case of ***Green v DB group Services (UK) Ltd 2006 EWHC 1898,*** There had. been a breach of duty of care by the respondents. The claims supported by these events were those of harassment and constructive unfair dismissal.

Exclusion from training

233. It should be kept in mind by the Tribunal that Mr Birr had a training course request approved, and that Mr Hughes had answered the second email from Mrs Chalmers but not the first one. She had missed the free training on 25 January. Mr Birr had been sent on a training course which carried a fee. Mr Hughes had intervened to block training for Mrs Chalmers. This had been an act of direct discrimination, the comparator being Mr Birr. It was also an act of victimisation and an element in the constructive dismissal claim.

Failure to have a grievance policy, written or otherwise

234. This was a breach of the ACAS code, said Mrs Chalmers. It contributed to her decision to resign and therefore her constructive dismissal claim.

Abusive call made to claimant directly following submission of grievance

235. Mr Whyte had telephoned Mrs Chalmers shortly after she had submitted a grievance. She was in tears during this call. It was accepted that Mr Whyte had said to her that he had not got rid of her in the summer when it would have been easier. This was a call to pressurise her not to continue with a grievance, said Mrs Chalmers. There was a need when tendering for work for the respondents to disclose any Tribunal action taken. The phone calls intended to head off any such action. Only threats were made rather than any attempt to investigate the matter.

236. This was a basis of the harassment claim, the claim of victimisation and the constructive dismissal claim.

Smirked at for having been upset

237. The Tribunal should accept that Mr Hughes smirked at Mrs Chalmers. This was a basis of her claim of harassment and an element in the constructive unfair dismissal claim.

Failure of duty off care to address stress and upset, nor foreseeing its impact

238. Nothing had been done by the respondents to address stress and upset on the part of Mrs Chalmers. Mr Whyte had witnessed that stress and upset given that Mrs Chalmers had been visibly in tears when talking to him. She been signed off by her doctor with work-related stress. Mr Whyte accepted that no action was taken to address the stress and upset. This formed part of the basis of the claim of constructive dismissal and of the claim of victimisation, said Mr Chalmers. She referred to the case of ***Marshall Specialist Vehicles Ltd v Osborne 2003 IRLR 673.*** That case highlighted the Tribunal should look at indications of distress on the part of the employee. Such indications should form the basis of action being taken by an employer.

Breaches of Mrs Chalmers' data protection rights and resultant stress and upset

239. Sensitive data had not remained confidential when it appeared in medical certificates. There had been no explanation for any breach. This was an element ~~which supported~~ the harassment, ~~victimisation~~ and ~~constructive~~ dismissal claims.

The manner In which LAW and respondents 2 and 4 misrepresented their contractual relationship to Mrs Chalmers from 6 February 2017

240. The information as to the interaction between LAW and the respondents through Mr Whyte, and also the interaction between MS Marshall and Mr Whyte in relation to sick pay, taken with the signing by Mr Whyte of the contract for LAW to act on behalf of the respondents on the eve of the grievance interview which he was about to carry out with Miss Marshall, all pointed to Miss Marshall always working for the interests of the respondents in order to protect the contract between LAW and the respondents. The chain of correspondence gave weight and context to the Tribunal in its consideration of the discrimination claims as a whole. This also provided a basis for the constructive unfair dismissal claim, Mrs Chalmers maintained.

The manner in which Ms Marshall conducted the grievance hearing on 13 February 2017

241. The grievance hearing had not been conducted in accordance with ACAS guidance, Mrs Chalmers submitted. An independent notetaker ought to have been there. Questions had been asked which had no bearing upon the grievance such as the reference to sick pay. The answers had been used by Ms Marshall to *"ingratiate herself* with Mr Whyte. The actings in this regard supported a claim of victimisation and aided the constructive unfair dismissal claim in the submission of Mrs Chalmers.

Without prejudice discussion without notice or representation

242. The notes of the grievance meeting between Ms Marshall and herself had been manipulated by Ms Marshall, said Mrs Chalmers. Ms Marshall had in her version of the notes placed reference to a Tribunal claim prior to the without prejudice discussion in order that the without prejudice discussion could be justified. This supported a claim of victimisation.

Misrepresentation and grievance notes

243. There were several mistakes in the notes of the meeting between Mrs Chalmers and Ms Marshall as produced by Ms Marshall. Mrs Chalmers said that her own position had been diluted and fabricated in the grievance notes. That was in order to ensure that the finding which Ms Marshall wished to arrive at was achieved. There had been no one with Ms Marshall during the meeting to take notes. Ms Marshall's notes as produced were cynical and calculated, Mrs Chalmers said.

244. This was an act of victimisation and was also supportive of the constructive unfair dismissal claim.

Grievance not investigated properly

245. There were various failings by Ms Marshall highlighted by Mrs Chalmers. Matters had not been investigated. Questions were not asked as Ms Marshall did not want to hear the answers to those questions given that she knew the finding she would be making from the outset. The grievance investigation had been a sham and a whitewash.

246. There was a breach of the ACAS code through the absence of proper fair investigation of the grievance of Mrs Chalmers. There had also been a breach of trust and confidence looking to the acts of Ms Marshall.

247. A claim of victimisation was supported, as was the claim of constructive unfair dismissal. The Tribunal should keep in mind earlier acts which would throw light or more light on the act in question.

P&yeut toSSP

248. Other employees had always been paid at full salary level, said Mrs Chalmers. She however had suffered a reduction to SSP. Custom and

practice was that full pay would therefore be paid to employees absent through ill health. The Tribunal were referred to the information from LAW to the respondents in an email which appeared at page 362 of the bundle. That had said that if there was no contractual provision then custom and practice should be considered and that if all other staff had been paid full pay, then paying her at SSP could be seen as unfair.

249. The Tribunal should have regard to the fact that Ms Marshall had asked Mrs Chalmers about sick pay in the grievance hearing and that Ms Marshall had then advised and drafted the response to Mrs Chalmers on sick pay, this at a time when she was supposed to be impartially investigating the grievance which Mrs Chalmers had lodged.

250. The cut from full salary to SSP was discriminatory, said Mrs Chalmers. The cut had been suggested by Ms Marshall as a means of ingratiating herself and procuring the 24 months ongoing contract. This was harassment. It was direct discrimination. It was indirect discrimination in the alternative. It was victimisation in the alternative. It had contributed to the resignation of Mrs Chalmers and to the circumstances in which that resignation was constructive unfair dismissal. The case of ***Shamoon*** was referred to.

251. In relation to custom and practice, the case ***of Park Cakes Ltd v Shumba and others 2013 EWCA Civ 974*** was a case to which the Tribunal should have regard. Custom and practice existed here as full pay was always given in times of absence.

Shut out of all work systems and email access cut off without notice

252. The email from Mr Whyte to Mr Hughes on 24 February 2017 which appeared at page 401 of the bundle was significant, Mrs Chalmers submitted. That referred to her accessing her PC and stated that if access was permitted all the respondents would be doing would be assisting Mrs Chalmers in building a case against them. The decision had been taken to prevent Mrs Chalmers from gathering evidence and to hinder her in building

her case. She should have received notice of possible removal of access. If a benign motive was involved then the new password ought to have been shared with her. Her private email address had been given so that her work email address could be cut off. This element supported the claim of constructive unfair dismissal.

Failure to Investlqate/address work related stress complaint

253. Mrs Chalmers said that Ms Marshall ought to have advised the respondents to assist with her stress and upset as she had personally witnessed it. No explanation had been given for this failure. Stress and upset was not mentioned in the grievance report. The certification of sickness from her doctor at clearly referred to this. This was a breach of trust and confidence and also victimisation, submitted Mrs Chalmers.

Grievance decision biased and unfair

254. Key allegations were not put to those interviewed. The investigation was a pre-agreed whitewash, said Mrs Chalmers. The only appeal offered was a review of findings by a colleague of Ms Marshall. Impartiality was of importance. Ms Marshall had however ***"circled the wagons"*** around the employers and managers. Mr Whyte had been asked for his comments before the grievance decision had been sent to Mrs Chalmers. She queried who had made the decision and whether the decision was biased. There had been no attention paid to the assertion by her, Mrs Chalmers said, of mistakes in the note and in the decision. No attempt been made to investigate or correct those despite her assertion that these were believed to have been deliberate.

255. Thia aspect supported a ~~claim~~ ef ~~victimisation~~ and also ~~constructive~~ dismissal claim. A relevant case was that of ***Watson v University of Strathclyde UKEAT S/0021/10.*** The case of ***Blackburn v Aldi Stores Ltd UKEAT/0185/12*** was also relevant as were ***Nicholson v Hazel House***

Nursing Home Limited UKEAT/0241/15, Bickerstaff v Royal British Legion 1401026/16 and 1400719/17, Peninsula Business Service Ltd v Baker UKEAT/0241/16 and ACAS guidance relative to conducting of investigations.

Failure to answer the questions sent regarding discrimination

256. The Tribunal should make an adverse inference of discrimination from this failure. This was confirmed in the EHRC code.

Refusal to share grievance investigation notes and witness statements

257. These documents ought to have been shared, said Mrs Chalmers. Absence of these had impeded decisions which she had to take. She referred to the ACAS discipline and grievances guide. This was Ms Marshall attempting to cover her tracks by refusing to release these documents. The documents exposed the paucity of the inadequate investigation. The claim supported by this was that of victimisation and in addition constructive dismissal.

Constructive unfair dismissal

258. In support of her claim of constructive unfair dismissal Ms Chalmers referred to the fact that Mr Whyte had, she said, stated to her *"let's leave it and see what happens"* when she made complaints of bullying, harassment and sexism. There had been the abusive of call from Mr Whyte after she submitted her grievance. He had referred to not having got rid of her in the summer when it would have been much easier. There had been a sham grievance investigation with a preordained outcome. Her pay had been cut to SSP. There had been no acknowledgement of the stress, upset and illness caused by the respondents. There had been an unfair exclusion from wage rises. A series of discriminatory acts had occurred. Reference was made to the Christmas party, the hardware refresh and to unfair exclusion

from training. There had been a hostile working environment from 27 October 2016 which had become increasingly unbearable.

259. This all supported the victimisation claim. Constructive unfair dismissal was supported and was in itself an act of victimisation as Mrs Chalmers said she been forced to leave her job entirely due to the conduct of the respondents in response to claims about sex discrimination.

260. It was accepted that the behaviour of an employer required to be looked at objectively in line with the test in ***Mahmud v Bank of Credit and Commerce International SA 1997 ICR 606.*** Other cases were referred to by Mrs Chalmers as set out in her written submissions.

Unfair deduction from holiday pay

261. Mrs Chalmers said she had been treated differently from Mr Horsley. Her holiday pay should have been rounded up.

262. Looking to elements of Ms Marshall's evidence, in a brief supplementary submission, Mrs Chalmers said that protecting the contract was one of the reasons Ms Marshall had produced the report she did. It was not however the only reason. Ms Marshall had accepted that she was annoyed as Mrs Chalmers had questioned her professionalism in relation to the notes. Her actions were victimisation. She was vindictive in relation to SSP. She was only able to do these acts of victimisation because of the protected acts. The complaint followed the grievance, which was a protected act, said Mrs Chalmers.

263. The Tribunal was reminded of ***Igen*** on the basis that Ms Marshall's actions had to be no sense whatsoever about the protected characteristic, said Mrs Chalmers.

264. The Tribunal was therefore strongly urged by Mrs Chalmers to find in her favour. She referred to having faced *"obfuscation, fabrication and downright lies"* from the respondents.

Submissions for all respondents

265. Mr MacKinnon also produced written submissions with a table or schedule in which he summarised the claims made and the respondents' answer to them. He specified the claims, as he saw them, of direct discrimination, indirect discrimination, harassment, victimisation and constructive dismissal. His submissions and the schedule are attached as appendix 2. What follows is a summary of his submissions for all four respondents. The Tribunal considered the "full version" of his submissions.

266. At the outset of his submissions, Mr MacKinnon said that 78 allegations had been made. He made his submissions in respect of each of those allegations or claims. Prior to so doing however he made some general observations on the case and observations on the evidence heard.

267. The Tribunal was urged to keep in mind that the respondents were a small employer with limited HR support which came from Mrs Chalmers. In considering the evidence from witnesses at the Tribunal, the Tribunal should prefer the evidence from the three witnesses for the respondents.

268. Mr MacKinnon referred to the manner in which they given evidence and urged the Tribunal to accept their evidence as credible and reliable. In relation to Mrs Chalmers, he said that the respondents accepted that she may well believe she had been mistreated butthat her evidence was in many areas not credible or supported by surrounding facts. She made various assertions and had her interpretation of what had happened. Her conclusions were in many instances at variance with the evidence of others and evidence before her. The case of *Laing* was referred to by Mr MacKinnon in a reminder to the Tribunal that it was for the employee to prove that the treatment had been suffered, not merely to assert it and that

the Tribunal must be satisfied on this after all the evidence had been considered.

269. The starting point appeared to be the decision not to reschedule the Christmas party in Mr MacKinnon's submission. All other matters were raised after that, although some had occurred prior to it. After a discussion between Mrs Chalmers and Mr Whyte on 13 December, Mr MacKinnon said that Mrs Chalmers had concluded that she was being treated unfairly and saw every action before and after that time through that prism. Anything that happened could only be connected with unfair treatment. That had led her to take what he referred to as a quite unreasonable stance both during the events and also at Tribunal.

270. Comments had been taken out of context and misinterpreted or misunderstood either wilfully or otherwise. Mr McAllister had commented on that being a tendency of Mrs Chalmers. Mrs Chalmers had refused to accept any explanation which did not accord with their own view. The Christmas party decision was an example of that. That had been, in Mrs Chalmers opinion, a conspiracy. Similarly the follow-up by way of investigation by Ms Marshall and the finding that the grievance was unsubstantiated had been because Ms Marshall had acted in bad faith, she alleged.

271. Mrs Chalmers had taken a wholly unreasonable approach throughout, said Mr MacKinnon. She had not used an objective view. That was demonstrated in her consideration of the notes of the grievance interview when any deviation from the exact words used was given an undeserved significance, said Mr MacKinnon.

272. Mr MacKinnon then set out the chronology of events. He highlighted that the first time anything was raised by Mrs Chalmers was following the Christmas party decision and occurred on 13 December 2016 when she spoke with Mr Whyte. There was a period when nothing happened it seemed, that being between 19 December and 9 January. There was

therefore a four-week period when events happened which, Mrs Chalmers said, made it impossible for her to remain at work.

273. Mr Hughes, it seemed, had a good relationship with Mrs Chalmers until the hardware refresh. Mrs Chalmers had raised comments about Mr Hughes to Mr Whyte on 12 January. There was a dispute as to what had been said to Mr Whyte and indeed whether Mr Hughes had said what Mrs Chalmers reported to Mr Whyte as what he had said. Mrs Chalmers' position appeared to be that she could not be expected to speak to Mr Hughes given a comment, which was denied, as to the cleaning of the fridge and given the request he had made of her in relation to the mobile phones.

274. As to wages being allegedly late, Mrs Chalmers had immediately adopted the mindset that she was considering her position with the respondents, notwithstanding the payment in October be made on the same date as had occurred in several previous months. She had made her position plain in the email page 206 of the bundle. She also had said to Ms Marshall that she was questioning her future with the business when the customer call was moved in time on 9 November. Again this had to be kept in mind as it illustrated the mindset of Mrs Chalmers in this time.

275. There was, said Mr MacKinnon, no evidence other than the assertion by Mrs Chalmers of smirking, an issue on the part of Mr Hughes with female project managers and aggressive or threatening behaviour by Mr Whyte and Mr Hughes towards her. Witness statements gathered by Ms Marshall did not support Mrs Chalmers in these allegations. There was reference to Mr Hughes being grumpy or thoughtless on occasion but that was not said to have been directed specifically towards Mrs Chalmers. Ms Rajain did not have any issues with the respondents on the basis of being a female and was positive about her treatment by the respondents.

276. In Mr MacKinnon's submission, where there were witnesses, such as to the incident when there was laughter by Mr Whyte in a call, witnesses did not support the interpretation which Mrs Chalmers had.

277. The conclusion which Ms Marshall had reached was therefore that which any investigator would reach.

278. It had been perfectly reasonable on the part of Mr Whyte to outsource investigation and determination of the grievance. There was no suggestion from the evidence or in any email traffic of undue influence being applied. A full-time replacement had been taken on by the respondents after Mrs Chalmers had left employment. Ms Marshall not taken on the role of Mrs Chalmers.

279. As to the notes of the meeting, those were expressly not verbatim. They were a good summary of that meeting which lasted over two hours. The recording was naturally more accurate, said Mr MacKinnon. The notes were satisfactory however despite the comments of Mrs Chalmers having gone over the notes and the recording in detail. There was no sinister motive which could be attributed to any difference between the two, Mr MacKinnon submitted.

280. Ms Marshall had interviewed all relevant witnesses. Witnesses had confirmed the accuracy of the notes or had made minor amendments. Whilst Mrs Chalmers might have asked different questions or have done further investigations, that was not relevant, Mr MacKinnon said. Mrs Chalmers could have provided more information or interviewed witnesses. She did not do so.

281. The without prejudice conversation instigated was simply an attempt to see if an acceptable outcome could be reached. By then it had been made clear by Mrs Chalmers that she did not see a return to work as being possible and that she was contemplating raising Tribunal proceedings. There was no pressure placed upon Mrs Chalmers.

282. Mr Mackinnon then turned to look at the areas of claim involved.

Direct Discrimination

283. Mr Mackinnon produced a table which set out the alleged discriminatory act, the factual background or evidence as the respondents saw it, whether an appropriate comparator had been identified by Mrs Chalmers, whether the act involved amounted to less favourable treatment or not and whether the act was because of Mrs Chalmers' sex. The respondents set out their own position in relation to those matters in the table.

284. Prior however to turning to the individual events, Mr MacKinnon said that the Tribunal should look at the evidence which both parties had led and determine whether there was any evidence to suggest direct discrimination. He referred to ***Shamoon*** and to ***Laing.*** His submission was that the evidence did not establish that Mrs Chalmers had, because of her sex, been treated less favourably. The Tribunal should, applying ***Laing,*** be satisfied on the evidence that the employer had given a genuine reason for the actions and no conscious or unconscious discrimination had been disclosed.

285. In relation to the Christmas party, Mr MacKinnon said that it had been arranged, with flights and hotels being booked, in circumstances where there was no suggestion of Mrs Chalmers having any difficulty in attending. It had not been rearranged. That was not however an act of sex discrimination.

286. As far as sick pay was concerned, there was no custom and practice as to full salary continuing. This was the first occasion on which anyone had been absent for more than 2 weeks. No one in the business had more than 2 days consecutive absence at any point prior to this. There was no discrimination in the decision taken by the respondents. The circumstances in which the decision was taken required to be considered, namely that Mrs Chalmers had received 2 weeks full pay together with the 4 days immediately preceding that two-week period.

287. It was recognised by the respondents that there were two occasions when late payment of wages occurred. That applied however in relation to each member of staff. It was not therefore a decision taken in relation to Mrs Chalmers' gender. Similarly the payment in tranches and who was within each tranche was not a decision consciously or unconsciously influenced by sex, particularly given that the evidence was that Ms Rajain was paid in the first tranche.

288. The training request to which the respondents had not replied was due to failure to read or respond to the email from Mrs Chalmers requesting that she attend the training event. There was no evidence to link this to her gender.

289. If the Tribunal accepted the position which Mr MacKinnon outlined in relation to these matters, the claim of direct discrimination failed. If the Tribunal was not with him, Mr MacKinnon referred to the table which set out the respondents' position in relation to the facts, disputed that an appropriate comparator been identified, that less favourable treatment had occurred and that the act was connected with Mrs Chalmers' sex.

290. Further, the claim in respect of late payment of wages was time barred, Mr MacKinnon submitted. Contact with ACAS in relation to the Early Conciliation Certificate had been made by Mrs Chalmers on 1 March 2017. The alleged late payment of wages had occurred on 27 October 2017. The respondents disputed that that was late payment having regard to the terms of the contract. Even however if it was regarded as late, the claim presented in relation to it was out of time.

Indirect Discrimination

291. The table set out the respondents' position on indirect discrimination, said Mr MacKinnon. That detailed the PCP as identified by Mrs Chalmers, commented as to whether the PCP had been identified, set out the view of the respondents as to whether the PCP put women at a disadvantage, their

view on whether Mrs Chalmers suffered disadvantage and whether the treatment was justified. For the reasons set out in the table, the claim of indirect discrimination should fail.

292. For the reasons set out above, the respondents maintained that the claim of indirect discrimination relating to alleged late payment of salary should fail as it was time barred.

Harassment

293. Mr MacKinnon reminded the Tribunal that the claim made was in terms of Section 26 (1) of EQA. He referred to that Section and to the need for the Tribunal to take a view objectively as to whether it was reasonable for the conduct said to have occurred to have had the effect described in terms of that section. His submission to the Tribunal was that individually and collectively harassment as defined had not taken place. It was also his submission that in the majority of complaints of harassment the evidence did not support a causal link between the conduct alleged and the protected characteristic of sex. He again referred to the table for the detail of the respondents* position.

294. The table set out the alleged act of harassment as summarised by the respondents, the date of the alleged act, the respondents against whom the allegation was made, whether the act was admitted, whether the act, if it took place, had the prescribed effect under EQA in the respondents' view and whether the act was related to Mrs Chalmers* sex in the respondents' view.

295. Mr MacKinnon took the Tribunal through the table. Summarising his submissions, he said that all claims of harassment made should be unsuccessful.

296. There had been no evidence as to ostracisation. Mrs Chalmers had accepted that there was nothing of significance she could recall which she

had sent to Mr Whyte during the period that required a response. She had continued to take part in priorities calls. Mr Whyte had approached Mrs Chalmers on 13 December. He sought to meet with her on 14 and 15 December to carry out the 121. At the 121 he had detailed various projects which Mrs Chalmers was being asked to carry out in the period after that. There was, said Mr MacKinnon, no evidence of a link to sex in any event. Mr McAllister had not raised a complaint about wages. The circumstances were different.

297. There had been no evidence of female project managers being belittled. Mr Hughes had been open in his evidence that he would make comments about customers or clients whose approach he found frustrating. Those comments were not directed to females in particular and were not due to the fact that those about whom any views were expressed were women. Ms Rajain did not have any issues with Mr Hughes treatment of her.

298. As to fridge cleaning, organisation of that was one of the responsibilities of Mrs Chalmers. It was reasonable to ask her to undertake this organisation. She had not been asked to clean the fridge herself. There was a dispute as to what Mrs Chalmers had said to Mr Whyte. Mr Hughes denied saying to Mrs Chalmers that he did not want to ask her to have to clean the fridge herself. Again the request made to Mrs Chalmers to organise cleaning of the fridge was not linked to the fact that she was female.

299. The request made that Mrs Chalmers assist with return of some of the mobile phones was not an act of harassment in that Mrs Chalmers was the only dedicated admin support in Glasgow. Mrs Chalmers was not in fact required to carry out this task as the IT manager ultimately dealt with all the phones in question.

300. It was satd by Mrs Chalmers That W respondents CM Tfof Investigate Tier complaint about Mr Hughes. Mr Whyte had however discussed the concerns of Mrs Chalmers with Mr Hughes. He had not communicated to Mrs Chalmers as to what was to happen as he was unsure as to how best

to proceed. The grievance saw the issues raised being investigated by a third party. The conduct of the respondents did not constitute harassment. There had been no indication given of how this related to Mrs Chalmers' sex.

301. Mr Whyte had explained that any laughter on the telephone call on 2 December was not directed at Mrs Chalmers. He had explained the basis of any laughter. There was no evidence as to how this related in any event to the sex of Mrs Chalmers. As to emails having been read and purposely ignored in relation to training, it was denied that this had occurred. Comments had been made upon this at an earlier point in submissions, said Mr MacKinnon. Mr Birr's circumstances were different to those of Mrs Chalmers. The failure to read or to reply to the email from Mrs Chalmers was not related to her sex.

302. Mrs Chalmers said that she had been belittled, told she was expensive and her role had been demeaned. That was denied. There had been a remark as to the team being expensive. Mr McAllister supported that as having been said. This was not a matter related to the fact that Mrs Chalmers was a woman, said Mr MacKinnon.

303. It was not accepted that Mrs Chalmers had been berated about fridge cleaning and the cleaners' performance in front of other staff. Mrs Chalmers had not said to Ms Marshall who any witnesses were to this behaviour. Witnesses who were interviewed by Ms Marshall had not seen any bullying or aggressive behaviour in this regard by Mr Hughes or Mr Whyte directed towards Mrs Chalmers. This was not related to Mrs Chalmers' sex.

304. It was said by Mrs Chalmers that she had been shouted at for putting in a grievance. Mr Whyte had accepted that he was exasperated when he received Mrs Chalmers' grievance. He could not understand why Mrs Chalmers had not raised this issue with Mr Hughes if she was keen to attend the seminar. His view was that Mrs Chalmers wished to provoke him into terminating her employment during this telephone call. This call was not,

submitted Mr MacKinnon, hostile intimidating or otherwise offensive when properly viewed. The outcome of the call was that Mr Whyte arranged for an independent third party to investigate the grievance of Mrs Chalmers.

305. Mr Hughes had denied smirking at Mrs Chalmers. In any event this was unrelated to Mrs Chalmers' sex. As to the allegation that Mrs Chalmers had had her rights under the Data Protection Act breached, that allegation was denied. In any event any such action as had occurred was unrelated to Mrs Chalmers' sex and could not on a reasonable interpretation be said to have met the terms of section 26.

306. The decision to monitor Mrs Chalmers' software was taken by the IT manager, Mr Horsley following upon complaints by Mrs Chalmers. No other employee had the same issue. This was an appropriate step from Mr Horsley to take in the circumstances. It was unrelated to Mrs Chalmers' sex.

Victimisation

307. Mr MacKinnon firstly addressed whether the three acts said by Mrs Chalmers to have been protected acts were properly in that category. The respondents' position was that the bringing of the Tribunal claim was the only such act which was a protected act. The table detailed the basis of this position. In short, the respondents disputed that Mrs Chalmers had referred to discrimination when talking about the Christmas party on 13 December. Had she done so, they would have taken advice. That is what had occurred when previous reference to alleged discriminatory behaviour had been made by Mrs Chalmers.

308. Raising of the grievance did not constitute a protected act in Mr MacKinnon's submission , There was no mention of EQA or sex discrimination. The word *"discriminatory"* was used but without any further detail being provided. That was not good enough in terms of constituting a protected act, said Mr MacKinnon. He referred to the case of ***Durrani.***

309. In terms of the claim of victimisation itself, the respondents disputed that the acts said to have occurred constituted victimisation. There was no causal link in the majority of cases between any alleged protected act and the allegation of victimisation in Mr MacKinnon's submission. It appeared that Mrs Chalmers was taking the position in her evidence that as her claim was for sex discrimination any acts after that were linked to it and constituted victimisation.

310. The table produced by the respondents detailed to which alleged protected act behaviour, said to constitute victimisation, was allegedly linked. It set out the date of the alleged act of victimisation, the particular respondents against whom the accusation was made, whether the act in question was admitted, whether the act was because Mrs Chalmers did or the respondents thought she had done the alleged protected act and whether the alleged act of victimisation amounted to a detriment. These were all set out in the terms in which the respondents urged the Tribunal to see them. The Tribunal should find that the act did not occur where it was not admitted, having regard to the evidence. The admitted acts or acts which the Tribunal found as having occurred were not however linked to the alleged protected act for the reasons which the respondents set out in their submission in relation to the various matters. Many of those matters had been referred to in the earlier parts of the submission.

311. Specifically as to alleged manipulation of the notes of the grievance interview with Mrs Chalmers, Mr MacKinnon said that these were produced in good faith. There was in any event no causal link shown by Mrs Chalmers between the protected act, as she saw it, and the alleged failure by Ms Marshall to investigate the grievance to her satisfaction. Mrs Chalmers herself had referred to the alleged defects being attributable to Ms Marshall's incompetence or her desire to secure a long-term relationship with the respondents. Mrs Chalmers had referred to that desire in her own submissions at various times. Mr MacKinnon referred to ***A v Chief Constable of West Midlands Police UKEAT/0313/14*** and in particular

paragraphs 20 to 23 and paragraph 30 of that Judgment. He also referred to ***Eke*** and ***Conteh.***

312. The possibility of settlement had been discussed in the meeting between Ms Marshall and Mrs Chalmers at the point where Mrs Chalmers had said that she did not believe she could return to the workplace and when she had Indicated that her belief was that by returning to the workplace she would risk her complaints becoming time barred. That was a clear indication that Tribunal action was being contemplated, Mr MacKinnon submitted. There was no detriment through Ms Marshall having raised the possibility of a negotiated settlement. There was no causal connection between a protected act and the alleged detriment. Mr MacKinnon emphasised that raising the possibility of a without prejudice conversation could not, in his submission, be viewed as a detriment.

313. It was true that the investigation notes had not been shared with Mrs Chalmers. She had not been prevented however from contacting or speaking to witnesses or to anyone else to whom she wished to speak. There was no requirement for notes to be shared. The response to the grievance was full in terms of the outcome letter. That was no causal link between this decision not to send on notes and any alleged protected act.

314. Mrs Chalmers sought to maintain that a constructive dismissal was an act of victimisation. The respondents disputed that her own decision to resign could be properly viewed as an act of victimisation by the respondents. Similarly her position that loss of employment, income and status was an act of victimisation was not something which was in that category or which could be, Mr MacKinnon submitted. These matters had arisen as a result of Mrs Chalmers' own decision to leave the respondents' employment and not through any act or inaction of the respondents.

315. The other matters which were raised as alleged acts of victimisation had been dealt with in relation to the facts in the earlier part of the submission of Mr MacKinnon.

Constructive dismissal

316*. There were, said Mr MacKinnon, 39 separate acts which Mrs Chalmers alleged were breaches of contract causing her to resign. Those acts, he said, overlapped in many instances, were repetitive or lacked specification.

317. It appeared that Mrs Chalmers said this was a last straw type of claim with the grievance report being the final straw justifying resignation, Mr MacKinnon said.

318. The principles of a constructive unfair dismissal claim were rehearsed by Mr MacKinnon. He referred to ***Western Excavating*** and to ***Omllaju.*** The grievance outcome was not capable of being viewed as a repudiatory breach or as having contributed to any alleged breach of trust and confidence, Mr MacKinnon submitted. It was factually accurate, was based upon a reasonable investigation and had conclusions which were consistent with evidence gathered. Whilst Mrs Chalmers may not have liked the outcome or may have believed that additional questions should have been asked or further investigation undertaken, that was not of relevance in the context of looking at a constructive unfair dismissal.

319. There was reference to the table in which the respondents set out their position as to the alleged breach of contract founded upon by Mrs Chalmers, the date of that alleged breach of contract, whether the act was admitted, whether the alleged breach of contract amounted to a breach of contract and whether Mrs Chalmers resigned in response to the alleged breach of contract.

320. Many of the items mentioned in the table and the explanations given as to the position of the respondents coincided with matters raised by Mrs Chalmers and dealt with in the earlier submissions of the respondents, save that Mr MacKinnon now set out the respondents' position in respect of there being alleged breaches of contract.

321 . Reference was made to the table in that regard. There was substantial overlap between the earlier submissions upon points and submissions made in the context of constructive unfair dismissal.

322. Specifically in relation to the allegation that there had been a failure by the respondents or by Mr Whyte to act upon the complaints of Mrs Chalmers as to ostracism and resultant stress, Mr MacKinnon said that it appeared that Mrs Chalmers was claiming that the respondents **did not act** upon her complaints yet was also complaining that they **did act** upon complaints but not to her satisfaction. These were not consistent positions. The respondents either acted on complaints, which they said was the case, or they did not.

323. There had been no fundamental breach of contract either in terms of any specific act or an accumulation of acts.

324. The grievance hearing had been conducted sympathetically. Mrs Chalmers had accepted that in her evidence. Events had occurred after date of resignation. The Tribunal should keep that in mind in the sense that the resignation could not be caused by such acts. The questionnaire and lack of response of the respondents, for example, occurred after resignation. Some events had occurred more than 3 months prior to resignation. Mr MacKinnon submitted that Mrs Chalmers had either not resigned in relation to any such alleged breaches of contract or had delayed unreasonably in so doing.

325. There had been no breach of an express term of contract. Insofar as it was said by Mrs Chalmers that there was a term implied by custom and practice as to full pay rather than sick pay being the right of an employee, that was not a finding warranted given the evidence.

Holiday pay

326. Mrs Chalmers herself had accepted when she resigned that she was due 4.17 days on the basis of holidays accrued but untaken at time of termination of employment. The respondents had paid that amount to her. It was not her position at this time that this ought to have been rounded up to five days.

327. There was however only one occasion alleged by Mrs Chalmers as having seen rounding up occurring. It had been Mrs Chalmers who had initiated that rounding up. Mr Whyte was unaware of that rounding up.

328. There was therefore no support for Mrs Chalmers' position that there was a custom and practice of rounding up holiday pay. The practice was not notorious and certain. A single instance was not enough to establish custom and practice.

Expenses/preparatlon time order

329. Each party "flagged up" that they regarded the case as being one in which payment of expenses or preparation time would appropriately be ordered. Mrs Chalmers had raised this at an earlier point. The Tribunal did not hear submissions in relation to these matters, taking the view that it was more appropriate that any such submissions were made if an application followed pursuant to the Judgment in the case.

Brief reply by Mrs Chalmers

330. In a brief reply, Mrs Chalmers said that the Tribunal should be careful in its consideration of the table which Mr MacKinnon had submitted. She cautioned that the Tribunal should look at what the claim actually was rather than following the respondents' language in describing the claim. She also referred to some inaccurate dates and to her position in respect of the PCP in some instances.

331. With regard to alleged protected act, Mrs Chalmers said that she regarded the decision in relation to the Christmas party to have been made on 2 December 201 6. It was confirmed to Mrs Chalmers that the Tribunal would decide what in its view were protected acts looking to the evidence it heard and the submissions from parties.

332. Although the respondents referred to Mr McAllister's statement, it was telling, Mrs Chalmers submitted, that the statement was unsigned.

333. As far as collusion between LAW and the respondents was concerned, regard should be had by the Tribunal to the email at page 361 of the bundle which confirmed that Mr Whyte took up the retainer service with LAW on 22 February 201 7. That email referred to "the unreasonable behaviour" of Mrs Chalmers.

334. The attempt to hold a without prejudice discussion did follow a reference to timebar and redundancy by Mrs Chalmers, she accepted. It was not appropriate however then to assume that she would be proceeding with a Tribunal claim.

335. In relation to sick pay, it was important that in terms of the absence policy there was no limit on the period when pay would continue to be paid.

336. As far as Ms Rajain was concerned, she was a software developer as was Mr Hughes. Mr Hughes verbalised about his contempt for women project managers. Ms Rajain was not a woman project manager and so had not experienced the reaction of Mr Hughes.

337. In relation to the Christmas party, the comment had been made by Mrs Chalmers about proceeding being potentially discriminatory. The venue had not been booked, at that point It was booked after what Mr Chalmers said was the protected act, her comment to Mr Whyte.

338. There had been a fundamental breach of contract by the respondents which could not be cured by any later hearing in respect of the grievance. The breaches of the EHRC code did not postdate Mrs Chalmers resignation.

339. Finally, in relation to late payment, Mrs Chalmers said that she had queried this when there was no payment on 26 October as she had been told that payment was to be automated. The complaint about her wages was not "out of the blue".

Discussion and decision

General Comment

340. In this case there were some important points where evidence as to what had happened differed as between Mrs Chalmers on the one hand and the respondents on the other. An example of that was the comment which Mrs Chalmers said she had made to Mr Whyte on 13 December that holding the Christmas party in circumstances where no woman could attend could be discriminatory. Mr Whyte denied that this comment had been made to him albeit that he accepted that there had been a brief conversation between himself and Mrs Chalmers that day in relation to the Christmas party.

341. The Tribunal required to come to a view on what it regarded as having happened, i.e. the facts of such matters, given the competing evidence before it.

342. In other areas there was a very large measure of agreement as to what had happened. The issue in those instances was whether the acts or inaction were discriminatory in nature. An example of that was the telephone call on 2 December where it was a matter of agreement that on Mrs Chalmers enquiring as to the current position in relation to the repayment potentially due from HMRC, Mr Whyte had laughed. Mrs Chalmers said that the laughter was directed towards her and was an instance of discrimination, being harassment. She said that this contributed as a straw to the situation

in which she resigned, claiming constructive dismissal. The respondents on the other hand, whilst accepting that a laugh was the response from Mr Whyte, attributed that to frustration on his part, being a reaction caused due to the length of time it was taking to obtain the repayment and the difficulty being encountered in securing repayment.

343. The Tribunal required to consider whether there were facts from which discrimination could be inferred. It required to keep in mind that bias or prejudice can be conscious or unconscious and that discrimination can be difficult to prove. Examination was required of the Tribunal both of each individual element said to be an act of discrimination and of the overall picture. It can be instructive and important to move away from looking at each individual incident in isolation and to consider whether the evidence overall points to either a discriminatory culture or to a pattern of behaviour with an overall picture emerging. A Tribunal also requires equally to keep in mind that just because there are several allegations, it does not follow that *"there must be something in if.*

344. The Tribunal gave detailed consideration to the evidence and to the application of law to that evidence. There was substantial oral evidence and substantial documentation. The case was heard over 9 days, being split between 2 sittings unfortunately. This arose in circumstances where bad weather meant that the hearing could not be completed on the days initially assigned to it. Submissions were full and clearly were the product of substantial time and effort by both Mrs Chalmers and Mr MacKinnon.

Discrimination

345. From the evidence before it the Tribunal gained no impression at all of there having been any acts of discrimination of any type by any of the respondents in relation to Mrs Chalmers. There were simpiy no facts, in the view of the Tribunal, from which an inference of discrimination could be drawn. The claims against the various respondents did not therefore progress to the second stage of the test in that the onus did not switch to the respondents

to show that they did not contravene the provision and that the acts were *"in no sense whatsoever"* related to discrimination.

346. Further, there was no PCP which put Mrs Chalmers and some within the group of those sharing her protected characteristic at a disadvantage.

347. In coming to these views the Tribunal was very conscious that Mrs Chalmers was convinced of discriminatory conduct existing on the part of the respondents.

348. The Tribunal had the benefit of seeing and assessing all the witnesses, including of course Mrs Chalmers. It recognised that one of the points made by Mrs Chalmers was that the character of Mr Whyte and Mr Hughes as presented in Tribunal and the attitudes which they portrayed in course of their evidence were entirely at odds with her experience of those gentlemen in the workplace.

349. It can of course be the case that a witness presents differently in a Tribunal Hearing to the way in which the witness may appear on a day-to-day basis in the workplace. The Tribunal was conscious of that. It equally kept in mind that there was a clear benefit to Mr Whyte and Mr Hughes in appearing calm and reasonable in the Tribunal proceedings given that liability turned, to large degree, upon the assessment by the Tribunal of their behaviour.

350. The view of the Tribunal was that both Mr Whyte and Mr Hughes were balanced, moderate and reasonable. They were credible in their evidence. They maintained their position under close questioning by Mrs Chalmers who knew her case extremely well. Mrs Chalmers is an intelligent, articulate woman and she was well able to test the evidence of all 3 witnesses for the respondents. There was no hint however from Mr Hughes or Mr Whyte of any issue with women in general or with Mrs Chalmers on the basis of her being a woman. Mr Whyte, in particular, accepted that some aspects could have been better handled by him. He referred to pressures of family illness and in particular to business pressures which were in existence at the time

of events about which the Tribunal heard evidence. He also openly said that he was at something of a loss in knowing how to deal with the points which Mrs Chalmers raised with him about Mr Hughes. He had spoken with Mr Hughes and had the response of Mr Hughes. He was unsure of how to proceed thereafter. His evidence in most matters, and certainly in the critical areas, was accepted by the Tribunal as being genuine and truthful. He had not done nothing in that he had spoken with Mr Hughes. He could have followed up more quickly either by taking advice or by making a decision. He did not simply dismiss what Mrs Chalmers had raised with him. Similarly, on receiving her grievance, he recognised that it was appropriate to seek advice and to engage an independent third-party, giving that third-party the authority to make the decision as well as to investigate the grievance.

351. Mr Whyte and Mr Hughes were each able to explain rationally and cogently why particular events had happened.

352. Mr Whyte, for example, was able to explain why the Christmas party proceeded on Tuesday evening notwithstanding the fact that it transpired that Mrs Chalmers could not be there and indeed that Ms Rajain could not be there. Although Mrs Chalmers' position was that the party was deliberately scheduled to avoid attendance by women, there was simply nothing to back that up as being the starting point or indeed an element in the decision-making as to when the party was held or in the decision not to rearrange it. It might have been anticipated, given the view which Mrs Chalmers had, that something which might be viewed as being more *"male orientated"* had been planned for or had occurred at the Christmas evening. That was not so however. There was no hint of that being discussed, proposed or indeed having happened. The night took the same course as had other Christmas nights which Mrs Chalmers had attended. Employees had met for a drink and had then gone on to have a curry.

353. It was no doubt the case that the evening could have been rearranged. There was always going to be someone however who could not attend. Travel and accommodation arrangements had been made by the time it

became clear that Mrs Chalmers could not attend. It later became clear that Ms Rajain could not attend. She had initially anticipated attending the meal. Flights were by then booked and hotel accommodation had also been booked. Mr Parmar and Mr Middleton could have travelled up in the car with Mr Whyte. That would have disrupted Mr Parmar in particular. Mr Whyte could have made himself available for the Monday evening to attend a party that night. Mr Khan could not attend on that evening however. Further, Mr Whyte gave a reasonable explanation for not adopting this course in that he would have been up very early to drive from Leicester to Glasgow and would have been tired that evening. Equally changing the party to Wednesday lunchtime would have, in reality, seen more than an hour occupied and would have interrupted important work.

354. The fact that neither of the female staff members could attend the party did not make holding it on Tuesday night discriminatory. The fact that Mrs Chalmers "lost out" on a benefit through not being able to attend the party, as did Ms Rajain, did not mean that it was discriminatory not to offer them some alternative.

355. There was simply no evidence to support the view that the decision not to rearrange the party was an act of discrimination of any type.

356. There was also no credible evidence to suggest that the Christmas party decision or other alleged acts of discrimination were discriminatory acts or acts undertaken as some form of retribution for the raising by Mrs Chalmers of payment being made to her of her salary for October on 27 October rather than 26, the date that she regarded as being the date when payment required to be made under the contract terms.

357. In relation to the conversation between Mr Whyte and Mrs Chalmers, the Tribunal preferred the evidence of Mr Whyte to that of Mrs Chalmers in assessing whether Mrs Chalmers had specifically referred to there being the possibility of discrimination occurring if the party proceeded in

circumstances where female members of staff could not be present at it. It concluded that that comment was not made by Mrs Chalmers.

358. As far as Mr Hughes was concerned, he was calm when giving evidence. He provided reasoned answers which, in the view of the Tribunal, were naturally given. Mrs Chalmers had both in the claim and in her own evidence portrayed Mr Hughes as being, in effect, a bully who had an issue with women in general and Mrs Chalmers in particular. This had developed to such an extent, she said, that she could not speak to him to enquire as to any response he might have to her email seeking to attend a seminar. During the course of cross-examination, however, Mr Hughes said that he had spoken face-to-face with Mrs Chalmers about matters other than the seminar around the time of her email about the seminar. He said that although Mrs Chalmers was not at this point comfortable with any non-business communication, business communication was continuing to take place. Mrs Chalmers did not challenge that evidence. In fact her subsequent question in that passage of evidence saw her put to Mr Hughes that she was behaving professionally. Mr Hughes confirmed this was so. A discussion therefore in relation to the email and possible attendance by Mrs Chalmers at the seminar would, in line with other business communications around this time, have been possible on this evidence.

359. Mr Hughes was able to explain his frustration over the approaches of project managers and other customers to work issues which he saw differently as a software developer. There was nothing to suggest that he directed his frustration or exasperation only at females. Although it was suggested that he had been spoken to about his approach halfway through a meeting with customers, other than Mrs Chalmers' view (and she was not present at the meeting in question), there was no indication that this was on the basis of there being an issue with his attitude towards women. Mr McAllister had been that meeting. He did not remember any specific incident when asked by Ms Marshall. When he described that matter Mr McAllister followed it up

by saying that Mrs Chalmers would pick up on things the wrong way when perhaps Mr Whyte and Mr Parmar had been talking.

360. In short, the Tribunal regarded both Mr Whyte and Mr Hughes as being credible and reliable in their witness evidence.

Mrs Chalmers

361. As mentioned, there were aspects where Mrs Chalmers had a different version of events to Mr Whyte and/or Mr Hughes. There were other elements where the issue was interpretation of particular matters. Mrs Chalmers often had a different view as to those areas than had Mr Whyte or Mr Hughes.

362. It struck the Tribunal from examples that Mrs Chalmers gave of things which she regarded as being sinister, that she was inclined to approach events from a particular angle, that angle being one of suspicion and concern. She also approached any discussion or document with the mindset that the respondents, including therefore Mr Whyte, Mr Hughes and Ms Marshall, were saying or doing things because of sinister motives. The motives which she regarded as being at play were, broadly put, *"anti- women", "advancing the interests of LAW" or "getting at or doing down"* Mrs Chalmers herself.

363. It is difficult to know when this approach of Mrs Chalmers first took root. She was clearly unhappy about the late payment, she saw it, in October 2016. As best can be judged, it seems that the decision made to adhere to the date of 13 December for the Christmas party in circumstances where Mrs Chalmers could not attend and where it ultimately became the case that Ms Rajain could not be present, led to Mrs Chalmers seeing both earlier and subsequent events on the basis that sex discrimination was at play, that the respondents did not want to tackle this and indeed were punishing her for raising this matter. Having formed this view, everything which happened was seen in this light. Other possible explanations were excluded as not being reasonable or credible. The request to organise cleaning of the fridge

was not seen as being made because the task fell within the role of Mrs Chalmers. Rather, she was being asked to do this because she was a woman. She regarded the way in which Mr Hughes asked to do this is being a *"veiled threat"* that she would be asked to do this herself.

364. In the view of the Tribunal on the evidence it heard there was however no basis for that view on the part of Mrs Chalmers. Similarly, and as another example, it was correct that elements of the grievance notes as prepared by Ms Marshall, were not 100% accurate. That was when compared to the recording which Mrs Chalmers had undertaken. In all but very few of the instances however, when the notes were compared with the recording the differences were inconsequential and perfectly capable of explanation. Some particular words or phrases appeared at slightly different points in Ms Marshall's version as opposed to the actual recorded version. Other particular phrases used in the meeting were not produced with 100% accuracy by Ms Marshall. Their meaning however was clearly there in the notes. Rather than take a view that the meeting had been fairly summarised or indeed set out areas which she wished corrected having regard to the recorded version in order to reflect that version, with the recorded version being supplied to Ms Marshall for comparison, Mrs Chalmers immediately came to the conclusion that there was deliberate falsification and that Ms Marshall had been involved in a *"cynical ploy".* She used the latter phrase in an email of 20 March 2017 to Ms Marshall in commenting on what she regarded as 1303 errors, omissions or complete inventions. That email appeared at page 234 of the bundle.

365. Where something had been picked up incorrectly by Ms Marshall, it was not always contrary to the interests of Mrs Chalmers, as Mrs Chalmers had claimed. One example is that the recorded version, and therefore the words used refers in a passage at page 143 of the bundle to a meeting on 19 December. Mrs Chalmers says that she, together with everyone else at the Glasgow office, was invited to that meeting. Ms Marshall recorded that as being a meeting to which all were invited except Mrs Chalmers. That would

have supported, if correct, a potential issue of exclusion. This passage of the discussion related to the hardware refresh.

366. The hardware refresh is another instance of the situation where Mrs Chalmers saw the revised specification not as being a response to financial issues and a reassessment of need at that particular time but rather as a means of excluding her. It may have been because there was imperfect communication around the reasons for the revised specification. The clear view of the Tribunal however was that it would not have mattered had that communication been greater in that Mrs Chalmers was by then set and fixed in her view that decisions were being taken due to an issue which the respondents had with women.

367. It is noteworthy that Mr McAllister in a statement to Ms Marshall refers, as mentioned above, to Mrs Chalmers picking things up the wrong way a couple of times. He also volunteers at page 325 of the bundle that Mrs Chalmers mentioned to him the conversation with Mr Whyte after Mrs Chalmers had lodged a grievance. He says that Mrs Chalmers *"Mentioned a few things that were around that Andy could find someone at half the price of her."* When asked by Ms Marshall whether he would have expected Mr Whyte to say something like that Mr McAllister responds.

> *"No. But I can imagine is him* (sic) *saying something and it being interpreted like that. An example might be at our development team meeting 7 could find developers to do your job but there is no way that I would do that as Pm investing in you guys as a team" but I could see how it could be interpreted in one way or another way."*

368. Where contemporaneous emails were produced, including emails which did not go to Mrs Chalmers at the time and were between LAW and Mr Whyte and would not therefore have been expected to have been seen by Mrs Chalmers, there was no *"smoking gun".* There was, for example, no email containing a remark which disclosed any support for the version of events spoken to in evidence by Mrs Chalmers, where that differed from the

evidence of Mr Whyte and Mr Hughes. There was no such document supporting the view that Mrs Chalmers held as to the motivation for decisions taken by Mr Whyte or actions of Mr Hughes. The Tribunal recognised that it would have been unlikely for either of those gentlemen to have been as crass as to set out in an email something which overtly gave away their position. The Tribunal considered whether anything pointed to unconscious bias but concluded that there was no such evidence. On the contrary, there was substantial credible evidence on which the facts as found did not support an inference of discrimination.

Ms Marshal!

369. In its assessment of the evidence from Ms Marshall, the Tribunal had regard to the nature and extent of the differences between the notes prepared by Ms Marshall and those produced from the recording by Mrs Chalmers. The views of the Tribunal on those differences are recorded above.

370. Ms Marshall struck the Tribunal as a credible and reliable witness. She did not strike the Tribunal as having been w/n *the pocket of* the respondents. That would certainly not have been apparent, even if true, to Mrs Chalmers at the time that she resigned. If it was true, of course, it would be a reason for the outcome of the grievance being as it was which was unrelated to sex discrimination.

371 . In large measure, the cross examination of Ms Marshall was directed not to her credibility as such but her motivation in producing what Mrs Chalmers regarded as inaccurate notes of the interview between Ms Marshall and Mrs Chalmers, conducting interviews which were not full, not asking appropriate questions and then producing an outcome letter which contained errors.

372. As stated elsewhere, it is undoubtedly true that the notes of the interview between Ms Marshall and Mrs Chalmers are not entirely accurate in the *"running order"* of that discussion and in some elements of words or phrases used. They are inaccurate in relation to a few comments made by Mrs

Chalmers. Those inaccuracies are not however of significance in the view of the Tribunal. Ms Marshall was clear that she had made the decision upon the. grievance based both on her own notes and on perusal and consideration of the detailed notes provided by Mrs Chalmers from the recording.

373. The Tribunal accepted the evidence from Ms Marshall that she was not considering the grievance and determining it either at the behest of the respondents or of Mr Whyte or because of any issue which she had with Mrs Chalmers having lodged a grievance in the first place. If the lodging of that grievance was therefore regarded as a protected act, the manner in which the grievance was handled and the grievance outcome were not acts of victimisation.

Wages

374. Other than on two occasions payment of wages to Mrs Chalmers took place within the terms of the contract in that payment was made *"on or about"* 26 of the month. There was no breach of contract by these payments being made when they were made.

375. Where late payment had occurred, that had affected all staff, in other words males and females. There was no discriminatory conduct through late payment. Equally, given that Ms Rajain was in the first tranche of payment and that there was an explanation as to how employees were placed in one tranche or the other (that being dependent upon the starting date with the respondents) the fact that Mrs Chalmers was paid in the second tranche was not an act of sex discrimination.

Ostracisation

376. Mrs Chalmers said that she was ostracised after she raised the complaint in relation to the timing of payment of her October salary. Mr Whyte accepted that he had not had a great deal of interaction with Mrs Chalmers in the

period following that time. The Tribunal was satisfied that he had not deliberately ignored Mrs Chalmers whether in reaction to the point she raised about salary at the end of October or otherwise. It accepted Mr Whyte's evidence that the respondents were in dire financial straits at that point. They were fighting for their life. Mr Whyte had invested substantial personal funds in supporting the respondents. He was seeking to keep their.' afloat. His attention was therefore elsewhere. Mrs Chalmers would of course have been unaware of these circumstances and of the need for Mr Whyte to focus his energies in those areas. She did not however point to any important emails or matters which she raised with Mr Whyte which he simply ignored. Further, Mr Whyte approached Mrs Chalmers on 13 December, sought to meet with her for a 121 in December and then held a 121 with her in January at which plans for forthcoming work by Mrs Chalmers were discussed by him. Those actions were inconsistent with ostracisation.

377. It is appreciated in relation to this question and also the information as to payment in tranches, that Mrs Chalmers said that the respondents had not produced the email traffic and logs of telephone calls before and after 27 October between herself and Mr Whyte. She said that this information would show who actually was in the first tranche and would also reveal the reduction in contact.

378. The Tribunal had however before it the evidence from the parties. At one point during the case, the question was raised with Mrs Chalmers as to the potential existing for an Order being sought for production of these records and papers. Mrs Chalmers said that she had made that application but that it had been refused by an Employment Judge. It seemed to the Tribunal therefore that it took it too far then to draw any inference from the absence of paperwork being produced by the respondents in circumstances where Mrs Chalmers had not produced the documentation, albeit due to an application for an Order being refused, and where the Tribunal had evidence which it accepted from Mr Whyte on this point, the Tribunal accepting him

as being credible. Further, the Tribunal also had the evidence gained by Ms Marshall during the course of her investigation. There was no reference in that evidence to other employees being of the view that Mrs Chalmers had been ostracised.

379. Mrs Chalmers said that Mr McAllister had complained about late payment and had not been ostracised. There was no information, other than the evidence from Mrs Chalmers on that point, as to Mr McAllister's view on whether he was ostracised or not. He certainly, to the Tribunal's knowledge, had not taken up any such point with the respondents. His statement at pages 322 to 325 of the bundle said that he had sent an email to Mr Whyte to let Mr Whyte know that payment was late. He said that he did not receive a negative reaction, although it seemed from the terms of his reply to Ms Marshall that the reply had been brief and did not explain why payment was late. Without seeing that email it is difficult to categorise Mr McAllister's email as being a complaint. There was no evidence before the Tribunal to support the view at which Mrs Chalmers had arrived, namely that she had been ostracised for having made a complaint about payment of October whereas Mr McAllister had not been ostracised despite raising a complaint at an earlier point. More fundamentally however the Tribunal took the view that any reduction in contact was *"in the normal course of business"* and due to business pressures and facts and circumstances relating to the critical financial position of the respondents at that stage.

380. The Tribunal was also satisfied that it was appropriate for Ms Marshall to proceed on the basis that Mr McAllister had not taken issue with the statement in that it had been sent to him and he had not replied with any amendments or adjustments. He had certainly not replied specifically approving it nor had he signed off on it. In the view of the Tribunal it was reasonable to take the statement however as having been accurately set out from the fact that he did not reply objecting to it or seeking to amend it. Mr McAllister had been informed by Ms Marshall at the start of the meeting

that notes would be sent to him for review and that he should track changes if he felt any additions or changes were necessary.

Customer Call, timing altered

381 . This was another example of a decision which, on the evidence the Tribunal accepted, was free from any discriminatory element. The customer had insisted upon the alteration of timing of the call. Unfortunately the consequence was that Mrs Chalmers could not participate in the call. The somewhat delicate situation in which the respondents were at that point with this particular customer meant that in order to retain the business, the customer's wish had to be followed. In general terms it would of course be the prerogative of a customer to specify a time of a call in any event. In this particular situation however the Tribunal accepted that there was no room for debate with the customer or seeking to persuade the customer that the call should be in the morning. There was nothing to suggest that the initiation of the change of time had come from the respondents. There was no evidence to support the view which Mrs Chalmers reached that this was an act discriminatory in nature or was some form of retribution for her email about late payment, as she saw it.

Call in which laughter occurred

382. The Tribunal was satisfied that there was no proper basis on which Mrs Chalmers could have regarded the brief laughter by Mr Whyte as being directed at her. Clearly, she formed that view herself. No one else took the laughter that way as there was little recall of it and in some cases no recall of it. That supported the view, as the Tribunal assessed it, that this could not have been laughter at the enquiry of Mrs Chalmers as to the tax repayment or in general at Mrs Chalmers. There was no evidence that this laughter had discrimination at its roots or was influenced to any extent by discrimination. No one else present on the call who was interviewed by Ms Marshall "logged" any issue or felt embarrassed on behalf of Mrs Chalmers.

Further, the explanation given that Mr Whyte was frustrated over the delay and that that led to the laugh in response to an enquiry as to progression in the claim was perfectly credible.

Hardware Refresh

383. There had been two previous hardware refreshes proposed. Circumstances had however changed. The priority of the respondents was to ensure that software developers were properly resourced with the latest equipment. Funds were however limited. This meant that whilst the earlier proposed refreshes encompassed wider staff, that was not going to be a case on this occasion. The Tribunal appreciated that Mrs Chalmers felt that this hardware refresh was coming about based on the tax reclaim which she had initiated and which potentially was for a large sum of money. That however did not mean that she was entitled to a hardware refresh or that excluding her from that, where there was reason so to do, was a discriminatory decision.

384. Cogent reasons were put forward by both Mr Hughes and Mr Whyte as to why it was that the hardware refresh contemplated around December 2016 did not extend to Mrs Chalmers. Equally the Tribunal was satisfied that the evidence was that Mrs Chalmers was not simply being left out in circumstances where this would disadvantage her in the context of the requirements of business. Efforts were to be made to assist her. There was discussion as to a laptop. As that was to be shared Mrs Chalmers was not keen on that solution. There was then discussion as to use being made of an older machine. Given however the problems which Mrs Chalmers raised and had been raising with her then current computer, it was felt appropriate to arrange monitoring of that. That was not done with a sinister reason but rather was done to try to get to the bottom of what the problems were. There was a view on the part of the respondents that Mrs Chalmers might be exaggerating problems with a view to supporting her case for a new computer. Equally the respondents were of the view that knowing the

problem she was facing might allow them to better design any computer solution for her.

385. The actings of the respondents at this time in relation to this matter and in respect of the monitoring of software were not tainted in any regard by discrimination in the view of the Tribunal.

386. Following this meeting, although Mrs Chalmers continued to sit adjacent to Mr Hughes, there was no social interaction between them. The relationship remained business like but was cool.

Conduct of Mr Hughes In relation to Fridge Cleaning and the standard of cleaning when carried out.

387. Mr Hughes struck the Tribunal as being focused on his work, to the extent where he had perhaps little "small talk". He also might not have the best manner, perhaps not being a "people person". There was reference in some of the statements given to Ms Marshall to him being "grumpy" and also "thoughtless" in his interactions at times. No one however mentioned any change in the relationship between Mr Hughes and Mrs Chalmers which was apparent to them.

388. In relation to fridge cleaning, organisation of this was a matter for which Mrs Chalmers was responsible. It was therefore appropriate that when the fridge needed cleaning, Mr Hughes spoke with Mrs Chalmers to ask her to organise that. It was unclear on the evidence what had happened on previous occasions when fridge cleaning was required. Mrs Chalmers took what Mr Hughes said to her, as she recalled it, as being a *"veiled threat'* that she would have to clean the fridge herself. The Tribunal found it hard to accept that Mr Hughes had commenced this request by saying to Mrs Chalmers that he did not wish to have to ask her to clean the fridge herself. It seemed to the Tribunal that it was more likely that on hearing from Mr Hughes that he wished her to organise cleaning of the fridge, Mrs Chalmers, in her mind, had some concern that Mr Hughes might be about to ask her to

clean the fridge. The evidence the Tribunal accepted was that Mrs Chalmers had reported a concern to Mr Whyte that in her view it was on the tip of Mr Hughes' tongue to ask her to clean the fridge herself. The Tribunal preferred this evidence from Mr Whyte, combined with denial by Mr Hughes of having made the remark attributed to him by Mrs Chalmers, to the evidence of Mrs Chalmers that there had been a statement made by Mr Hughes implying some form of threat that Mrs Chalmers may ultimately be required to clean the fridge herself. The Tribunal accepted the denial by Mr Hughes as being genuine and concluded that no statement of this type had been made Mr Hughes when Mrs Chalmers was asked to arrange for cleaning of the fridge.

389. It transpired that the fridge was not thoroughly cleaned by the cleaners. Mr Hughes spoke to Mrs Chalmers to ask her to raise this with the cleaners and to ensure that the fridge was properly cleaned by the cleaners. In the view of the Tribunal the evidence did not support any comments which he made to Mrs Chalmers being of a tone such that they would reasonably or realistically be regarded as being in the category of *"berating"* as Mrs Chalmers had it.

390. By this time Mrs Chalmers was convinced that there was an issue between the respondents and herself. She may therefore have been somewhat oversensitive and may have read some criticism of her own role into comments as to the fridge not having been properly cleaned or as to the requirement for the cleaners to attend the premises once more.

391. The Tribunal did not regard the evidence of supporting there being any discriminatory conduct on the part of the respondents and in particular on the part of Mr Hughes in relation to this matter.

Mobile Phones clear up and return.

392. In the view of the Tribunal it was open to Mr Hughes to seek to involve Mrs Chalmers in resolving the issues with the mobile phones which required to be returned to some clients. Mrs Chalmers had some client knowledge in this regard as to details of the appropriate person and location to which phones should be returned. Mr Horsley had done some of this work himself. Ultimately, he carried out the task in its entirety.

393. It was difficult on the evidence to see why it was that Mrs Chalmers concluded on any reasonable basis that the actions of Mr Hughes were discriminatory or in any way associated with her being female. The Tribunal was satisfied that there was no such connection.

121 between Mrs Chalmers and Mr Whyte 12 January 2017

394. Firstly, the fact that Mr Whyte had arranged this 121 and discussed future work for Mrs Chalmers was of relevance in that the Tribunal accepted that it demonstrated that Mr Whyte saw a future with the respondents for Mrs Chalmers and that he had not *"taken umbrage"* at anything which had earlier happened. It was not consistent with Mrs Chalmers having been ostracised, for example.

395. In this 121 , Mrs Chalmers raised with Mr Whyte the concern she had about Mr Hughes. She also raised the question of her salary. The Tribunal accepted that Mr Whyte had discussed salary levels for various employees, including Mrs Chalmers, with Mr Brown. That had resulted in *"benchmarking"* those salaries against what were considered to be market levels. It had resulted in the view being taken that Mrs Chalmers' salary would not be increased. The Tribunal was satisfied that this was a review. although it did not involve discussion with Mrs Chalmers. There was no entitlement to any salary increase. The decision not to increase Mrs Chalmers' salary was not a decision affected at all by the fact that she was

female. The reference to *"expensive"* was, In the view of the Tribunal on the evidence it heard, a reference to the team rather than to Mrs Chalmers as an individual. Given the extent of her role beyond HR, with HR forming only a small element of the role of Mrs Chalmers, the Tribunal found it hard to accept that Mr Whyte would have said in response to Mrs Chalmers raising the question of a salary increase that he could get someone at half her salary in HR to mark-up attendance.

396. Following the 121, and again contrary to any view which Mrs Chalmers might have held as to Mr Whyte not being interested in her being an employee or having some prejudice towards her, Mr Whyte took up the issues which she had mentioned to him that she regarded as existing between herself and Mr Hughes and the attitude of Mr Hughes as she saw it, with Mr Hughes. He obtained comments from Mr Hughes. He did not then follow those up prior to Mrs Chalmers submitting a grievance. That delay was unfortunate. In the view of the Tribunal however it was not of such duration that it indicated that Mr Whyte was simply not intending to do anything or that he did not take the comments of Mrs Chalmers seriously. It would have been better, of course, had Mr Whyte at least let Mrs Chalmers know that he had spoken with Mr Hughes and that he was now, for instance, considering the points she had raised in light of that or that he required to meet further with her. There was nothing however about these events from which an inference of discrimination could appropriately be drawn.

Training

397. The Tribunal did not accept that Mr Hughes had deliberately ignored the email from Mrs Chalmers asking that she be authorised to attend a morning seminar. It accepted that the respondents would have had no issue with her attending that seminar had the request been picked up by Mr Hughes. The seminar was free. Oversights do happen in relation to emails and responding to them, particularly when the volume of emails received by Mr Hughes is as it is. Had Mrs Chalmers raised the point specifically with Mr

Hughes, there might have been a reaction which would have given some credence to her view that the email was being deliberately ignored and that there was some issue with her attending due to the fact that she was a woman. That would have depended upon the response of Mr Hughes. The response to any such conversation might also have informed a view on whether the actings of the respondents or their inaction could properly be interpreted as a *"straw"* in relation to the case of constructive dismissal. Mrs Chalmers did not however raise the matter with Mr Hughes verbally, despite her implicit acceptance in the questioning of Mr Hughes that business conversations between them took place around this time and that she behaved in a business-like fashion in her interaction with him. Rather, she chose to send an email with a heading which she designed to catch his attention and with content designed to provoke a response. Again the email exchange in the background between Mr Hughes and Mr Whyte, undertaken without knowledge that it would become known to Mrs Chalmers, was of assistance to the respondents rather than to Mrs Chalmers in that it did not disclose any agenda or motivation which supported her case.

398. Mr Birr was in a different position to that of Mrs Chalmers. He was not someone who had asked to attend a course. The course had been earmarked by the respondents on the basis that attendance by one of their employees would be appropriate given requirements been placed upon them. Mr Birr was then chosen as being the relevant employee and was asked to attend the course.

Smirking

399. The Tribunal accepted that Mrs Chalmers was sensitive to the fact that she had been crying when she entered the room where those in Glasgow were taking part in the priorities call. In her view Mr Hughes smirked at as she joined those taking part in the call. Mr Hughes denied having done that. The Tribunal accepted his evidence on this point. Given the Tribunal's earlier findings in fact as to the actings of Mr Hughes and the absence of

any acts constituting discrimination on his part, it would have been inconsistent and at odds with that had he smirked as Mrs Chalmers joined the call. It is possible again that Mrs Chalmers misinterpreted the contact between Mr Hughes and herself as she joined those on the call. She may have been concerned that she looked as if she had been crying and may therefore have not correctly interpreted any acknowledgement from Mr Hughes.

Without prejudice conversation

400. There is nothing to prevent parties holding a discussion at any point in time as to possible settlement of a claim. That can be introduced to any discussion whenever it is considered appropriate by one party or the other. If an employer wishes to have the conversation, in effect, off the record, then it is important that it arises in circumstances where legislation permits a without prejudice conversation to be held. If that occurs then the content of that conversation cannot be referred to in an unfair dismissal claim, save in certain circumstances where, in general terms, inappropriate pressure is applied to the employee. In a discrimination case any such conversation can be referred to.

401. The respondents at no time sought to exclude any part of the grievance notes as not being properly referred to by the Tribunal on the basis that they contained a without prejudice conversation. It was difficult therefore for the Tribunal to see quite the significance of that passage of the notes. Mrs Chalmers argued that the notes as prepared by Ms Marshall introduced reference to a Tribunal claim before that had occurred in order that the next section of the discussion and subsequent notes became a without prejudice conversation. It was extremely arguable that circumstances existed at the time when the possibility of settlement was raised such that a without prejudice conversation was legitimately being held. The reference by Ms Marshall to Tribunal proceedings appeared in her notes ahead of the point where the word “Tribunal” had been used by Mrs Chalmers. Nevertheless

prior to discussion of settlement being initiated, there had been reference by Mrs Chalmers to a time-bar issue and to redundancy.

402. The Tribunal did not regard any out of sequence reflection of the discussion by Ms Marshall as being deliberate in the sense of misrepresenting the discussion or as being manipulative or motivated by the fact that a protected act had occurred. For the reasons found in the Judgment above however the Tribunal was of the view that there had not been a protected act at this point.

Telephone call after submission of the grievance

403. Mr Whyte accepted that he was annoyed when he spoke with Mrs Chalmers after she had submitted her letter of grievance. That irritation arose as he could not understand why she had raised a grievance which stemmed, from the terms of her email of 25 January, from the failure by Mr Hughes to reply to her email seeking consent to go on a course.

404. It was accepted by Mr Whyte that he had made the remark that if he wanted to get rid of Mrs Chalmers he would have done this in the summer. Whilst Mrs Chalmers took this as an indication that he still had that in mind, in the context of events around the time the Tribunal accepted that this was said, albeit in exasperation, as a means of trying to reassure Mrs Chalmers that he did not wish her to leave the respondents. That was consistent with his position at the 121 when tasks for the future were discussed. It is also consistent with the fact that there remained a role for Mrs Chalmers at the time when she resigned, something demonstrated by the fact that the respondents have recruited to replace her.

405. Whilst this call may have been handled in a somewhat clumsy way by Mr Whyte, and whilst it might have been better had he allowed a degree of time to pass and taken advice potentially on responding, the Tribunal understood why he had responded when he did and in the terms which he used. It was

satisfied that there was no act of discrimination, whether by way of harassment or otherwise in the actings of Mr Whyte during this call.

Pay reduced to SSP

406. Again, the Tribunal could see no basis on which the decision taken by the respondents could properly be viewed as discriminatory. This was the first occasion on which an employee had been off for a substantial period of time. There was no immediate prospect of return. Mrs Chalmers had received full pay for slightly in excess of 2 weeks. There was no custom or practice established that full pay continued indefinitely during absence or for a period which extended to the length of the absence of Mrs Chalmers on this occasion. Whilst Mr Birr had been absent and had received full pay, he had not had continuous absence for a period. He was also not sick at this point. The leave which he had obtained was compassionate leave in the unfortunate circumstances of his wife's illness.

Grievance outcome

407. With hindsight, some aspects of the grievance outcome might have been better dealt with. There could, for example, have been complete accuracy in the outcome letter. There was reference for example in the heading to point 5, on page 425 of the bundle, to Mrs Chalmers having highlighted to Mr Whyte that *"no Airpoint staff would be able to attend"* the Christmas party. In fact what had been said was that no female staff would be able to attend. That, and other inaccuracies were unfortunate. None of them however were critical in the sense that they did not affect the matters which Ms Marshall had investigated or her view upon the information which she gained during that investigation. It should be recorded at the Tribunal was quite content that Ms Marshall had made the decision upon the grievance without any interference from Mr Whyte or other parties whether within the respondents or within LAW.

Summary in relation to discrimination

408. This was therefore a case where, after careful consideration of the evidence, no facts were found from which the Tribunal could infer that there had been discrimination. There was no PCP established with any causal link to disadvantage for the claimant and some of those with the protected characteristic founded upon by her.

409. The Tribunal took account of the fact that Mrs Chalmers had submitted questions for the respondents and that the respondents had not replied to them. If the question of discriminatory behaviour had been in the balance, it might be that an adverse inference could have been drawn from the failure to reply such that the burden would have shifted to the respondents. As it was, the facts were clear in the unanimous view of the Tribunal and did not permit of an inference of discrimination.

Protected acts

410. Given the finding that there were no acts of discrimination, is clearly not essential to establish whether and when protected acts were done by Mrs Chalmers. This was however a point which arose. It is therefore appropriate to comment upon it.

411. For the reasons set out in the Judgment, the Tribunal formed the view that nothing had been said about discrimination or potential discrimination to Mr Whyte on 13 December 2016. If discrimination had been alleged by Mrs Chalmers to be taking place the context was that no female members were to be in attendance at the Christmas party. The view could potentially have been taken that this was an allegation of contravention of EQA. The Tribunal however did not accept that any such allegation of discrimination had been made by Mrs Chalmers at this time. Any acts of victimisation therefore proceeding on the footing that there had been a protected act done on 13 December 2016 therefore failed.

412. Similarly, the Tribunal took the view for the reasons set out in the Judgment that the grievance did not constitute a protected act. Any acts alleged to be ones of victimisation based upon the submission of the grievance also failed.

413. It would only be acts founded upon by Mrs Chalmers which had occurred after submission of the claim which were properly viewed as potentially being acts of victimisation. This is because there had been a protected act at that point.

414. This is however a somewhat academic exercise as the Tribunal did not find on the evidence that any acts said to constitute victimisation were because Mrs Chalmers had done what was said to have been a protected act.

Time Bar

415. Had there been a sound basis of claim of breach of contract or of discrimination in relation to late payment of salary as Mrs Chalmers saw it, the question of time bar would have required consideration. A *"stand alone"* claim based on this one element would have been time barred. The Tribunal would then require to have considered whether there was conduct extending over a period, bringing into play the terms of Section 123 of EQA. Consideration would also potentially require to have been given to whether it was just and equitable to extend time for bringing of such a claim. If the claim was one of constructive unfair dismissal based on these alleged breaches of contract, consideration would potentially require to have been given to whether it was or was not reasonably practicable for the claim to have been presented within the appropriate time.

Constructive dismissal

416. The Tribunal did not regard the acts of the respondents whether individually or looked at collectively, as amounting to a fundamental breach of contract entitling Mrs Chalmers to resign.

417. Breach of trust and confidence is always a fundamental breach of contract. The matters founded upon by Mrs Chalmers however were, in the view of the Tribunal, matters with which she was unhappy rather than anything which constituted either individually or together breach of the implied term of trust and confidence.

418. There were no terms about which evidence was heard which were incorporated into the contract by custom and practice. There was no breach of an express term of contract between Mrs Chalmers and the respondents. Her resignation came shortly after the issue to her of the grievance outcome. It was important that the Tribunal kept in mind that matters potentially relevant in its assessment of whether there had been constructive dismissal were those which occurred and which were known to Mrs Chalmers at the time of her resignation. Matters which later became apparent, such as the discussions between LAW and the respondents as to the respondents becoming a customer or client of LAW at the time when the grievance investigation was being undertaken could not have influenced the decision of Mrs Chalmers to resign. That behaviour could be looked at by the Tribunal in relation to motivation in the sex discrimination claim. Mrs Chalmers said that the investigation was a whitewash and was an instance of discrimination. Had the Tribunal gained any sense of that, knowledge on the part of the Tribunal that there was a potential business relationship unfolding between LAW and the respondents around this time might have been of relevance to that ground of claim. The Tribunal was however satisfied that the investigation process and decision taken was proper and reasonable.

419. There was within the grievance process and having regard to the outcome and reasons provided, no basis on which there had been a fundamental breach of contract. Whilst Mrs Chalmers was not happy with the outcome and indeed the process given that she was aware of the grievance notes as prepared by Ms Marshall at that point, the test is not a subjective one, it is

an objective one. In an employment relationship it is often the case that things are not perfect. There is a line to be drawn. Beyond the line are matters which, if they occur, are such that the implied term of trust and confidence has been breached. There are many matters about which an employee may be unhappy but which do not however warrant resignation on the basis then of a constructive dismissal claim being successful at Tribunal.

420. Mrs Chalmers of course founded upon various incidents culminating in what she said was the *"final straw"* being the grievance outcome letter. That principle is recognised as a basis of potential claim. An employee is able to refer to earlier matters, even potentially matters where there may have been affirmation. The final act does not require of itself to be a repudiatory breach of contract. It may be of some significance without being such a repudiatory breach. Providing it is a part of a course of conduct which the Tribunal views as a breach of the implied term of trust and confidence, a successful claim of constructive unfair dismissal may be advanced. Reference is made to the case of *Omilaju* and that of *Kaur.*

421. The Tribunal saw there as being potentially stronger position for Mrs Chalmers in relation to constructive unfair dismissal than was the case in relation to her claim of sex discrimination.

422. Having however considered the facts as found and the law in this area, the Tribunal unanimously concluded that there had not been either by one incident or by an accumulation of incidents and the final straw, breach of the implied term of trust and confidence.

423. There had also been no breach of an express term of contract between Mrs Chalmers and the respondents. The closest to which any event came as being in that category was that of the payment of salary to Mrs Chalmers on 2 occasions. The record of Mrs Chalmers bank account at page 479 of the bundle confirmed that she had been paid late in March 201 6 (29 March) and in August 2016 (30 August). Any other payment, whilst not necessarily

made on 26 of the month was clearly in the category of having been paid on or about 26 of the month.

424. No action had been taken by Mrs Chalmers when those payments were late in that she had not lodged a grievance. She had not "logged" the incident saying that she was working under protest, for example.

Summary

425. It is unfortunate that the relationship between Mrs Chalmers and the respondents, both as individuals in the cases of Mr Whyte and Mr Hughes and in the form of the first respondents, reached the point where Mrs Chalmers concluded that resignation was appropriate. The respondents did not act perfectly. Communication could have been better and clearer. Once however Mrs Chalmers had formed the view (without proper justification or foundation) that the respondents were ill-treating her, discriminating against and did not wish her as an employee, a path was taken and an approach adopted by her which was likely only to have one outcome, namely her resignation. She was clearly unhappy at work at this time. The role of this Tribunal is to determine however whether her resignation was in circumstances such that in terms of law she is entitled to make a claim of constructive unfair dismissal. The test to be applied is an objective one.

426. The Tribunal was unanimous in its view that the facts did not support a successful claim of constructive unfair dismissal. This element of the claim is also unsuccessful.

Holiday pay

427. It was difficult to discern why it was that Mrs Chalmers regarded herself as being entitled to five days holiday pay given that she had initially specified her entitlement as being 4.17 days. The Tribunal recognised that Mrs Chalmers had put forward the position on behalf of Mr Horsley that his

holiday pay was to be rounded up when he left the respondents and that the respondents' accountant had processed payment at the rounded-up total.

428. Mrs Chalmers had herself however been surprised when this had occurred. This one occasion, which is all Mrs Chalmers pointed to as establishing custom and practice, was not enough in fact and in law to constitute custom and practice. It would seldom be the case that for something to happen once would constitute custom and practice. That might occur if, for example, in approving the course of action a comment was made as to that being the expected course or the norm which would be followed. The reverse had happened, even in Mrs Chalmers' mind in this case however, where Mr Horsley had, to the surprise of Mrs Chalmers, received payment at the rounded-up number of days. The Tribunal did not see a basis on which this claim could successfully be maintained. It is unsuccessful.

429. It is appreciated that feelings were running high during the conduct of this hearing. The Tribunal wishes to record its appreciation of the thought and preparation given by parties to the case which meant that it was concluded within the allotted number of days and, for the vast majority of the time, in circumstances where it did not boil over.

Employment Judge: R Gall
Date of Judgment: 20 June 2018
Entered in register: 02 July 2018
and copied to parties