EMPLOYMENT TRIBUNALS

Claimant: Ms J Khanam

Respondent: Vistra International Expansion Ltd

Heard at: Watford Employment Tribunal

On: **4 to 7 and 10 January 2022**

Before: Employment Judge Quill; Ms I Sood; Ms J Hancock

Appearances
For the claimant: In person
For the respondent: Ms L Banerjee, counsel

RESERVED JUDGMENT

(1) All of the claims are dismissed.

(2) All of the complaints, save for the unfair dismissal, are out of time such that the tribunal does not have jurisdiction.

(3) There will be a hearing to consider what should happen to the deposit paid by the Claimant.

REASONS

Introduction

1. The claimant was employed by the respondent as Client Service Manager, then Associate Director – Global Services from 1 September 2016 until her dismissal with notice with termination date 5 January 2021. By a claim presented to the tribunal on 27 November 2020, she claims:

   1.1 Unfair dismissal;

   1.2 Race and sex discrimination; and

   1.3 Whistleblowing' detriment.

The Claims & Issues

2. At a Preliminary hearing before EJ Reed on 4 May 2021, the following draft list of issues was prepared. (Numbering as per the original).

Time limits / limitation issues

4.1 Were all of the claimant's complaints presented within the time limits set out in the relevant legislation? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

4.2 Given that early conciliation commenced on 27 November 2020, any complaint about something that happened before 28 August is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Unfair dismissal

4.3 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was redundancy. The claimant accepts that there was a bona fide redundancy exercise.

4.4 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

4.5 The claimant asserts that her dismissal was unfair on the following grounds:

4.5.1 She was put into the wrong pool for selection (although she accepts that she was later put into the correct pool),

4.5.2 Of the two criteria that were applied to her, she says that one - the size of her portfolio - was unreasonably adopted;

4.5.3 The Respondent improperly score her against the criteria;

4.5.4 There was alternative employment that could and should have been offered to her, namely Finance Director for the region, Finance Sector Lead and a Treasury role.

4.5.5 Her appeal went before an improper person.

Public interest disclosure (PID)

4.6 Did the claimant make a protected disclosures (ERA sections 43B) as set out below. The claimant relies on subsection (b) of section 43B(1), namely that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject..

4.7 What was the principal reason the claimant was dismissed and was it that she had made a protected disclosure?

4.8 Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

4.9 If so was this done on the ground that s/he made one or more protected disclosures?

4.10 The alleged disclosure the claimant relies is the contents of an e-mail dated 22 July 2019 in which she says she disclosed that management in Reading were bullying and carry out various other acts. The claimant's claim does not specify which acts are said to amount to detriments flowing from the alleged protected disclosure. She was directed to provide full particulars of those detriments to the respondent (in the same form as she is in relation to her claims and discrimination – see below) by 28 May 2021.

EQA, section 13: direct discrimination because of race or sex

4.11 The claimant alleges in her claim form that in various respects she was treated less favourably than either particular individuals or a hypothetical comparator by reason of her sex or race. She describes herself as British Bangladeshi.

4.12 It is not clear from her claim form what matters are alleged to amount to causes of action and what information is provided by way of background. In any event, I pressed upon her the desirability of her selecting perhaps half a dozen or so allegations and inviting the tribunal to deal only with those.

4.13 She was directed by 28 May to provide to the respondent, full particulars of those allegations, ie:

(i) The date upon which the incident is said to have occurred;

(ii) Very short details (no more than two sentences) describing the event itself;

(iii) The names of those involved on behalf of the respondent;

(iv) Where appropriate, the identity of a comparator or comparators.

3. In response to those orders, the Claimant produced a detailed document at page 61 of the bundle. However, she later amended it, withdrawing some of the complaints and submitted what appears at pages 712 to 714 of the bundle, which was sent to the Respondent and Tribunal on 25 November 2021 and was explained in her covering letter of that date.

4. She sought to add two alleged protected disclosures, and permission was granted by EJ Bedeau at a hearing on 2 December 2021. (See page 717 of bundle).

4.1 The first document appeared on page 193 of the bundle and was described by the Claimant as follows:

s.43(1)(d): On 20 February 2019, I sent an email, to Jackie Mayers Fink, listing a number of colleagues who were off sick and expressing my concerns for the health and safety of the team as a whole given the pressure we were under. I asked for help with securing resources for Global Services.

4.2 The second document appeared on pages 208 and 209 of the bundle and was described by the Claimant as follows:

s.43(1)(b): On 3 May 2019 I sent an email to Mr Campbell reporting an IT security breach. This was a disclosure of information about conduct which risked breaching the GDPR as well as internal IT Policy.

5. For the remaining Equality Act Claims, the Claimant's table of allegations was as follows. For 1.5, the sex discrimination allegation was not pursued after the Claimant decided not to pay the deposit ordered by EJ Bedeau on 2 December 2021 and the allegation 1.6.6 was dismissed upon withdrawal, but with EJ Bedeau's permission for evidence about it to be given as background material.

No.	Period	Description	Allegation
1.4	2019 Q1 OKR review	Other colleagues' performances were recognised with a visible promotion I.e. change in job title, financial reward and announced in companywide emails. This was not applied to my 2018 performance, I was not promoted. My performance score at the end of December 2018 was 5, the highest possible rate; I was given a 7% pay rise and bonus but no promotion.	Direct race and/or sex discrimination compared to Mr Danny Beard
1.5	Monthly on the date of each HoD meeting, from December 2017 (job-levelling letter) to January 2021	Exclusion from monthly Heads of Department (HoD) meetings: Other Heads of Department (see casting schedule) did not have their direct reports attend Mr Doyle's monthly Heads of Department (HoD) meeting. Therefore there was no need for me or any of my peers who also reported to Heads of Department, including Mr Beard, Ms Wedekind and Mr Hbarek, to attend Mr Doyle's monthly HoD meetings. However, all of my peers had a standing invitation to Mr Doyle's monthly HoD meetings but I was excluded. I had no knowledge of the local strategies and decisions which put my peers at an advantage in terms of opportunities to network with other peers, Executive Directors and the Executive Committee	Direct race ~~and/or sex~~ discrimination compared to Mr Beard, Ms Wedekind and Mr Hbarek and/or a hypothetical comparator

1.6.2	20 February 2019 – 31 July 2019	On 20 February 2019 10:21, I sent an email to Jackie Mayers Fink (cc'd Mr Doyle) listing a number of colleagues who were off sick and expressing my concerns for the health and safety of the team as a whole. I asked for help with securing resources for Global Services. The tone of Mr Doyle's reply implied I was not entitled to express an opinion in the way the department was being run. It was a 'manipulative put down' i.e. my thinking was flawed and given my experience in 2017 I felt intimidated by it. In addition, Mr Doyle told Ms Namaseevayum not to engage with me on the recruitment process, which was also a detriment.	Detriment suffered because of email on 20 February 2019, which was a protected disclosure; alternatively, direct race and/or sex discrimination compared to a hypothetical comparator. I believe Mr Doyle treated me detrimentally because I had sent the email, and the reason why the email made him particularly angry was because of my race and/or my sex.
1.6.3	3 May 2019 to 31 July 2019	On 3 May 2019 I reported an IT Policy breach (GDPR) to Mr Campbell. After the email was forwarded to Mr Doyle, Mr Doyle approached me very aggressively and invaded my personal space, waving the printed-out email at me and asking me angrily if I wrote it. It was very intimidating, and he only backed off when he saw that I was on a client conference call. In response to the email of 3 May 2019 Mr Doyle also told Mr Fielding 'a person like this' in reference to me, should not be in the business.	Detriment suffered because of email on 3 May 2019, which was a protected disclosure; alternatively, direct race and/or sex discrimination compared to a hypothetical comparator. I believe Mr Doyle treated me detrimentally because I had sent the email, and the reason why the email made him particularly angry was because of my race and/or my sex.
~~1.6.6~~	19 February 2020	On 19 February 2020 Mr Doyle referred to me as 'a jobby' which is a colloquial reference to 'excrement/ faeces'. It happened during an All Hands meeting when Ms Natasha Oliver did a roll call of people dialling in remotely. She said, "Is that you, Joby?" and Mr Doyle said, "That sounds like a jobby". I heard Ms Natasha Oliver snigger along with Mr Gurney. This was gratuitously offensive.	~~Harassment related to race.~~ Mr Doyle was making fun of my unusual name in a way which was offensive. My name is related to my race, and my name is unusual in the UK because I am a

			member of a minority ethnic group.
1.7	25 February 2020 to April 2020	Disciplinary process - unfairly and detrimentally relying on two pieces of incomplete and misleading evidence. (1) On 25 February Ms Walsh 'conducted' my OKR review. I documented the meeting. Ms Walsh did not reply to that email and provided her comments in an 'internal document' as part of the bundle for the Disciplinary Hearing on 3 April, conducted by Mr Lickess. When I asked Ms Walsh to send my email to Mr Lickess she informed me that my email was deleted from the system. She subsequently said she had sent the document as 'internal document 6' but it was in an unreadable format. (2) An email from Ms Chamberlain that had been deliberately distorted. At some point the middle chain of the email which had included everyone (a wider distribution list which included me) was edited to remove everyone except Mr Beard and Mr Doyle. They alleged that I had deliberately added the other team members in my response to denigrate them. Ms Chamberlain had sent her email to everyone in Global Services and I had responded using the 'to all' button.	Direct race and/or sex discrimination compared to a hypothetical comparator. I believe that the Respondent would not have relied on incomplete or misleading evidence in the case of a member of staff who was white or male.

6. She gave information about her unfair dismissal claim as follows, referring to the period 1 September 2020 to 5 January 2021 (using her numbering).

   3.1 The redundancy process was a sham, see email from Ms E-Wu to me 29 November 2019 15:13. A decision had already been made to exit me from the Global Services team. The events leading up to the 'formal redundancy consultation process' in September are: 25 February, (see 3.1.2) my 2019 performance rate is down graded; March 2019, Disciplinary Hearing without access to email or colleagues so that I could not defend myself resulting in a written warning; April 2020, promoting Mr Kuza & Ms Visrolia to Associate Directors; June 2020, Mr Beard confirmed as the Head of Global Services; July 2020, selecting me for redundancy with higher ranking colleagues in Germany; the redundancy process and the appeal process were irregular; blocking access to internal recruitment portal - it was all predetermined - see 3.1.1 to 3.1.9

   3.1.1 My 2018 performance rating was reduced from 5 to 4

   3.1.2 My 2019 performance review (25 February 2020) was conducted by Ms Walsh and down graded my rating to 3 from my self-assessment rate of 5. I had

rated myself based on the fact that the Reading Office performance not only out performed the annual budget and the stretch forecast, but was the top performing office globally within Vistra. Mr Kemp took the entire office out for celebratory food and drinks. I believe the results are directly linked to my efforts early in quarter one to secure resources for Global Services. My Report to Mr Damer and the subsequent actions he took to address the issues I raised were significant. It is the Hawthorne effect of addressing the pervasive bullying and harassment culture which improved staff morale in general. I was told by Ms Walsh that the only way to change my rating was to inform Mr Burgoyne of my Report to Mr Damer. I spoke to Mr Damer on 25 February 2020 and he confirmed that - other than Ms Keren Chapman he had not shared the Report with anyone due to Confidentiality. I did not trust Mr Burgoyne as I was concerned that he was part of Mr Doyle's cohort and they would be able to identified the colleagues in my Report and punish them. So I accepted the lower rate of 3 which was classed as - 'meets expectation and delivered all the goals'.

3.1.3 Mr Beard said two selection criteria for redundancy were used: performance and size of the portfolio. I do not control how clients are allocated. Client allocation is determined by Mr Doyle and Mr Beard. Their actions in July 2019 cost the business the renewal of the TMS Account which was valued at circa $4.5m-$6m, (doubling the value) over a 3 year term.

3.1.4 Ms Visrolia and Mr Kuza were promoted to Associate Director in April 2020 and Mr Ventogen is a contractor. I had a proven track record of managing teams and complex clients that Mr Beard could not manage (TMS and CloudHealth/VMware) and held the position of Associate Director since November 2017 (contract variation from Client Service Manager).

3.1.5 Four additional 'junior' positions were created as part of the re-structuring

3.1.6 Comment in the scoring matrix: "Progressed from Senior Manager to Associate Director since commencing career with Vistra. Has excellent UK financial experience, however, has had limited impact with regards to client growth and has lacked key interpersonal skills required to drive client and internal relationships." This is a blatant falsification of my contractual records, the change in job title was a job title levelling exercise conducted in November 2017 and not a promotion. TMS was a failing account (see 1.1) and I turned the account around. The client invited Vistra to tender for both the existing business (non-European) and their European region i.e. doubling in value. Vistra were short listed as the final 2 out 5 bidders, with 80%-90% confidence of winning. The client was equally shocked to see an 'out of office' message from me and Mr Fielding shortly after the 16 July Service Review Meeting. No one from the Reading Management Team contacted the client to apologise for the unplanned absences. Comment: "Qualified finance professional with demonstrated career progression. However, within a client services role this has not always translated into the interpersonal skills required to manage both client relationships and the various internal stakeholders, often peers, at the level expected of an associate director." It is because of my credentials and inter-personal skills that I turned a difficult relationship around and third parties and colleagues across the globe engaged with me despite the lack of support from the Reading Management Team.

3.1.7 Comment in the scoring matrix: "Negative client experience and feedback expressed at on site meeting with VMware concerning the management of the CloudHealth account and transition post acquisition". Mr Doyle 'muscled in' at the exclusion of experts in an exploratory meeting (6 November 2019) requested by VMware Tax team - a relationship I cultivated from 2018. I recall passing the VMware opportunity to Mr Novak and Ms Hultman. NPS score - Mr Doyle and Mr Beard concealed this data from me and was the key reason why I complained to Group Compliance (21 September 2020 12:12). It was a sense of 'deja vu' as CloudHealth was the client for whom I had advocated in August 2017, which resulted in the malicious abuse from Mr Doyle on 2 August 2017. Three years on - Mr Doyle had not produced the client escalation process and failed to support me to resolve the issue in Germany and I had to escalate to Mr Kemp for a resolution.

3.1.8 It is only when I checked into the ACAS website that I realised I had the right to appeal in relation to the redundancy outcome. Ms Walsh did not (at the outset) explain this to me. My appeal was not taken seriously as Mr Burgoyne nominated Mr Cooper, his sub-ordinate, as the investigating officer.

3.1.9 Ms Walsh requested my IT access to various systems be removed on 5 October which included VConnect (software portal) via which job applications are made. I raised an IT ticket which was not resolved until 17 December 2020. On 18 December, Mr Hilton Hess (CFO) announced two Finance Directors (externally recruited) were joining his team in a companywide Newsletter. I was disheartened and I emailed Mr Hess on 23 December saying: '[smiley face emoji] Good to read that you have finished budgeting & putting your teams together' - a reference to the fact that I had asked him for few minutes of his time to discuss potential job opportunities, shortly after Mr Burgoyne had told me that I was at risk of redundancy in July. Mr Hess re-directed me, via email, to his UK Finance Director. Mr Hess said he did not have any opportunities in his department. Generally, the lead time to recruit senior staff, on average, tends to be between 3 to 6 months so he would have known about the 2 director roles within that time. Before the start of the 'formal consultation process' in September and the removal of my system access, I had applied for 2 roles which included: Project Manager (2 ranks below me) and Group Treasury Director (a rank above Associate Director) - I was unsuccessful in my applications for both roles. The Treasury role was recruited externally in Hong Kong, and I do not know whether the Project Manager role was internally or externally fulfilled. In October, I reached out to Ms Hultman, Sector Lead - Corporate based in Luxembourg and Mr Bremmer (Regional MD for Europe). Ms Hultman suggested a few teams in Luxembourg that I could reach out to but Mr Bremmer immediately replied to say that there were no opportunities in his Region, over-riding Ms Hultman. Mr Bremmer left at the end of November 2020. Sadly, everyone in Vistra were blanking me.

The Issues

7. The Respondent's representative had helpfully prepared a draft list of issues and submitted to the Claimant. We discussed with the parties that some of the paragraphs could be removed in light of the Claimant's withdrawal. We have used the headings as part of our analysis.

The Evidence

8. We had an agreed bundle which, including supplementary items, was in excess of 800 pages.

9. The Claimant had prepared a written statement which she swore to, and she answered questions from the other side and the panel.

10. For the Respondent, each of the following had prepared a written statement which they swore to, and answered questions from the other side and the panel: Ms Namaseevayum; Ms Oliver-Smith; Mr Doyle; Ms Chapman; Mr Beard; Ms Walsh

11. We also noted the contents of Ms Mayers-Fink's signed statement, giving it such weight as we saw fit.

The findings of fact

12. Numbers in brackets refer to the page(s) in the main hearing bundle unless otherwise stated, or unless the context makes clear that they are referring to something else.

13. The Claimant commenced ACAS early conciliation on 27 November 2020 and that conciliation finished, with the certificate being issues by email, the same day. (708). The claim form was presented the same day. (1).

Background

14. The Claimant describes herself, for the purposes of this claim, as a British Bangladeshi woman, and the Respondent does not take issue with that description of her protected characteristics. She is a member (ACMA) of Chartered Institute of Management Accountants.

15. The Claimant started working for the Respondent from 1 September 2016, as a Client Service Manager. She joined the Global Services Department at that time and she began reporting to Ben Fielding from around January 2017. She continued to do so until around 18 July 2019 when (as will be discussed in more detail below), Mr Fielding was dismissed.

16. Mr Peter Doyle is a director of the Respondent. He was one of the founders and equity partners in a business callled Nortons, which was a Reading-based firm of chartered accountants. Nortons provided UK and US-based companies with a range of services, including audit, local HR, payroll, tax and accounting services. The US work was originally referred from larger international accountancy firms. The US clients were mostly technology businesses and Nortons services were provided through a network of partner firms called NIS Global. Nortons sold its business to Vistra Group (of which the Respondent is a part) in February 2016.

17. Vistra is a multinational business, employing around 4,500 people in more than 40 countries around the world. Its headquarters are in Hong Kong. In the UK, at the relevant times, it had offices in London, Reading, Bristol and Edinburgh.

18. At around the same time it acquired Nortons, Vistra also acquired a business called USA2Europe, which sub-contracted the delivery of accounting support services for its clients. USA2Europe provided no direct services itself.

19. After Vistra acquired Nortons and USA2Europe, that part of the business became known as the Global Services department and it organised various business services for corporate clients and sub-contracted them to other Vistra offices or affiliates. Initially, the former Nortons employees in the Global Services Department continued to work from Reading office space. Whereas the former USA2Europe staff worked remotely, and often outside the UK. A decision was made that the Respondent would hire someone to be a facilitator of communications between these two groups of staff (a "go between" as the Claimant puts it, or a "conduit" as Mr Doyle describes it). The person recruited to perform this task was the Claimant.

20. Mr Doyle was in a personal relationship at all relevant times with Ms Carmen Oliver. She was his partner. She worked for Nortons prior to Vistra's acquisition of Norttons, and, after the takeover, she had the title Vice President for Human Resources. The relationship between Mr Doyle and Ms Oliver was declared prior to the takeover, and subsequently on the annual conflict of interest declarations.

21. Ms Oliver's role involved dealing with internal HR matters and also being in charge of the department which arranged for HR advice to be provided to clients of the Global Services Department.

22. We will refer to Carmen Oliver as "Ms Oliver". Ms Oliver's sister is Natasha Oliver-Smith. At work, she simply uses the surname Oliver (her maiden name), but we will refer to her as "Ms Oliver-Smith" to distinguish her from Ms Oliver. Ms Oliver-Smith worked for Nortons and then, after the takeover, became a compliance manager for Vistra.

23. Anick Namaseevayum began work as a temp for Nortons in around 2004, later becoming permanent and developing her career as an HR specialist. Before, and immediately after, the takeover by Vistra, she reported to Ms Oliver. Ms Namaseevayum provided HR advice on internal matters as well as being part of the function which arranged for HR advice to be provided to clients of Nortons, and - later – of Vistra's Global Services Department. Ms Namaseevayum had a good working relationship with Mr Doyle. In her witness statement, she makes the following comments which the panel accepts are her genuine opinions (while, of course, taking into account the fact that she has been friendly with Mr Doyle and Ms Oliver for many years).

> I am a woman of colour, of mixed heritage, including Asian. However, that never made the slightest difference to Pete in the way he treated me as a colleague and one of the directors/managers in his team. At no time did I ever experience any treatment by him could be remotely regarded as racist or sexist, nor did | observe him treat anyone else in that kind of way. Nortons had a very diverse workforce (para 6)
>
> I worked for many years on the recruitment and promotion processes for the business. At no time did I observe unfair or discriminatory comments or behaviour by Pete Doyle. Pete did not question, comment or make inappropriate comments

> on gender, ethnicity or any other protected characteristic. Throughout the years, his teams have included many supervisors and managers who were female and/or from non-white backgrounds and the International Expansion division was one of the most diverse in the business. (para 7)
>
> Overall, I regarded him as a fair boss and a very good employer. He treated me very well and rewarded hard work and results fairly. For example, I received regular pay rises and bonuses and was promoted several times, all of which were subject to Pete's approval. (para 5)

24. Ben Fielding joined the Global Services Department upon the Respondent's acquisition of a business called Orangefield. He was given the title "Head of Global Services". As the name suggests, he was a Head of Department, namely the Global Services Department. He left on 18 July 2019. The decision that he leave appears to have been the Respondent's, though we have not received (and do not need) evidence of precisely what was said to him, or why, about his departure. We infer that some sort of leaving agreement was entered into between him and the Respondent. For these proceedings, we will discuss his departure, as it appeared to the Claimant and as it is relevant to her claim, below.

25. There were other people/posts reporting to Mr Fielding/Head of Global Services, as well as the Claimant. These included Danny Beard, Helen Wedekind and Marc Hbarek. Mr Beard and Mr Hbarek are male. Ms Wedekind is female. All 3 are described in the evidence (and we accept) as "white European". Mr Beard worked from the Reading Office. Mr Hbarek and Ms Wedekind worked remotely, from outside the UK. In the time that the Claimant was reporting to Mr Fielding (so January 2017 to July 2019) each of Ms Wedekind. Mr Beard and Mr Hbarek had a job title which described them as a "director". They were not, as far as we are aware, directors, in the company law sense of the Respondent. Furthermore, in our reasons below, unless we expressly say otherwise, whenever we refer to someone being "director", we mean only that that was part of their job title.

26. An individual who worked for the Respondent's Global Services Department for a long period of time was Mr Raf Vetongen. Our finding is that he was not an employee, but rather he provided services to the Respondent as a contractor. We do not know (and do not need to know) whether Mr Vetongen had any other clients apart from the Respondent during the relevant period, but we are satisfied that he performed very substantial volumes of work for the Respondent during the relevant times, and, despite the fact that he was technically an outside contractor, for day to day purposes there was little practical difference between him and the employees of the Respondent who were doing similar work. He had worked for USA2Europe prior to its acquisition by Vistra.

27. The written offer/contract of employment is at pages 114-125. The offer letter was signed by Ms Oliver. The role (starting 1 September 2016) was Client Service Manager reporting to Samantha Randall on a starting salary of £65,000 per year. The named employer was "Nortons Services - General Limited", though it was on Vistra's stationery. The place of work was specified as the Respondent's Reading office, but with a clause which purported to change that (on reasonable notice) to any other place in the UK. It stated that salary reviews were undertaken annually (and effective from 1 April the following year). It said an increase awarded would not set a precedent in relation to future years and that salary would not be reviewed

during a notice period. Amongst other things, it included non-solicitation clauses (18, 20 and 21) and a "confidentiality and non-competition" clause (22). It also included the following:

> 12. Disciplinary and Grievance
>
> The Company has a Disciplinary and Grievance procedure, which does not form part of your employment contract, however your employment may be terminated by the Company without notice if you are found guilty of gross misconduct or in any way a fundamental or repudiatory breach your employment contract with the Company. The Disciplinary procedure contains examples of conduct that would entitle the Company to terminate your employment without notice or payment in lieu of notice.

<u>Claimant's Communication Written Communication Style</u>

28. Not long after the Claimant had commenced employment, she was copied in to an email sent by Mr Vetongen on 2 November 2016. The email was to a client and to various employees of the Respondent, making introductions and stating what role "Norton" / "Nortons" would have in assisting that client with its payroll for its employees.

29. The email was not sent to Mr Doyle or Mr Fielding, or to Andy Hooper, who had been managing director of USA2Europe and who was, by this date, "Director International Expansion UK". The Claimant sent an email (739) to those 3 (and no others) timed at 9.15, so about 9 minutes after Mr Vetongen's.

> Subject: When will we accept we're Vistra?
>
> Gents,
>
> I am not Vistra's brand police however, I find below email offensive – when will colleagues move on and accept we're one Vistra family? Why are some colleagues introducing clients as 'nortons'?
>
> Apologies if I sound petty or sensitive but I am a great believer of living one company values and ethos.
>
> Cheers,
>
> Joby

30. The Claimant was referencing that Mr Vetongen had used the name "Nortons" rather than Vistra and drawing the matter to the attention of 3 senior people. She was doing so without discussing with Mr Vetongen first. We do not accept that she found Mr Vetongen's email offensive.

31. Mr Hooper replied later the same day. His email (740) makes clear that, as of November 2016, there had not yet been any formal decision about business name for the former Nortons part of Vistra's business (which is consistent with the fact that the Claimant's name of the company which issued the Claimant's own contract of employment). His email said that the Claimant's use of the word offensive wa extremely "harsh". The panel agrees that was a fair comment. He added

> Please remember that Raf is part of your team too, it would have been much nicer and proactive to have sent an email to Chris just pointing out that it may be better if Raf stopped using Nortons

> and instead referred to Vistra. This would have been well received because you were right to point it out, you just went the wrong way about it.
>
> Have a chat with Chris when you see him tomorrow, if you need to clear the air.

32. Mr Hooper's email was fair and reasonable.

33. Around 31 July 2017, on her return from annual leave, the Claimant became aware that a client in the Netherlands was raising an issue because – it appeared – that its payroll had not been done, and – therefore – its employees had not been paid. It was her opinion that Daniel Beard had not taken sufficient action in her absence to proactively deal with this matter.

34. The Claimant emailed (127) Vistra's Managing Director for Netherlands stating

> Apologies for reaching out to you in this manner; however having spoken to NL Payroll (Risma) I am informed that the payment is awaiting Daniel's approval and he is on annual leave.
>
> According to Risma no-one is authorised to have Daniel delegation of authority to make this payment. Needles to say I am shocked that Vistra's processes allows for such single point of failure and I would urge you to review this process asap.

35. The Claimant meant "needless" rather than "needles". Vistra's Managing Director for Netherlands replied stating that he would deal with the matter, later adding "And don't jump to the conclusion so easily without further investigation please, thank you." (126).

36. Mr Doyle was cc'ed into the full exchange. He wrote to the Claimant at 18:21 the same day, 1 August 2017, (131/132) highlighting in yellow (132) the sentence "Needles to say I am shocked that Vistra's processes allows for such single point of failure and I would urge you to review this process asap" and stating that that sentence was not an acceptable email to send to an MD or any team member from another Vistra office. He acknowledged the Claimant had been correct to seek to resolve the payroll issue urgently. He also wrote the Netherlands MD a short while later saying:

> Many apologies for this Ron
>
> This was a totally inappropriate email to you from my team member.
>
> I will speak to them.
>
> Loudly!

37. By the word "loudly", he was not implying that he was literally going to speak in a loud voice. He did not mean that he would shout at the Claimant. He meant that he would be direct with her when telling her that her tone had been inappropriate. He had ended his email to the Claimant by saying "Let's discuss how we approach these kind of issues." He had intended to follow up his email. He was not planning disciplinary action, but he did intend to let the Claimant know that she should not do something similar in the future. The Claimant replied (131) on 2 August 2017. On reading her reply, he decided to have HR involvement in the meeting, and was accompanied by Jackie Mayers-Fink, HR business partner. That meeting took place on or around 2 August 2017. After it, the Claimant wrote to Ms Mayers-Fink

(141) on 7 August, cc'ing Mr Fielding and Mr Doyle. In the email she stated that (i) her actions on 1 August 2017 had been justified and (ii) Mr Doyle had been "threatening" in her opinion and (iii) that any feedback should have been by Mr Fielding or Ms Oliver, rather than from Mr Doyle. She asked how long the matter would be on her record. Mr Doyle replied on 9 August, reiterating that the meeting on 2 August 2017 had not been a formal disciplinary meeting. We accept his evidence (and the point is in the meeting notes, though not in the email) that he had said, on 2 August, that the disciplinary procedure might be instigated if there were a future similar incident. He told her that the notes provided (244-245) were for her information and would not go onto her HR file.

38. In November and December 2017, there was an exchange between the Claimant and a colleague, Chris Price, Commercial Director, in relation to some work for a client. On 20 December, Mr Price wrote to the Claimant (768) stating that he had a file note to seek an update from her. His email was not cc'ed to anyone else. She replied about 17 minutes later, cc'ing Mr Fielding and Mr Beard. She wrote:

> Hi Chris,
>
> I don't need micro managing.
>
> I am aware of the priorities for my clients as I agree these with Ben.
>
> As agreed with you previously, I will update as appropriate. Be assured they are in hand.
>
> I would be grateful if you could let me know if you have any plans to engage with my client on any matter like colleagues do here in the Reading office.
>
> Thank you for your understanding.
>
> Cheers,
>
> Joby

39. He "replied all" stating that he would expect the matter to be almost completed, rather than "in hand" and stating his request had been a reasonable one, and he was not micro-managing, and did not have plans to engage with her client.

40. The Claimant forwarded this to Mr Doyle about 13 minutes after receiving it:

> Hi Pete,
>
> I am very disappointed with email below.
>
> I can only imagine Chris's portfolio of work is so thin that he has opportunity to chase me on ELI that is being managed by Phil (who is keeping me in the client communication loop). How these impacts Chris' s day to day is beyond my understanding – not surprising as I do not attend any prioritisation of activities amongst Ben's direct reports.
>
> All I know is I am working until 10:30pm each day to manage escalations & until this afternoon (11/12 – 20/12) on iphone! So you can imagine my work stack. I have regular contacts with my client so I am pretty confident I am working on their priority tickets.
>
> Please help by ensuring we all have same size basket of work & highly aligned through agreed business KPIs to minimise emails below.

Cheers,

Joby

41. Mr Doyle replied the same day, 20 December 2017, (766) suggesting that Mr Price's basic request for the info had been reasonable, but implied that they were each at fault for the tone of their emails to each other. He said it would be important to look at the Claimant's workload and hours to ensure she was not working until 10.30pm, and that he would ask Mr Fielding to pick that up with her. About an hour later, the Claimant wrote with details of her current portfolio, and how it could be reduced, and with details of what extra resources would help her.

Grievance November 2017

42. The Claimant brought a grievance by letter dated 1 November 2017. A meeting was arranged for 27 November 2018 to discuss it. the decision maker was to be Stuarty Bradburn. The notes of the meeting (though not the grievance letter) are at page 144. The Claimant was accompanied by Ms Oliver-Smith as her support companion. The Claimant said that this was because she had not been given enough time to prepare. The Respondent offered the chance to postpone, but she said that was not necessary. The Claimant's grievance alluded to the fact that she wanted clarity about the route to becoming a regional director, pointing out that she had applied unsuccessfully for that prior to being appointed as Client Services Manager. She also asked why there had not been harmonisation between former Nortons conditions and former USA2Europe conditions. She referred to her TMS role (see below). The notes include the following (146):

> JK feels the TMS assignment places undue pressure on someone not experience for a Regional Director role. JK has been told she does not have the experience for Regional Director by her line manager in various conversations.
>
> If it is found after investigation of the recruitment of the Regional Director role in 2016 by Chris Price and Mike Dawson to be unfair or that JK has been discriminated against she would like to be compensated for the cost of travel to work place and paid the difference in salary from September 2016. JK would also like an apology from Chris Price and Mike Dawson for the hurt caused for degradation of JKs skills and experience due to her gender and race. Also an apology from Chris Price and Mike Dawson for not checking in with JK on how she was settling into her role, in light of the cultural differences post acquisition. JK expressed she felt no one cared except Ben Fielding.
>
> Subject to findings that Sam Randal and Mike Hrabak are enjoying terms and conditions not offered to the rest of Global Services, JK feels it is indirect discrimination therefore would like contract harmonised, specifically the opportunity to work from home.

The underlining is ours, and is not in the original.

43. She also added that she though the Respondent should have regard to ACAS guidelines re pay grading, that Mr Fielding owed her an apology, having not treated her equally, and that Mr Fielding had told her he would be reviewing her salary, but she would not be receiving as much as a male colleague, John Pestell. The Claimant said that her opinion was that this was "a direct admission that male colleagues are valued higher than female colleagues regardless of the contribution made".

44. The outcome letter is at page 151-156 and dated 21 December. In it the Respondent denied that Client Services Manager was the same as, or equivalent to, Regional Director (”RD”). It denied John Pestell had been appointed to the role for which the Claimant had unsuccessfully applied. It was accepted that no formal job description had been created for the Claimant’s role of Client Services Manager, which was newly created. It said “The Company strongly deny any bias based on your race or gender for not selecting you for RD”. It also denied discrimination in relation to pay. It denied that the Respondent or Mr Fielding had treated the Claimant unfairly. It conveyed Mr Fielding’s opinion that she was not yet at the standard required for an RD role and that, in any event, appointment to RD would depend on their being a suitable vacancy. It said that, while not being willing to discuss other individual employees, TUPE meant that employees were able to keep the terms that they had had pre-transfer. It said the Claimant had been offered (and had accepted) the post as an office-based one, but she could make a formal request for flexible working if she wished.

45. The letter also addressed the Claimant’s comments about an event which the Claimant alleged was “training” which Mr Bradburn and Ms Randall had attended on 2017. The reply in the letter was:

> *a) You stated that you had asked for more Business Development content and to attend sales training and were told that Global Services did not do Sales/Business Development function and therefore no training was available. You said that you later learnt via the Vistra intranet that Sam and Stuart were selected for Vistra Sales Academy*
>
> I would confirm this was not specifically a sales training event. Sam and I were selected to attend the Vistra European Academy earlier this year, this decision was made by Ben and Pete based on the business needs. Vistra (Reading) were offered 2 invites for both years. In 2016 Anick and Danny attended and this year it was decided that Sam and I would attend as the management team expected we would need to work closer together on client and business needs and believed attending this event would start to develop stronger teamwork. You already have the advantage of being onsite and have regular contact with the teams. The selection for 2016 and 2017 therefore demonstrates a balance and does not support your argument either of gender or race discrimination.
>
> The Company has the right to select individuals they deem suitable for appropriate training, I would also clarify that training is not a contractual term of your agreement.

46. It did not accept that its pay and grading was unlawful and disputed the factual accuracy of what the Claimant had said about Mr Pestall. It referred to the Associate Director role.

47. The letter stated that to appeal, the Claimant should write to the Senior Vice President – Human Resources within 5 working days.

48. The letter was sent by post and also by email (162) from Ms Mayer-Fink. The Claimant wrote to Mr Doyle the same day (copying Ms Oliver, the Senior Vice President – Human Resources). She wrote, “I feel utterly demoralised and I hope you will help for a fairer outcome”. Mr Doyle overlooked it at the time, but spotted it in February when filing emails. He asked on 19 February 2018 (162) if it was now resolved.

49. Her reply on 26 February (161) made clear that she did not regard the matter as resolved and implied that her duties were more commensurate with those of

director than Associate Director. Mr Doyle said that her had thought she had been told of her right to appeal. In later correspondence, having checked, he said that the right to appeal had been included in the letter which the Claimant had been referring to in her correspondence with him, as well as in the grievance policy.

50. On 7 March (159) he wrote:

> To be clear your new salary was set by reference to overall budgets and then Ben sitting down with me to discuss raises for each of the members of his team.
>
> My understanding was that you were promoted to assistant director late in 2017 at a point when there was no budget for additional salary . I understand that you agreed to take on the role then with potential for review on in January 2018. Thanks for being flexible there.
>
> The change in salary from 1 January reflects the additional responsibility.

51. The Claimant took no further steps to appeal. Her reply at 12:34 that day (159) thanked Mr Doyle and said it was the clearest explanation to date. She made clear that she still believed that she was potentially being undervalued and/or treated unfairly for the work she was doing on the TMS account and (by implication) that she hoped, in due course, to receive a higher salary and a Director job title.

52. On 8 March 2018 (164), Ms Mayers-Fink wrote to the Claimant asserting, on behalf of the Respondent, that the appeal process was in the grievance policy, and supplying a copy. The following day, the Claimant replied, stating:

> Hi Carmen, Jackie,
>
> Thank you for sending the document.
>
> I am taking comfort from Pete's email to me and look forward to the implementation of more transparent structure, global job banding and reward system which I hope will address the legacy disparity.
>
> On that basis I will not be taking my grievance any further and as I said to my email to Ben and Carmen yesterday, upon receipt of my Salary Review Letter, I am resolutely committed to company goals and objectives and look forward to a successful 2018.
>
> Many thanks for your help.

<u>"Mr Doyle never forgets 'a grudge'"</u>

53. The Claimant alleges that she escalated the issues about her pay and the grievance outcome internally, including to Group HR and to the Divisional MD. She alleges that Mr Fielding was aware that she had done this and that, when she returned to work in February 2018 (she had injured her wrist just before Christmas 2017), Mr Fielding had told her that Mr Doyle was annoyed that she had done this and that "Mr Doyle never forgets 'a grudge'".

54. Mr Fielding was not a witness. The contents of the November 2017 complaint largely referred to Mr Fielding's dealings with the Claimant, and, in December, the Claimant had sought to get Mr Doyle involved for a fairer outcome. We are not satisfied Mr Fielding was accurately conveying Mr Doyle's views to the Claimant, even if he, Mr Fielding, did make the alleged remarks.

55. Furthermore, on the facts, and taking into account subsequent events, we are not persuaded that the Claimant was deterred from raising issues with the Respondent and/or Mr Doyle after February 2018. In fact, she frequently did so.

Associate Director

56. Mr Doyle's 7 March 2018 email is consistent with the letter (158) containing salary review for 2018. That letter, dated 28 February 2018, from Ms Oliver, stated that the Claimant was to have the job title "Associate Director – Global Services" from 1 November 2017, and a pay increase from 1 January 2018.

57. The role had been offered to the Claimant prior to the grievance outcome letter being issued, though she had not confirmed acceptance by that date. On 9 November 2017 (143), Ms Oliver wrote to say that, following a "global job levelling" exercised which had commenced on 8 September, the Respondent had decided that the Claimant would have the new title with effect from 1 December. The Claimant was asked to sign to confirm acceptance. That letter contained no offer of a salary increase and expressly stated that all other terms and conditions would remain the same.

Heads of Department Meetings

58. Mr Doyle held regular meetings for those Heads of Department and Directors who reported directly to him in his role as Managing Director of Vistra's Reading office. From around January 2017, he expanded the meeting to add 3 posts/people who did not report directly to him. These were Ms Wedekind. Mr Beard and Mr Hbarek who each (as mentioned above) had a job title which described them as a "director" and who each reported to Mr Fielding, rather than directly to Mr Doyle. It was Mr Fielding who reported directly to Mr Doyle.

59. The Global Services Department was significantly larger than the other departments, and Mr Fielding believed it would be beneficial to the efficient running of his part of the business to have, as well as Mr Fielding, the Head of Global Services Department, the 3 directors who each were responsible for a sizeable part of that department: Beard for Global Consulting; Wedekind for Europe; Hbarek for Asia.

60. Those 3 were the only 3 attendees who were not heads of department. No-one with a title which was "lower" than director attended. From start of her employment, when the Claimant was Client Services Manager, she was not invited to attend (and nor was any other Client Services Manager). From November 2017 to end of her employment, when the Claimant was Associate Director, she was not invited to attend (and nor was any other Associate Director).

61. To the extent that the Claimant alleges (paragraph 21 of her statement) that, from February 2018 onwards, Mr Doyle decided to exclude her because he was angry about her November 2017 grievance, and/or what she had said and written in response to the outcome letter from that grievance, there is no evidence to support that. The decision to include Ms Wedekind. Mr Beard and Mr Hbarek had been made a year earlier (Minutes from 9 January 2017 meeting at 740 of bundle). Prior to her appointment as Associate Director, there were already other employees with

that title, none of whom were attending the monthly Heads of Department meeting. Mr Doyle had no reason to consider inviting the Claimant and made no conscious decision that she would not be invited.

<u>TMS – start of the Claimant's involvement circa August 2017</u>

62. TMS was potentially a large source of income for the Respondent. It was not a typical Global Services Department client in that it was not in the tech sector. It was a worldwide company. It was a client acquired by Mr Fielding and, until Mr Fielding left, Mr Doyle had little involvement with it.

63. The Claimant's position is that she was forced to take on this client against her will, and told that she might be dismissed if she would not take it on. The meeting notes from November 2017, a few months after she was allocated this client do not reveal that that was her claim at the time. Rather, at the time, she was pointing out (as she did in other communications) that there was a lot of work to do on the TMS account, and she did not believe that was being properly factored into her salary and job title. As per her correspondence with Mr Doyle on 20 December, she also believed that some of her other clients should be taken off her, and additional software resources provided to her.

64. On balance, we accept that the Claimant always felt slightly aggrieved that colleagues on higher pay than her had (she believed) declined the TMS account as being too difficult for them. We do not accept that Mr Doyle had said to her, in August 2017 or at all, that he would sack her unless she took it on. Rather we accept that, as the Claimant knew at the time, it was Mr Fielding who decided who would work on the TMS account and what role the Claimant would have. At the time, the Claimant was willing to be flexible about what tasks she would undertake and for which clients, provided that she received proper recognition and remuneration.

<u>Use of Radius</u>

65. In around July 2018, the Claimant decided that one of her clients would benefit from the services of "Radius", which was a business newly acquired by Vistra. She believed that Radius could provide a better service than was currently being provided to the client. This was in relation to "expats" and how such employees of the client would be treated in connection with remuneration/payroll matters.

66. The Claimant set out her position in an email dated 23 July 2018 (169-170) to various people, including Ms Oliver, and cc'ed to Mr Fielding, Mr Doyle and Mr Beard. Ms Oliver replied the following day (168) including just the Claimant, Mr Doyle and Mr Fielding. She said (i) all expat issues should be via her and (ii) there was an agreement with an existing supplier and a different supplier should not be used without Mr Doyle's approval. Amongst other things, she said:

> I can speak to [contact at the existing supplier] if there are issues. The email you sent to them was rude and whilst I appreciate your frustrations we should refrain from taking this approach. We have worked with Richard for over 10 years so please call them if you have concerns – thanks.

67. Mr Fielding replied, thanking Ms Oliver, while agreeing with the Claimant's position that the existing supplier was not providing a good service on the issue at hand.

Ms Oliver acknowledged his comments. At 10:23 on 24 July 2018 (UK time), the Claimant asked Mr Doyle to approve the use of Radius. She suggested that both price and service would be better, but did not give details of price.

68. At 7:21 on 26 July 2018, she sent a further email to Mr Doyle (and others) seeking a decision from Mr Doyle (and updates on other matters, from others). At 14:13, Mr Doyle replied to say:

    We would work with Radius for expat tax work.

    Carmen would lead that discussion.

    Carmen

    Are you speaking to the client?

69. The Claimant replied almost immediately (at 14:19 UK time) to say that she would "arrange an intro call with Radius person I have been liaising with". Mr Doyle replied by stating, "No – via Carmen as noted please" at 14:48.

70. In the meantime, a bit less than 2 hours after her 7.21am email, at 9:10am (UK Time), the Claimant sent an email that was a few paragraphs long and (therefore) must have taken quite a few minutes to type out. She sent it to Mr Vincent Bremmer, the Regional Managing Director for Europe. She also sent it to Stephen Chipman, a senior employee with the Radius part of the business. She did not cc Mr Doyle. Her email included the following extracts:

    Hi Stephen, Vincent,

    Apologies for this direct approach; however CloudHealth is another of my rescue clients and I got into trouble with Pete Doyle for reaching out to Ron Anderson, MD, Netherlands, this time last year, to help me unblock delays in paying employees!

    I am anxious yet again my client & I are caught between Vistra's organisational changes. …

    … I am driven by providing exceptional client service and mean no disservice to anyone in the process. Could I kindly ask that you encourage Pete Doyle to acknowledge my request to him?

    FYI - please find attached my response to Carmen Oliver and my original email to the team which led to this predicament. I did ask Ben to escalate this to you both, so hopefully this not a complete surprise.

    Many thanks for your support.

71. Mr Bremmer replied at around 18:38 UK time, copying in Mr Doyle. He said that Mr Fielding had not raised it with him. This was the first time that Mr Doyle knew that the Claimant had contacted Messrs Bremmer and Chipman. This was about 4 hours after Mr Doyle and the Claimant had had the exchange between 14:13 and 14:48, mentioned above. Mr Doyle's replies were not influenced by what the Claimant had sent to Bremmer and Chipman, because he did not know about it.

72. On 27 July 2018, at 18:36 (171), Mr Doyle replied, pointing out that he had been travelling for work, and was now on holiday. He invited her to work with Ms Oliver going forwards. He stated that the existing supplier was "a valued partner so please keep all communications with them respectful". He said he had explained

the issues about what she had written to the Netherlands MD at the time, but was happy to discuss on his return from holiday if the Claimant wanted that.

73. The Claimant is wrong to assert (as per paragraph 23 of her statement) that Mr Doyle had not responded to her on the issue until his 18:36 email on 27 July. As mentioned above, there was an exchange between them in the 2pm hour the previous day.

OKR Review of 2018

74. In January 2019, the Claimant submitted her own assessment of her performance against objectives for the year to 31 December 2018, and submitted to Mr Fielding. (page 178-191)

75. Her "self rating" was 5 out of 5. Management gave her a 4. (775). This was Mr Fielding's decision, with input from Mr Doyle. The only other unredacted scores, apart from the Claimant's on page 775 show that Mr Beard rated himself between 3 and 4 out of 5, and management gave him a 3.

76. On 25 January 2019, the Claimant was notified that her salary would go to £75,935 with effect 1 January 2019. Her salary from 1 January 2018 had been £70,967.00 (158) and so this was a 7% increase. Her bonus for 2018 was £2839 (so 4%) as confirmed to her on 27 March 2019 by Ms Oliver (205). Had she been rated at 5 out of 5 by management, her bonus would have been 10%.

77. Her post title did not change.

78. In paragraph 28 of her witness statement, the Claimant lists various people who were promoted and/or given what the Claimant regards as career development.

    78.1 In the case, of Mr Hbarek, the Claimant claims that he did the same job as her. Our finding is that that is not the case. There is a similarity that he also was reporting to Mr Fielding. However, firstly, we accept the Respondent's evidence that he was responsible for a very significant part of the Global Services Department; secondly, even on the Claimant's own case, he was a former USA2Europe employee who worked in Switzerland.

    78.2 In the case of Mr Beard, as we will discuss in more detail below, he gained a significant promotion from director to Head of Global Services Department.

    78.3 In the case of the others, there are several men listed and several women. The promotions are varied. For example, Wu and Cairn and Kuza and Visrolia and Streets are described as being appointed to Associate Director on dates later than the Claimant was given that title, and, in each case where length of service is mentioned, after a longer period of time working for the employer. Whereas in the case of, for example, Mr Bradburn being appointed from Director- Management Accounting to Head of UK Client Accounting Services, his role prior to promotion was more senior that the Claimant's (hence he was a suitable choice to deal with her 2017 grievance) and there is no evidence that the Claimant was a better candidate than he was for that post (or that she applied for it).

79. Our finding is that the Respondent was a large employer and, while we accept that quite a few of its employees were promoted internally during the 4 years that the Claimant worked for the Respondent, in percentage terms, there was also a high percentage of employees who were not promoted. The Claimant had one promotion, slightly more than 1 year after starting, and did not achieve another one during the slightly more than 3 further years that she worked there. The mere fact alone that she was not promoted was not out of the ordinary.

Recruitment Efforts in 2019

80. In 2019, both the Claimant and Mr Fielding were strongly convinced that it was urgent that some recruitment take place (on a temporary basis) at least to help cover the workload in Global Services Department. On 20 February 2019, she sent an email which is alleged to be a protected disclosure to Ms Mayers-Fink.

> Hi Jackie,
>
> Hope you are well.
>
> Ben informed me that the role for senior manager has already been uploaded to Indeed job board.
>
> Could you confirm whether we use preferred agency and the agreed rates? I have number of recruitment colleagues I would like to distribute the ad via my LinkedIn to get this expedited.
>
> The team is following resource short:
>
> 1. Siobhan (sick leave)
>
> 2. Meike (sick leave)
>
> 3. Sharon (Mat Leave)
>
> 4. Marc (more recently learned that Marc is 50% to IES)
>
> Existing colleagues have absorbed these extra work & grown revenue by 20% last year; however we are now spiritually broken and the situation will only deteriorate, judging by the client allocation review I am doing for Ben and the feedback I am receiving from colleagues. Your support to address this chronic resource constraint in the team is appreciated.
>
> Cheers,
>
> Joby

81. The email was specifically in connection with one post, GS Relationship Manager. It referred to other absences and to Marc Hbarek’s permanently changing roles. Our finding is that the reason for referring to those other 4 employees were to emphasise why, in the Claimant’s opinion (an opinion shared by Mr Fielding), it was urgent that the vacant GS Relationship Manager post was filled asap. The Claimant’s comments about staff being “spiritually broken” were a rhetorical flourish of a type common in many of the Claimant’s emails. The Claimant genuinely believed that there was no additional capacity for the vacant post to be absorbed. Part of her reason for using emphatic language, including “spiritually broken” was that she was seeking to persuade the Respondent to allow her to play an active role in the recruitment exercise, including using her own contacts.

82. The Claimant had copied on Mr Doyle as well as Mr Fielding and Mr Doyle replied all about 40 minutes later.

    Thanks for this Joby

    Ben is working on this with HR.

    If you want to discuss how this works – I suggest you set up a meeting with me and Ben.

    thanks

    Pete

83. This was not an intended put down to the Claimant. It was an acknowledgment of the fact that the Claimant regarded the situation as urgent by stating that Mr Fielding was seeking to recruit. It was an acknowledgment of the questions in her third paragraph by offering to discuss.

84. At the time, the Claimant did not regard this as an insult or a put down. She replied thanking him and saying she would like to meet. She arranged an appointment via his PA. The appointment was arranged to take place shortly after Mr Doyle had finished a meeting with his own line manager. However, in fact, that meeting overran and he therefore could not make it. He did not deliberately miss the meeting in order to disrespect the Claimant or Mr Fielding. On 27 February, while emailing the Claimant on another topic, he added: "*PS - we didn't have our meeting with Ben. My fault my meeting with Jane overran (by about 3 hours!) on Thursday. When are you in?*" He meant what he said in that email; that is, he was willing to rearrange following the Claimant's return from visiting a client in South Africa.

85. The Claimant replied the same day, 27 February (198). She said she would be back in Reading on Monday 4 March 2019 and also said:

    Thanks for expediting the approval process for hiring post. I have circulated amongst folks in my LinkedIn Group. I know I speak for whole of GS when I say we're all feeling the strain of absent colleagues, so you support is much appreciated.

    Ben is great at upward managing but often at the expense of his direct team, however he is receptive to feedback & learning & I cannot ask for more.

    I am exact opposite of Ben, it's why we have a complementary relationship! As Marc said yesterday " you're a fixer Joby", I tend to bridge a gap in a team & don't rely on position power to engage with people to get things done; however as I recently realised in Vistra Reading that counts above experiences! I will expand more when we meet in person.

86. Mr Doyle did not reply until 6 March at 20:03 (so later than her replied to the Claimant's 5 March email, see below). He said:

    Apologies for the slow reply. Lots on/catching up.

    Happy to discuss staffing issues with you & Ben & see what we can in the short term to fix some of these while we move towards a longer term plan.

    It is not right to comment on others management style in this way Joby – I am surprised you would think it was acceptable. We can discuss why not when we meet but I don't want to see it again please. If you have a genuine complaint then there is a process for that.

> Yeah – position/power aren't something I live by – and so Reading Office should not be suffering from that. Respect for colleagues/processes/management structures – those are different – and needed in measure in any organization in my view.
>
> Happy to debate in general terms and hopefully allay any fears you have (F2F – not by email please – my Inbox is creaking at the seams).

87. The comments in the third paragraph were his genuine views, and were similar to what he had said previously about the Claimant's tone in emails. In any event, those comments were motivated by her 27 February email, not her 20 February email. His last paragraph offered a face to face meeting because he thought that would be quicker, easier and more efficient (and because he had already offered that on 20 February) and not because he intended to use a face to face meeting as an opportunity to shout at the Claimant, nor because he wanted to avoid leaving a paper trail.

88. The following day, 7 March, the Claimant wrote (197) to Ms Wendy De Feo, Vice President Global Human Resources, who was based in the USA. She forwarded Mr Doyle's email to her and complained about it, alleging that he lacked objectivity (by implication because the recruitment function fell within Ms Oliver's remit) and the Claimant added: "*his natural 'aggressive' passive or otherwise inhibits Ben and others from confronting issues experienced with Reading HR function and require urgent support from you.*" She did not allege that the situation was connected to her sex or race, or that she in particular (as opposed to both her and Mr Fielding, a white male) was being treated badly.

89. At about 3pm on her second day back in the office after South Africa (5 March 2019), the Claimant wrote to Mr Doyle to say that they kept missing each other. (204). The Claimant said that she concerned that Ms Mayers-Fink was due to leave and mentioned a local recruitment firm which she would like to add as a preferred supplier. He replied the following day at 19:22, saying

> Carmen is leading HR – so adding her.
>
> I don't know whether we add additional recruiters in this way – we probably have a number we work with already

90. Mr Fielding replied saying that the situation was urgent and – by implication – supporting the Claimant's suggestion of using additional agencies. Mr Doyle replied at 19:36 to say:

> As I said – over to Carmen.
>
> I agree we need to find you staff – but let's follow process

91. These replies were not seeking to put down either the Claimant or Mr Fielding. His reasons for saying that the requests should go via Ms Oliver were because she was in charge of the department, and Ms Mayers-Fink's line manager.

92. Ms Oliver replied on 7 March 2019, declining to add the Claimant's choice to the list of suppliers. 19 minutes later, the Claimant forwarded the trail of emails to Ms De Feo, suggesting that Ms Oliver had a grudge against the recruitment firms she, the Claimant, had suggested. She made clear in the email that she had already

approached that firm, and would now stand them down. She copied in Mr Fielding, and in a paragraph in the email starting "@Ben" alleged that Ms Namaseevayum had told the Claimant that Mr Doyle had told her to keep the Claimant out of the process.

93. Having heard from both Ms Namaseevayum and the Claimant and Mr Doyle, we are satisfied that all that was conveyed to Ms Namaseevayum by Mr Doyle and to the Claimant by Ms Namaseevayum was that Mr Fielding was leading on the recruitment, and that proper processes needed to be adhered to.

<u>IT Security breach</u>

94. When the recruitment got underway, the Claimant was part of the selection panel. Because of that involvement, on 26 April 2019, she received an email (206) sent from the account of an HR Manager, but signed by a new member of staff, an HR adviser. The email conveyed details of interviews which had been arranged for the Claimant and Ms Wedekind to conduct. The para above the signature read:

> (Please note: I'm waiting for my IT to be set up so I am using Tanya's email today and to confuse matters further my phone (ext 5291) still reads Jackie Mayers-Fink! Hopefully this will all be set up/updated by the end of business today)

95. The Claimant's initial response was to reply to the email a few minutes later, to the email account which sent the email, but addressed to the (different) person who had sent the email, rather than the email account holder. She thanked her for the email, and sympathised with the IT problems.

96. However, on 3 May 2019 (so exactly a week later) she sent the email which she alleges is the second protected disclosure, addressed to Tony Campbell and copied to Mr Fielding and Ms Wedekind. It said:

> Hi Tony,
>
> Thanks for talking to me.
>
> As I explained, on 26th April when I received the attached email I believed Tanya was in the office and Helen F just used the email whilst Tanya was at her PC! When I got Tanya's out of office I was baffled however and I had other urgent tasks so could not flag this immediately!
>
> Final straw, was when a candidate HW & I interviewed yesterday, (4 to 5:30pm) flagged this and asked why if Helen F arranged the interview did he get an email from Tanya – saying it's Helen F! Please note, this candidate's background is Technology and one of his biggest client is VF. I have number of x-colleagues at senior levels who work there. This is of extreme personal embarrassment as security is fundamental pillar in Technology organizations and not to mention Vistra reputation!
>
> Yesterday, I had mentioned how embarrassed I was and hoped I had deflected that question from the candidate adequately to BF, DB and TK, at which point all said that's a well-known practice in HR and TK was told by a staff member (who has left Vistra) that sharing login and passwords was an internal HR policy!
>
> It seems this is a well known practice at senior level, including yourself and at some point we have to stop 'turning a blind eye' to fundamental Company Policy breach. There are other ways HR can organize to ensure Client Service without violating Vistra security policies.
>
> For avoidance of doubt I do not know who gave Helen F Tanya's login and passwords.

Thank you for your understanding and I look forward to the changes you planning to implement to stop this non-compliance and manage business risks accordingly.

@ Ben & Helen – FYI I trust I can rely on you to corroborate you heard TK and the candidate. I do feel seriously about this issue and we must assure this practice is stopped here in the Reading Office.

Cheers,

Joby

97. "Helen F" refers to the new employee using someone else's account. "Tanya" refers to the account holder. "BF" to Mr Fielding; "DB" to Mr Beard and "TK" to a team member, Tom Kuza.

98. Our finding is that the email was sent at 10.23am (see page 292), and the version on page 208 has the incorrect time. Ms Wedekind replied to all at 11am, saying that the situation had been embarrassing, but denying she had heard Mr Kuza make the comment.

99. Tony Campbell is the Head of Audit and someone who Mr Doyle had known a long time. At page 292, a few months later, in September 2019, he wrote his version of events. In it, he claimed that the Claimant had not represented his conversation with her accurately, because, in the conversation, he had said that he believed the practice of sharing passwords had ended, but told her to speak to Mr Doyle if she had concerns. Mr Campbell forwarded the email to Mr Doyle and discussed it with him. Mr Doyle was angry both with the Claimant and with Mr Campbell. While angry, he went to attempt to speak to the Claimant, but saw she was on the phone. He told her to come to speak to him when she had finished but, in the event, the Claimant and Mr Doyle did not have a discussion about it.

100. We find that when he came to the Claimant's desk he was angry and that she could tell that he was angry. He started to speak to her before realising she was on the phone. His tone of voice was angry. He did not put his face a few inches from the Claimant; he realised when he was a few feet away that she was on the phone and ceased talking about the matter, telling her to come to find him instead.

101. The Claimant claims that Mr Fielding later told her that, because of this report of an IT Security breach, Mr Doyle had later said to Mr Fielding that "a person like this should not be working for the company". Mr Doyle denies making any such remark, and we accept his denial. The Claimant does not claim to have heard him say it. We note that when the Claimant sent the email to the chief executive Alan Brown that was treated as her grievance (253-254), matters were fresher in her mind (it was 22 August 2019) and she was seeking to list specifics of her bullying allegation. She did not mention it then, despite saying, in the next paragraph, that Mr Doyle wanted to terminate her and Mr Fielding for what the actions they had taken in July 2019.

102. Mr Doyle reported the matter to his own line manager, Jane Pearce, Regional Managing Director for the UK. Between them, they agreed that Mr Doyle was the person who should investigate and take appropriate action.

103. On 15 May 2019 (210), the Claimant wrote to Ms De Feo (prompted by an email the Claimant received from Ms De Feo). She included various points of criticism about the Reading office and the HR department in particular. She also mentioned her email to Mr Campbell and included a copy of it. She said that she was "dreading" the process of Mr Doyle investigating the breach. However, the email makes clear that she knew the investigation was to be into the breach, and not into her, the Claimant's, conduct. She made no reference to Mr Doyle coming to her desk. Taking into account the other matters which she had raised with Ms De Feo about Mr Doyle's alleged attitude towards her, our finding is that the reason she did not mention that 3 May encounter to Ms De Feo in the email sent 12 days later was that she had not been particularly upset by his approach to her desk and it had not been particularly memorable. Had he behaved in the way that the Claimant has later alleged, then (i) the Claimant would have remembered that on 12 May and (ii) the Claimant would have described his behaviour in this email.

104. Mr Doyle's file note of the investigation is 213-217. He spoke to Mr Kuza, and Mr Kuza said that a payroll colleague had said, during a cigarette break, that when she was on leave, colleagues dealt with her emails. From that, he had inferred the payroll department shared email passwords. Mr Doyle spoke to payroll and was assured that that was not the case; they simply had a system for email forwarding during absence, with no password sharing. Having checked with various departments, Mr Doyle concluded that Mr Kuza was wrong.

105. His investigation concluded that Ms Namaseevayum had authorised Helen F to use Tanya's account on Tanya's day off, as a stop gap pending IT setting up Helen F with her own email. He and Ms Pearce agreed that this was a minor breach. He spoke to Ms Namaseevayum about it and sent an email the same day, 22 May 2019 (212) which accurately set out what he had told her. She was regarded as being in breach of the policy and told that she must not do it again. He acknowledged she had acted in good faith, and suggested that she could involve him in the future in the event of any delays by IT in setting up a new starter's password.

106. The Claimant suggests that Ms Namaseevayum was exited from the Respondent as a result of this issue. That is not correct. This issue was fully disposed of by Mr Doyle's comments to her that she had committed a breach, and must not repeat the breach. She was not formally disciplined, let alone dismissed or encouraged to leave because of the incident. She later left on voluntary redundancy terms as part of a restructuring proposal which she had known about for some time, and because she believed that taking the severance package was a better career move than taking the role in the new structure which had been offered to her.

107. In the filenote of the investigation, Mr Doyle wrote that he considered "Joby using information to be unpleasant / cause trouble".

Mobile Phone Issue and Mr Fielding's departure

108. In early July 2019, the Claimant complained to Mr Doyle about what she saw as an unreasonable refusal by Ms Oliver-Smith to supply a particular mobile phone handset (which was currently in the Respondent's possession and not allocated) to a new member of the Claimant's team. It was Mr Doyle's opinion that Ms Oliver-

Smith had been correctly following the proper approval process for such matters and that the Claimant's email was worded inappropriately.

109. He wanted to speak to her about the matter. He had his PA arrange a meeting. As was made clear in the exchanges, while he wished to discuss the tone of the Claimant's communications, it was not a disciplinary matter.

110. Coincidentally, and unbeknownst to the Claimant at the time, Mr Fielding was about to depart. The same day that Mr Doyle planned to meet the Claimant (18 July 2019), he met Mr Fielding to, as Mr Doyle puts it "discuss his departure". We infer that this was the Respondent's decision rather than Mr Fielding's.

111. Mr Doyle had no plans to dismiss the Claimant that day. The Claimant has later alleged that the only reason that she was not dismissed together with Mr Fielding was that she declined the meeting that day, and was on sick leave immediately afterwards. This is not correct. She would not have been dismissed.

112. The Claimant also alleges that she infers from Mr Beard's text message on 22 July 2019 (224) that the question "Has Pete got hold of you today?" implies that there had been an intention to cause her physical harm for "having the wrong skin type". That is not a reasonable interpretation of the exchange, in which Mr Beard makes clear that the Respondent was seeking to give the team information about how things would be moving forwards, following Mr Fielding's exit.

113. On Monday 22 July 2019, the Claimant wrote to the divisional Managing Director, Mr Justin Damer. She did not copy in Mr Doyle. As mentioned in the covering email, she was seeking the involvement of senior staff to reverse (what she inferred was) the dismissal of Mr Fielding.

114. She attached a 9 page report with graphics and tables, which alleged that she and Mr Fielding had been doing a good job, but other parts of the Reading office were not and suggested that Mr Doyle was bad for business, as were his ties to Ms Oliver and Ms Oliver-Smith. She suggested that those 3 should be exited, and Mr Fielding brought back.

115. She did not allege that she was being treated worse than her white male colleague, Mr Fielding. She did not allege that sex or race played any role in the alleged wrongdoing referred to in the document.

116. In the report (appendix on page 238), she referred back to the incident with the Netherlands MD (which the panel is aware was in August 2017), and the issue about seeking to approach Radius directly (rather than through Ms Oliver) (which the panel is aware was in around July 2018), as well as alleging that Mr Doyle had put his face close to hers on a particular occasion (which the panel is aware refers to 3 May 2019. If there were other alleged examples of bad treatment of the Claimant specifically (as opposed to the general pressures which she alleges in the report were put onto all staff) then she would have mentioned them.

117. Although the Claimant says in her witness statement (paragraph 53) that she wrote this in a state of terror, we do not accept that. We do accept that, as she says in the same paragraph, she was "summarising [her] experience and observations in

the Reading office". She made an effort to include all the things done to her that she thought portrayed Mr Doyle in a bad light.

The Claimant's grievance and the remainder of 2019

118. The Claimant was on sick leave from 22 July to 17 August 2019. She then was on annual leave, and resumed work in September.

119. Keren Chapman is Executive Director and Head of Human Resources for Europe. On the evening of Monday 22 July, the Claimant contacted Mr Doyle and Ms Chapman to say that she was signed off sick as she was distressed with "unfolding events". Mr Doyle asked Ms Chapman to assure the Claimant that Mr Fielding's departure would not mean something similar would happen to her, and that his concerns over the tone of her emails would not be pursued as a disciplinary matter. We accept what he wrote at the time is accurate; he and Mr Beard had attempted to contact the Claimant that day, but only because she had not reported sick on Friday 19 or earlier on Monday 22, and it was assumed that she was working from home.

120. Mr Damer referred the Claimant to Ms Chapman if she, the Claimant, wished to follow up on the contents of her communications to him. During the Claimant's sick leave, they corresponded and Ms Chapman drew the Claimant's attention to the grievance policy, and (on the Claimant's request) supplied a copy. The Claimant sent copies of the notes of the August 2017 meeting (her, Mr Doyle and Mayers-Fink) as an example of alleged bullying.

121. In August, the Claimant wrote to Ms Chapman about a reorganisation which she had seen announced. She said she was working from home with effect from 19 August and asked (i) for details the reorganisation and (ii) whether she could work from home, or else from Vistra's London office, going forward.

122. Ms Chapman sought advice on how to respond from Mr Doyle and from Jason Burgoyne, Regionals Operations Director. Ms Chapman was informed that (as she had correctly surmised) the reorganisation did not affect the Claimant. Mr Doyle stated that the Claimant's contract was to work in the office (and the Reading office in particular) rather than from home. However, he was not her line manager, and he acknowledged that she had probably been allowed a lot of flexibility to work from home under Mr Fielding. He said that he did not think there were reasons for her to work from the London office. He discussed with Mr Burgoyne the need for a suitable person to take over responsibility for the TMS account now that Mr Fielding had left, and that that person would therefore be supervising the Claimant who was working regularly on that contract. In fact, by now, the TMS account made up almost the entirety of the Claimant's work. By 21 August, Mr Burgoyne and Mr Doyle had agreed that the most suitable person was Lee Sheehan, Managing Director of Statutory Compliance and Governance, taking account of workloads, experience, and the nature of the TMS contract. Ms Chapman was copied into this email trail and on 22 August, Mr Burgoyne asked her to assist with making the arrangements for him to inform the Claimant about this decision.

123. There was a hearing of the grievance arising from the Claimant's correspondence to Mr Damer and Ms Chapman. The hearing took place on 9 September 2019 with

Mr David Rudge (MD - Corporate & Private Clients) as decision-maker, Ms Julia Walsh (an HR Business Partner based in Reading) as his HR adviser, and Mr Sheehan in the role of the Claimant's companion.

124. The notes, with the Claimant's changes are at pages 265-275 of the bundle. The Claimant added numbered headings to the notes to summarise the matters that she was complaining about to which the relevant sections of the notes referred. These were:

    124.1 "August 2017 – Manner in which I was disciplined for engaging with" the Netherlands MD

    124.2 "Support for Recruiting Staff … unsupportive and bullying nature of email tones"

    124.3 "Asking for approval to use Radius … ignoring my request for approval"

    124.4 "IT security breach … threatening to sack me for whistleblowing"

    124.5 "Not to engage with anyone, regardless of the situation, with anyone above PD"

125. Mr Rudge's outcome letter dated 27 September 2019 (pages 294-295) rejected the grievance, addressing the matters in each of the Claimant's headings, albeit in a slightly different order. He stuck to the headings from the 22 August 2019 email to Mr Brown, the chief executive.

126. The Claimant was given the right to appeal, and she did appeal. Her email to Rachel Norrington, Head of HR – UK, Ireland & Channel Islands on 30 September 2019 (296) raised various matters, but did not allege discrimination because of sex or race (or any other protected characteristic). It referred to the "unfair dismissal" of Mr Fielding.

127. There was an exchange of emails in which, amongst other things, the Claimant had been incorrect to inform Ms Norrington that Ms Chapman had failed to supply a copy of the grievance policy and the Claimant was informed that her line manager in the formal reporting lines of the structure was to be Mr Beard. (Although Mr Sheehan was supervising her work on the TMS account, which was effectively all of her work.)

128. the Claimant's appeal letter dated 11 October 2019 (304) was submitted. The Claimant noted that she had studied the handbook and made reference to it. She alleged there had been bullying and harassment and reiterated why her grievance should have been upheld by Mr Rudge. She did not allege that her treatment was because of a protected characteristic. She alleged that Mr Rudge's letter had been unfair to Mr Fielding.

129. Mr David Kemp was more senior than Mr Rudge, being a Regional MD. He was appointed to deal with the appeal. He met the Claimant on 25 October 2019, and he was accompanied by Ms Norrington. The Claimant was accompanied by Mr Sheehan. The notes are 311-312. The outcome letter was dated 5 November 2019 and was sent by email that date. The letter was fairly short and it contained

a mistake in that it referred to the Claimant's being a Client Relationship Manager. It rejected the appeal, stating that her grievance appeared to mainly relate to her belief that the Respondent had intended to exit her in July, along with Mr Fielding, and that that belief was factually incorrect.

130. According to Ms Chapman:

> In October/November 2019, I was involved in giving advice to Derek Kemp, who was hearing the Claimant's appeal against the outcome of her second grievance. We had some concerns about whether she should remain in the business. She appeared to be unhappy about a number of things stretching back to 2017 and I knew that this was not her first grievance. I was aware of, and involved in, without prejudice discussions with the Claimant at this time. The Respondent does not waive privilege over the content of those discussions. I can confirm that Pete Doyle was not involved at all in the decision to have the discussions or in the content of them.

131. On 29 November 2019 (316), the Claimant received an email from Ms Helena Hui-E Wu, a colleague in the Singapore office. It was part of a trail of friendly exchanges between the two of them, and included the following: "*By the way, I heard you may not return to GS after TMS transition, which would be a loss for us!*"

132. At the time, the Claimant's reaction to that email was to forward it to Mr Kemp at 15:54 the same day, by way of an email which the parties have not alleged was privileged. She seemed to imply that Mr Kemp would know why Ms Wu thought the Claimant might not return to the Global Services Department once the TMS contract ended.

133. Whether Mr Kemp knew or not, Mr Doyle and Ms Chapman each denied having stated something of that nature to Ms Wu (during her visit to the UK, or at all). Our finding is that Ms Wu was not expressly told that the Claimant would be leaving Global Services Department, let alone the Respondent. The email provides no concrete evidence for anything going beyond someone possibly saying that they did not know whether the Claimant would come back to the Reading offices in due course or not. There is no evidence of a breach of confidentiality in relation to the Claimant's request for a change of office, or the settlement discussions, or at all. Further, we do not find that this email is evidence that the Respondent had plans, as of November 2019, to dismiss the Claimant, or that Ms Wu had been told that the Claimant might be dismissed.

<u>OKR Review of Year 2019</u>

134. The Claimant had been line-managed up to July by Mr Fielding. After that, Mr Sheehan had had closest contact with her because she worked on the TMS account, and he was in charge of that account. By January 2020, when the TMS work was due to come to an end shortly, it was envisaged Mr Beard would be her day to day line manager as well as (as notified to the Claimant by Ms Norrington) her formal line manager.

135. We note what Ms Walsh says in paragraph 7 of her statement (and Mr Doyle in his paragraph 63), but prefer to rely on the contemporaneous documents.

136. In any event, as mentioned by Ms Walsh, there were genuine reasons that Mr Fielding's view of the Claimant's work for the first part year could not be taken into

account. It was decided that Mr Beard and Mr Sheehan would work together to come up with scores.

137. Mr Beard was not aware of the Claimant's "Bring Back Ben Report". He had not been aware of Mr Fielding's termination before it happened and had not been expecting it. His decisions on the Claimant's scores were not influenced by those things or the Claimant's attitude to them. Mr Sheehan was aware of the contents of the Claimant's grievance, having attended at the Claimant's invitations as her companion.

138. The Respondent accepts that Mr Beard in particular, and even Mr Sheehan, did not have as much knowledge of the Claimant's performance as Mr Fielding might have had. Her work was on the TMS contract almost exclusively. The Claimant believed that she should be rated "5" for most things. Feedback was given in February 2020 by Ms Walsh and the Claimant responded in writing on 25 February 2020. She made clear she thought the rating should be higher than the "3" which had been discussed. She gave her reasons, and did not allege sex or race bias. She implied that her loyalty to Mr Fielding was a source of annoyance to others. She spoke favourably of Mr Sheehan, and hoped he could have a role mentoring her going forward, even though she acknowledged that Mr Beard would be line manager.

139. The final outcome, signed off by Mr Sheehan on 12 May 2020 (492-499) rated her as "3" ("fully meets expectations") for everything other than teamwork, for which she got "2" (developing, partially meets expectations").

140. We have no evidence from which to conclude the opinions were anything other than Mr Sheehan's genuine beliefs, although we take into account that there is no witness statement from him.

<u>Background Issue – Alleged "jobby" remark</u>

141. As shown in her email signature, the Claimant tends to use a shortened form of her first name, "Joby". It is common ground that the way that she pronounces it, and the way that people at work, including Mr Doyle and others, knew that it was supposed to be pronounced, is to rhyme with the name "Toby".

142. There is a word "jobby" which rhymes with "hobby", and which is slang for faeces.

143. On around 19 February 2020, the Claimant now alleges that, during a conference call, while checking who was on the call, Ms Oliver-Smith said, "Is that you, Joby?" to which Mr Doyle replies "sounds like a jobby".

144. However, that is not how she reported the matter nearer the time, and we find that it did not happen. Nearer the time, she reported that he had said "sounds like a Joby". Her objection, nearer the time, was that the use of the word "a" in that sentence was disrespectful. We reject the Claimant's account that, all along, she had heard him say "jobby" but was too embarrassed to report it on that basis, and so, instead, made a quite different complaint.

145. Our finding is that the Claimant knows that Mr Doyle did not say "jobby" or otherwise refer to her or her name by comparing her or it to excrement, jokingly or

otherwise. Had she genuinely believed that he had said that, she would have raised it almost straight away, at a high level within the organisation. At the time, she heard him (or she believes it was him) say “Joby”. See her email of 25 February 2020 at page 339.

146. On the balance of probabilities, it was Mr Doyle that the Claimant heard speak, and he did say “sounds like a Joby”. It does not adversely affect our view of Mr Doyle’s credibility that he does not specifically recall it. From the context, as the Claimant described it nearer the time, we infer that it was not a particularly memorable incident.

<u>Replacement for Mr Fielding</u>

147. After Mr Fielding’s departure, Mr Beard acted up into the role of Head of Global Services Department.

148. The permanent post was advertised, the Claimant applied, and the Respondent decided that Mr Beard would be appointed in early 2020.

149. Mr Doyle took into account the length of time that he had known Mr Beard and his performance while acting up, as well as interview performance.

<u>TMS – End of the Claimant’s involvement and the disciplinary process</u>

150. In 2019, after Mr Fielding had left, the TMS contract came up for renewal and the Respondent made a bid for it. The Respondent did its best to be re-awarded the contract It was unsuccessful and TMS went with another provider. This meant that there would be a transition period in which the Respondent was responsible still for the day to day TMS work, as per its contract, and also in which the Respondent was required to co-operate with TMS and its new provider to share information and data so that everything would be ready for the start date of the new contract.

151. It is not suggested by the Respondent (and nor was it at the time) that the loss of the TMS contract was due to any failure by the Claimant. The Claimant had worked hard on the contract both before and after Mr Fielding left.

152. The finance director for TMS was Ms Morris. In March 2020, she raised several concerns with the Respondent in which she suggested that the Respondent’s performance of the contract and the transition was not good enough. She also raised particular issues about the Claimant’s actions.

153. For example,

153.1 On 11 March, she told the Claimant that her comments had been “particularly unhelpful in this case which I take very seriously and am happy to escalate much higher within the Vistra organisation” (347)

153.2 An email which the Claimant had sent about the handover which said “Please see my comments below, until you are more precise I do not see the benefit of us attending any meetings. It is waste of all our times“ was not sent to Ms Morris by the Claimant, but forwarded to her by one of the recipients.

153.3 On 16 March, Ms Morris wrote to Mr Burgoyne and Mr Beard to say: "*I'm really sorry to raise this with you both but we are increasingly struggling with Joby and the tone of her emails and her working style which appears to be deteriorating.*" She implied she would prefer a different point of contact.

153.4 On 19 March, she copied Mr Burgoyne and Mr Beard into her reply to the Claimant's email of 18 March (364). about what she thought

154. This led Mr Burgoyne and Mr Beard to have a discussion and Mr Beard to raise the matter with the Claimant. Then, the following day, 19 March, another complaint from TMS was received, giving examples of alleged rudeness and other failures in connection with the handover.

155. As a result, Mr Beard, having taken HR advice, and discussed with Mr Doyle, decided to suspend the Claimant. He informed her of this, and the Respondent's letter of 19 March (signed by Ms Walsh: 367) confirmed the decision.

156. For the disciplinary process which followed, the decision maker was Tom Lickess and he was assisted by Clare Lambert. The Claimant attended the hearing on 3 April 2020.

157. The Claimant alleges that a document (part of the evidence for the hearing) was distorted when sent to her by Ms Walsh. Although we accept that the Claimant is telling the truth about this (and she has not, for example, forged the item on page 384) our finding is that, regardless of what caused this problem, is not done deliberately by Ms Walsh or anybody else, either before or after Ms Walsh's 27 March email. The Respondent had brought items of internal correspondence into the disciplinary, as well as TMS matters, and they were discussed during the meeting. The allegations were said to be potentially gross misconduct. The Claimant's comments that she had simply "replied all" rather than adding in new recipients were taken into account. Ms Walsh told us she does not know (and we believe her) why there are different versions of the trail with Helen Chamberlain.

158. On 6 April, by conference call, Mr Lickess informed the Claimant that he had upheld the misconduct allegation (not gross misconduct) in relation to the TMS emails, but not the internal correspondence. This was confirmed by a letter emailed the same day. (398). The outcome was "Written Warning".

159. The Claimant was informed of right to appeal and did not do so.

160. The suspension was lifted. By now the pandemic had hit and the TMS contract had finished. Mr Beard gave her duties which were suitable for her job description, experience and seniority.

161. There was some disagreement between the Claimant and a colleague Ms Siulea. Mr Beard instructed Ms Siulea that the tone of her emails needed to improve.

<u>The Claimant's redundancy</u>

162. In 2018, the Respondent had implemented some redundancies at Reading, as part of a realignment of its services. Mr Doyle had also been asked to make some redundancies for costs reasons in 2019, but had been able to avoid doing so.

163. In June 2020, announcements about Vistra Model Office ("VMO") were made. Overall, the plane for the Respondent was to have more junior staff, and potentially reduce the proportion of mid-level and senior staff.

164. Mr Doyle decided not to make any changes to Singapore. He looked at Germany and 2 employees departed (one female, one male). These were a Director and a Regional Director.

165. He looked at the 3 Associate Directors: the Claimant, Tom Kuza and Hiral Visrolia and also Mr Vetongen. Mr Kuza and Ms Visrolia had taken up their roles as Associate Directors in 2020, but following decisions made earlier.

166. The decision was that, to save costs, Mr Beard was responsible for removing one of the 3 Associate Directors reducing to 2.

167. The Claimant's first consultation meeting (done remotely) was on 4 September 2020 with Mr Beard and Ms Walsh. The Claimant was accompanied by Mr Sheehan. The Claimant asked why Mr Vetongen was not being included. She also commented on the proposed scoring matrix.

168. Ultimately, while Mr Beard decided that Mr Vetongen would go through the process, Mr Beard decided that, in reality, he needed to select one of the 3 Associate Directors for redundancy (unless there was alternative work being available for them instead) because Mr Vetongen's costs to the Respondent could be reduced anyway; he was a contractor paid for work done, and so he could simply be given less work.

169. Mr Beard got advice from Ms Walsh as to the scoring matrix. Mr Beard initially did it in August 2020 but it was reviewed in September. (584-587). In the September scoring, the Claimant was given the middle score (9, with 15 being the maximum) for standard of work based on her 2018 and 2019 OKR scores, and the TMS complaint. She was given the maximum (5 each) for qualifications and experience, and she was given the lower option (2 rather than 5) for skills (meets "some", not "all" the requirements) based on TMS. She was given the middle mark (5, rather than 10 or 15) for a portfolio exceeding £1m but not £1.5m. This was based on TMS, even though that had ceased. She got 0 for disciplinary record, and would have got 10, but for the April warning. Her overall score was 26.

170. Mr Kuza got 42. He got 3 for experience (the middle score), but the Claimant takes issue with his score of 5 for qualification, stating it should be zero. The Respondent gave him that score because it was satisfied with his proges towards getting the UK qualification, but if he had been given zero, his overall score would have only reduced to 37.

171. Ms Visrolia got 47. Notably this included the same as the Claimant for standard of work. Ms Visrolia had two scores of 4 in her OKR for 2019 and 2018, rather than 3 and 4 as per the Claimant.

172. Mr Vetongen was given 39.

173. The second meeting was 18 September (596-598). She was given the scoring outcome and told she had been selected for redundancy. She was told that she

would remain working until 30 September and then, if no alternative work had been found, she would be on garden leave.

174. On 21 September, the Claimant wrote to Group Compliance and the chief executive (599-601). The compliance department forwarded to HR (Ms Walsh) to deal with. The same date, Ms Walsh also responded to the Claimant's request for information and documents.

175. The Claimant sent a more detailed list of queries on 23 September. (607-608). She said "for tribunal purposes" she would like to see Mr Kuza's and Ms Visrolia's scores. Ms Walsh's reply was at 10:40 on 29 September. At 12:25, the Claimant replied to that reply, including making comments (highlighted in yellow) within the body of Ms Walsh's responses. The Claimant said she would bring a tribunal claim. She also referred to harassment and unfair treatment. In context, she was referring to matters she had raised in her 2019 grievance. She did not mention that she believed she was being treated badly because of sex or race.

176. As discussed on 18 September, a meeting was due to take place on 30 September. At the Claimant's request, this was moved to 5 October 2020 so that Mr Sheehan could attend. No alternative work had been found and so the leaving arrangements were discussed. The Claimant's dismissal letter was dated 5 October 2020, with last day of employment being 5 January 2021. (618). It did not refer to right of appeal. She was generally not required to work during the notice period, but was required to be available in case required.

177. In accordance with standard procedures, Mr Beard asked the IT department for her access to systems other than email and intranet to be removed. He correctly supplied the relevant information and dates on the appropriate forms. The Claimant, in fact, was unable to access her emails for a large part of the notice period. However, that was an error, and not the result of deliberate action by Mr Beard or Mr Doyle or any of the Respondent's other witnesses for this hearing.

178. On 7 October 2020, the Claimant expressed interest in the role of Exec Director – Operations by email to the talent acquisition partner, copied into Ms Walsh. She was told that she should have IT access to the software application for submitting the job application. (631)

179. By email on 8 October 2020, Ms Walsh informed the Claimant of the appeal process. On 8 October 2020 (633), the Claimant appealed against the dismissal. She disagreed that portfolio size should differentiate between the 3 Associate Directors. She also said that her 2018 score was wrong. (Our finding is that the Claimant did know what her 2018 score was at the time, even if she had forgotten it by October 2020). She also said that it was not reasonable to score Mr Kuza the same as her when he was only studying for his CIMA qualifications, and she had hers already.

180. An appeal meeting took place remotely on 20 October 2020. The Claimant brought Mr Sheehan as "employee witness". The decision maker was to be Paul Cooper – Management Director. Caroline Williams from HR attended. Upon asking, the Claimant was told that Ms Walsh reported to Ms Williams. Mr Cooper reported to Mr Burgoyne.

181. The Claimant told Mr Cooper that she was concerned because – in her opinion – it had been Mr Burgoyne who had told her that the VMO programme placed her at risk. (In fact, she stated that he told her she was redundant, but our finding is that that is not correct; he did not do that. So we proceed on the basis that she meant "at risk"). Mr Cooper said he had not known that. The Claimant then asked about how the appeal would work, and it was made clear that the meeting was to discuss the appeal after which Mr Cooper would make an independent decision.

182. After the meeting, the Claimant suggested that it had been agreed in the meeting that Mr Cooper because he reported to Mr Burgoyne would not be the decision maker. That is not accurate. She was specifically told he would be.

183. The outcome was supplied to her on 5 November 2020. The appeal was rejected. The meeting notes were provided by Ms Chapman on 11 November 2020. (647)

184. The Claimant sent further correspondence to the CEO, the chair and the legal department asking for a change of decision and/or informing them that there would be litigation.

185. During the consultation until 5 January 2021, the Respondent considered the Claimant's expressions of interest and queries for alternative work, as well as taking steps to alert her to potential vacancies. However, because of the VMO project opportunities at her level were limited. Some of the potential roles discussed were:

185.1 a Global Treasury Director role in Hong Kong. This had been filled before the Claimant was placed at risk. This was several levels above Associate Director.

185.2 Two Executive Director roles, for which the Claimant did not apply. (They were about 2 levels above Associate Director.

185.3 a temporary Project Manager role in Bristol for which the Claimant did not apply.

185.4 a role in Luxembourg, for which the Claimant was told the process should she wish to apply

185.5 Anti-Money Laundering Compliance in Jersey, which had already been filled

185.6 Commercial Finance roles in Hilton Hess's (Group Chief Financial Officer) team, which were more senior than Associate Director

The Law

186. In the Equality Act 2010 ("EQA"), time limits are covered in s.123, which states (in part):

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

187. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

188. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

189. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

190. The factors that may helpfully be considered include, but are not limited to:

190.1 the length of, and the reasons for, the delay on the part of the claimant;

190.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

190.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

191. S.136 EQA deals with burden of proof. It is applicable to all the Equality Act claims in this section (the claims of harassment, victimisation and direct discrimination).

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

192. S.136 requires a two stage approach.

192.1 At the first stage the Tribunal considers what facts have been proven to the Tribunal (and the findings could be based on evidence from the respondent or evidence from the claimant, it does not matter) and decides whether the tribunal has found facts from which the Tribunal could conclude - in the absence of an adequate explanation from the respondent - that the contravention has occurred. At this stage it is not sufficient for the claimant to prove that what she alleges happened did in fact happen. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention. That being said, the Tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate when deciding whether the burden shifts at Stage 1.

192.2 If the claimant does succeed at Stage 1 then that means the burden of proof does shift to the respondent and that the claim must be upheld unless the respondent proves the contravention did not occur.

193. If the Tribunal is not satisfied on the balance of probabilities that a particular incident did happen then complaints based on that alleged incident fail. S.136 does not require the respondent to prove that alleged incidents did not happen.

Direct Discrimination

194. Direct discrimination is defined in s.13 of the Equality Act.

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

195. It has two elements; firstly whether the Respondent has treated the Claimant less favourably than it has treated others ("the less favourable treatment question") and secondly whether the Respondent has done so because of the protected characteristic ("the reason why question"). So for the less favourable treatment question the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about the characteristics of a hypothetical comparator. That being said, the two questions are intertwined and sometimes an approach can be taken that the Tribunal deals with "the reason why question" first. If the Tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of it will necessarily follow that the person whose circumstances are not materially different would have been treated the same. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

196. Section 23 Equality Act 2010 provides that, on a comparison of cases in claims of direct and indirect discrimination, there must be no material difference between the circumstances relating to each case. For direct discrimination that means that any

comparator relied upon, whether an actual person, or a hypothetical comparator, must be in the same relevant circumstances as the claimant.

197. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not. We must analyse both the conscious and sub-conscious mental processes and motivations for actions and decisions and s.136 applies. In other words, if there are proven facts from which the Tribunal could infer that there had been unlawful discrimination then the burden of proof shifts to the respondent and the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of a protected characteristic.

198. In approaching the evidence in a case and considering the burden of proof provisions the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] ICR 931; [2005] EWCA Civ 142 and Madarassy v Nomura [2007] ICR 867; [2007] EWCA Civ 33. The burden of proof does not shift simply because the claimant proves a difference in sex and a difference in treatment. That only indicates the possibility of discrimination, and that is not sufficient. Something more is needed. The "something more" does not need to be a great deal more; it could, for example, depending on the facts of the case, be an untruthful or evasive answer from the Respondent or a crucial witness.

199. As per Essex County Council v Jarrett EAT 0045/15, when there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. It should not take a broad-brush approach in respect of all the allegations.

Protected Disclosures

200. The term "qualifying disclosure" is defined by section 43B Employment Rights Act 1996 ("ERA 1996") , which provides, in part:

> 43B.— Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (a) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> … or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

201. There must be a disclosure of information. A disclosure of information may be made as a part of making an allegation. See Kilraine v London Borough of Wandsworth [2018] ICR 1850: "In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

202. There are three requirements that need to be satisfied for the definition of protected disclosure in section 43A of the Employment Rights Act to be met. There needs to have been a disclosure within the meaning of the act. That disclosure has to be a qualified disclosure. It must be made by the worker in a manner which is set out at sections 43C through 43H.

203. There are five questions for the tribunal to consider when deciding if the disclosure qualifies under section 43B(1): firstly, that the disclosure has been made and it contains certain information; secondly that the employee actually believed that the disclosure tended to show one of the things (a) to (f); thirdly that the employee's belief was reasonable on that point; fourthly that the employee actually believed that the disclosure was being made in a public interest; and fifthly that such a belief was reasonable.

204. The worker must believe, at the time of making it, that the disclosure is made in the public interest, and that belief must be reasonable. Underhill LJ considered this latter requirement in Chesterton Global Ltd v Nurmohamed [2018] ICR 731:

204.1 The tribunal has to ask (a) whether the worker believed, at the time that they were making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable

204.2 The tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The tribunal might need to form its own view on that question, as part of its thinking, but the tribunal's view is not determinative

204.3 The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. What matters is that the Claimant's (subjective) belief was (objectively) reasonable.

204.4 While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be their predominant motive in making it.

204.5 Parliament has chosen not to define the phrase "in the public interest" and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression.

205. A "protected disclosure" is a qualifying disclosure which is made by a worker in accordance with any of sections 43C to 43H.

206. Workers are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA.

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. …

207. "Detriment" is not specifically defined in the legislation, but should be interpreted consistently with case law relating to discrimination and claims for detriment

relating to trade union activities. (For example: *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337)*

208. As a result of section 48(2), if the Claimant proves on the balance of probabilities by the claimant there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment, the burden shifts to the respondent to prove that the worker was not subjected to the detriment on the ground that they had made the protected disclosure. This means that the Respondent has to show that the protected disclosure did not (or, at least, did not more than trivially) influence the employer's motivation for subjecting the employee to the detriment. *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372*

209. Section 47B(2) of the ERA 1996 provides: "(2) ... This section does not apply where—(a) the worker is an employee, and (b) the detriment in question amounts to dismissal (within the meaning of Part X)."

210. Section 103A is also within Part X, and also defines an unfair dismissal to which the 2 year requirement does not apply.

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

211. It is for the respondent to prove what its reason was for dismissing the employee. However, if the Tribunal decides that the reason or the principal reason for the dismissal was something other than a protected disclosure then the claim for a breach of section 103A fails even if the dismissal was for a reason that is different to the specific one put forward by the employer. See for example Kuzel v Roche Products [2008] EWCA Civ 380.

212. Evidence that the employer has acted in a high handed or unreasonable fashion or deliberately turned a blind eye to evidence that the employee was not guilty of misconduct and/or was actually doing a good job are not necessarily sufficient for the employee to succeed under section 103A. The only relevance of such matters would be if they supported an inference that the employer's purported reason was not the true reason for the dismissal. As per Abernethy v Mott Hay and Anderson [1974] I.C.R. 323, the reason for the dismissal of an employee is the set of facts known to the employer, or the set of beliefs held by the employer, which caused the employer to dismiss the employee. That is subject - in protected disclosure cases - to the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55. Where the real reason for dismissal is hidden from the decision maker behind an invented reason, then it is the Tribunal's duty to look behind the inventive reason. So, if an investigator or senior manager wants to get rid of an employee and they trick or deceive the dismissing officer into deciding that the employee had committed misconduct, or had performed poorly, then the reason that the investigator or senior manager had for wanting to get rid of the employee can potentially be attributed to the employer as the dismissal reason.

213. In a case where there is an overall plan involving several people to remove a whistle blower from an organisation, then a number of managers might be "in the know" about this plan. If the tribunal decides that there is evidence to support such

a conclusion, then it might decide that the decision maker was acting in accordance with such a plan. If the reason or the principal reason and that the employee was dismissed was that plan, and if that plan was formed because of the protected disclosure, then the claimant can succeed under section 103A.

214. The mere facts alone that a person might have made a protected disclosure and that one or more colleagues might have been aggrieved by it and/or complained about it, are not enough - necessarily - for the claimant to succeed under section 103A. It is the decision maker's reason for the dismissal that falls to be analysed. In the absence of the special circumstances of a Jhuti type case, the opinions or beliefs of other people within the organisation are not necessarily relevant.

215. If there is a case where the Tribunal finds (or the respondent admits) that the dismissal or detriment was somehow connected to disclosure but the respondent says it was the manner of the disclosure not the fact of the disclosure, then the Tribunal must be slow to accept that the claimant's behaviour at the time of disclosure (and/or inappropriate language in making the disclosure) was the reason for the dismissal. However, in principle, it is possible to separate out the claimant's conduct when making the disclosure from the disclosure itself and to decide which of those was the dismissal reason.

Unfair Dismissal

216. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

217. Section 98 ERA states, in part:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

218. Provided the respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

219. In considering this general reasonableness, taking into account the respondent's size and administrative resources. Typically, the tribunal's analysis includes the question of whether the respondent carried out a reasonable process prior to making its decisions. In terms of the outcome of dismissal itself, the tribunal decides whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

220. In carrying out the analysis, it is important for the tribunal to make sure that it does not substitute its own decisions for those of the employer. In particular, it is not relevant whether the tribunal members would have applied a different selection criteria, or carried out a further stage of investigation, etc, so long as the employer's decisions were not outside the band of reasonable responses.

221. Section 139 ERA states in part

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

222. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation. In an unfair dismissal case, where the

employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence. If there was such a state of affairs, then, as made clear by the House of Lords in Murray v Foyle Meats Ltd [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "wholly or mainly attributable to" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

223. In deciding the reason for the dismissal, it is entirely irrelevant why the redundancy situation existed, and whether the employer could have done anything to avoid it. If those points come into the unfair dismissal considerations at all, then they might be considered as part of section 98(4).

224. More generally, as regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunal must remember that it is guidance, and does not replace the wording of section 98(4). where Browne-Wilkinson J

224.1 The employer should give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment, either with the Respondent, with an associated employer, or elsewhere.

224.2 The employer should consult (usually with representatives) as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer should seek to agree the selection criteria with the representatives, and be willing to continue to engage about the processes for applying those selection criteria

224.3 The employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

224.4 The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations representatives as to errors or unfairness in the selection.

224.5 The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

225. In Compair Maxam, the court was mainly focussed on situations where the unions would be heavily involved in the process. However, neither then, nor now, are employers able to justify the fairness of a procedure merely by arguing that the union, or other employee representatives, had agreed it. The other side of the

same coin is that it is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant, and the tribunal must not substitute its own views.

Reasonable Practicability

226. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving that it was not is on the claimant. When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant.

227. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the claimant has to have acted as fast as would have been reasonably practicable.

228. The fact that an employee pursued an internal procedure is a relevant circumstance which can, and should, be considered by the tribunal. However, generally speaking, it is not usually enough by itself to make it "not reasonably practicable" for the complaint to be presented within the prescribed period, even if the employer is slow to announce the outcome. See the Court of Appeal's review in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*.

229. In *Porter v Bandridge Ltd 1978 ICR 943, CA*, the Court of Appeal held that the correct test is not whether the claimant knew of her rights but whether she ought to have known of them. Similarly, when a claimant is ignorant about (or makes a mistake about) a fact which is relevant to the calculation of time limit, the question is whether that ignorance (or that mistake) is reasonable. The assessment of reasonableness has to take into account that a potential claimant ought to be aware of the importance of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of the dismissal, then that does not necessarily mean that it was not reasonably practicable to issue the claim in time. The claimant must also show that the ignorance was reasonable and that he could not reasonably have been expected to have discovered the true situation during the limitation period. Furthermore, ignorance of the true facts must be the actual reason for failing to issue the claim sooner.

Analysis and conclusions

Did the Claimant make a protected disclosures.

230. The Claimant relies on subsection (b) of section 43B(1), namely that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

PID 1: 20 February 2019

231. We are satisfied that the Claimant's email contains words which could be taken as a reference to an employer's duty of care to it staff. Ie a legal obligation.

232. We are not satisfied that, at the time she sent the email, the Claimant actually believed that she was disclosing information which tended to show breach of a legal obligation. At the time, in our judgment, she was trying to hurry the HR department along by explaining why she (and Mr Fielding) considered that the recruitment to this particular vacancy was urgent. She did not think that she was informing the Respondent that it was making people ill, or otherwise breaching its duty of care.

233. If we had found that she had genuinely believed, at the time, that she was disclosing a breach of a legal obligation, we would not have decided that it was unreasonable for her to hold such a belief. The reasonableness (in the hypothetical scenario that we had found it was her actual belief) would have been judged against her assertions that there were staff shortages, which she had explained.

234. In any event, we do not consider that the Claimant believed that the disclosure was in the public interest. Furthermore, even had she had such a belief, it would not have been a reasonable one. We do not accept that the Claimant believed that a significant number of staff were affected. Her cast list is 76-80, for example, and not many of those would have been affected by a delay in filling the GS Relationship Manager vacancy, or by the temporary absences of the 3 employees named, or by Mr Hbarek's relocation. A comparatively small group of employees were affected, at most, and mainly Mr Fielding and the Claimant.

235. Thus the 20 February 2019 email (at 10:21) was not a protected disclosure.

<u>PID 2: 3 May 2019</u>

236. We are satisfied that this meets all the criteria. The Claimant believed that she was disclosing a breach of data protection legislation. We are satisfied it was a reasonable belief.

237. The Claimant believed that the matter was in the public interest as potentially being relevant to a large number of the Respondent's staff (in the Reading office, but potentially beyond if it reflected a wider culture) as the security of their data was at risk. Client data could also be placed at risk if there was a lack of transparency and accuracy over who had access to which systems. We are satisfied it was a reasonable belief.

<u>Allegation 1.4 Direct Sex/Race Discrimination about OKR Review for 2018 (completed in Q1 of 2019</u>

238. This allegation is one for which the time limit ran from 1 February 2019 in our judgment, as the score was finalised then. (775). If we were wrong about that, then time ran from the 27 March 2019 notification of bonus (205).

239. There are no facts from which we could infer that the decision to give her 4 (rather than 5) for her OKR score (and to base her bonus on that score of 4) were motivated, consciously or unconsciously, by sex or by race.

240. Our finding is that the reason the Claimant was given that score was that, when Mr Fielding and Mr Doyle discussed it, "4 - Exceeds Expectations" was believed to

be the right judgment call, and "5 – Exceptional" was not. The Claimant was entitled to her own opinion (and to state that opinion prior to the decision's being made) but it was the employer, rather than the Claimant, who had the right to select the correct rating for all its staff.

Allegation 1.5 Direct Race Discrimination about not going to Heads of Department meeting

241. The Claimant alleges that this is an act which continued until the end of employment. Given the minutes of the January 2017 meeting, the decision to expand the Head of Department meeting to include 3 directors (and no associate directors; and not the Claimant was made then, and so the better view is that time starts running then.

242. As stated in the findings of fact, the Respondent decided to invite 3 people who were not "Heads of" as per job titles, was because of the significant roles they played within a large department.

243. There are no facts from which we could infer that the omission of an invitation to the Claimant was because of race (whether consciously or unconsciously). No other associate directors were invited either.

244. This allegation is no longer pursued as sex discrimination.

Allegation 1.6.2. Direct Sex/Race Discrimination or detriment on the grounds of protected disclosure

245. On the facts, we did not accept that the Claimant was told that she was excluded from the recruitment process by Ms Namaseevayum and we did not accept that Mr Doyle told Ms Namaseevayum to exclude the Claimant from it.

246. We do not agree with the characterisation "put down" in relation to Mr Doyle's reply, for the reasons stated in the findings of fact. We do not accept that the Claimant was intimidated by it.

247. There are no facts from which we could infer that the tone of his reply to her email (either the first reply, or in the further discussions) was because of the Claimant's sex or because of the Claimant's race.

248. We decided that this was not a protected disclosure. However, and in any event, the Claimant was not subjected to a detriment. As stated in the findings of fact, Mr Doyle thanked the Claimant for her email, tried to assure her that the urgency had been noted, and Mr Fielding was dealing with the matter, and offered a meeting to discuss the query in her third paragraph

Allegation 1.6.3 – Protected Disclosure Detriment

249. We rejected the allegation that Mr Doyle said that the Claimant should not be in the business.

250. We found that Mr Doyle became angry on 3 May 2019. We rejected the specific allegation that he came very close and either accidentally or deliberately

intimidated the Claimant. A short time later (around 12 May), she did not think his immediate reaction on 3 May 2018 was worth mentioning to Ms De Feo, even while complaining about various things in Reading.

251. In accordance with sections 48(1A) and 48(3) ERA, the time limited to bring this claim was 3 months from 3 May 2019 and so expired 2 August 2019. This was more than 15 months before the claim was presented.

252. It was reasonably practicable for the Claimant to present the claim in time. Pursuing an internal grievance would not have meant that it was not reasonably practicable. Furthermore and in aby event, even the grievance commenced after the 3 months were up. Further, the grievance outcome and grievance appeal outcome were in excess of year before the claim was presented.

253. We are satisfied that the Claimant had the means to easily find out about time limits if she wanted to. In her 2017 grievance, she referred to ACAS (albeit, we acknowledge, not specifically in the context of time limits for claims).

254. We are satisfied that the reason the Claimant did not bring a claim (or at least start early conciliation) by 2 August 2019 is that she decided not to do so, not because there was any practical difficulty.

255. Given the tone and content of her comments to very senior employees, she was not put off litigation by concerns about “rocking the boat”.

<u>Allegation 1.6.3 –sex and race discrimination</u>

256. We rejected the allegation that Mr Doyle said that the Claimant should not be in the business.

257. We found that Mr Doyle became angry on 3 May 2019. We rejected the specific allegation that he came very close and either accidentally or deliberately intimidated the Claimant. A short time later (around 12 May), she did not think his immediate reaction on 3 May 2018 was worth mentioning to Ms De Feo, even while complaining about various things in Reading.

258. The time limit would have been 2 August 2019 (unless we decided there was a continuing act).

259. There are no facts from which we could infer that Mr Doyle’s anger on 3 May was because of the Claimant’s sex or because of the Claimant’s race. We say that in any event. The Claimant’s argument (which we are not persuaded by) that he was angry because of consequences for Ms Oliver and/or Ms Namaseevayum does not assist the Claimant with her the Equality Act 2010 claims. On the contrary, they point in the opposite direction.

<u>Allegation 1.7 - Direct race and/or sex discrimination – 25 February to April 2020</u>

260. Our finding of facts were that there was no deliberate distortion of the evidence.

261. There was an investigation, then a decision. For the internal emails the decision was in the Claimant’s favour. There was no misconduct.

262. The decision was 6 April 2020. Thus that is the latest date that time starts running from, even ignoring that the alleged manipulation of evidence, or unreasonable inclusion of evidence, occurred during the March investigation.

263. There are no facts from which we could decide that the errors (even taking the Claimant's allegations at there highest) in the documents circulated during Respondent's investigation was because of sex or race. The same can be said about the decision to include the Claimant's email to Ms Walsh about the OKR meeting as an example of alleged rude communications.

264. For all the Equality Act allegations, we do not find that there was a continuing act. The Walsh/Lickess/Beard decisions about suspension and investigation (and outcome, though that is not specifically complained of) under the disciplinary procedure are not, in our judgment, connected to the matters complained of in Allegations 1.4. 1.5, 1.6.2, 1.6.4, 1.6.5.

265. All of the Equality Act allegations (including 1.5 in our judgment) would have been out of time. We think it unlikely that we would have extended time, given that many are very old, and that the Respondent was entitled to think that its internal processes had drawn a line under the matter.

266. However, in any event, they all failed on their merits.

Unfair Dismissal

267. We agree with the Respondent's representative, that section 103A ERA (that the principal reason for the dismissal was the protected disclosure) is not part of the Claimant's pleaded case.

268. We do acknowledge that she uses the word "sham" as part of 3.1 in her schedule on page 713. She did not seek permission to amend her claim to add this allegation, notwithstanding the fact that in the list of issues drawn up on 4 May 2021 no such claims was included.

269. Further, the list notes "The claimant accepts that there was a bona fide redundancy exercise."

270. In any event, and for avoidance of doubt, we are satisfied that the reason for dismissal was redundancy and had nothing to do with the Claimant's 3 May 2019 email (or, for that matter, the 20 February email which we decided was not a protected disclosure.

271. We accept that the background to the reorganisation was the Respondent's VMO programme and that, consistent with that, it was decided to reduce the Associate Director numbers (as well as some more senior posts in Germany). The Respondent did not deliberately promote others to be Associate Director to get rid of the Claimant.

272. It is not for this panel to second guess the selection criteria. The criteria do not appear to be unreasonable. They take into account the types of things that employers often taken into account.

273. There was a consultation meeting and the employees, including the Claimant had the chance to comment on the methodology in advance.

274. There is no right or wrong answer as to how much weight to give each factor in the criteria. However, we are satisfied that Mr Beard approached the matter with an open mind, and with HR advice, and did not have a pre-determined outcome in mind. We do not believe that it was unreasonable to base the size of the Claimant's portfolio on her form TMS account, or to omit to add in the work that some colleagues reporting to her did.

275. Even if we had decided it was unreasonable to give Mr Kuza a 5 for qualifications (and, in fact, we consider that our deciding that was wrong would be substituting our decision for the employer's; we accept Mr Beard genuinely believed that he should be given that score) then that would have still meant that the Claimant was the lowest scorer.

276. We accept that Mr Beard genuinely believed that it would not be a sufficient outcome to simply keep the 3 Associates and to cease using Mr Vetongen as a contractor. That was his decision to make, not ours. It was not so unreasonable that no reasonable employer would have done it.

277. There was a further consultation meeting, and the Claimant had the opportunity to comment on the outcome of the scores.

278. The Respondent made reasonable efforts to look for alternative work, and to answer the Claimant's queries about such work. However, there was no such suitable work available.

Outcome and next steps

279. There will be a hearing to decide what happens to the deposit.

Employment Judge Quill

Date 8 April 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS