Case No: 1406389/2020

EMPLOYMENT TRIBUNALS

Claimant: **Rachel Sunderland**

Respondent: **Superdry PLC**

Heard at: **Bristol** **On:** **21st to 25th March 2022**

Before: **Employment Judge David Hughes**
Dr C Hole
Ms E Smillie

Representation
Claimant: Mr Holt of Holt HR Consulting
Respondent: Mr Platts-Mills, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant's claim for unfair dismissal is well-founded and is upheld;

2. The Respondent contravened ss13 and 39(2)(b) and (d) by directly discriminating against the Claimant on the grounds of age;

3. The Respondent is ordered to pay the Claimant the following compensation:

   (a) Basic award of £4,025.00;
   (b) £54,797.76 in compensation for financial losses cased by the Respondent's discrimination;
   (c) £7,500 in compensation for injury to the Claimant's feelings caused by the Respondent's discrimination.

4. The Claimant is awarded interest pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, Regulation 6, as follows:

   (a) On the compensation for injury to feelings, at 8% from 31.03.2017 to 08.06.2022, being £3,107.80 and;

(b) On the compensation for other losses attracting interest, at 8% from 03.11.2019 to 08.06.2022, being £8,257.08.

5. The sum of compensation and interest being £77,697.64, the sum is grossed up to £96,208.70.

6. The total sum the Respondent is ordered to pay the Claimant is £96,208.70.

REASONS

The parties

1. The Respondent is a well-known business, selling clothes, both through its own stores and as a wholesaler to others.

2. The Claimant is a knitwear design specialist. It is not disputed that she was employed by the Respondent from 24.09.2015 – her contract has the date 27.08.2015 – until 20.09.2020.

3. The Claimant resigned from her employment with the Respondent by an email sent on 23.07.2020. The circumstances of this resignation are dealt with further below.

The hearing

4. The hearing took place at Bristol, starting on the 21 March 2022 and continuing for five days. At times, the Claimant required a number of breaks. It was not possible for the Tribunal to reach a conclusion on liability, deliver that conclusion, and then hear separate evidence and argument about quantum, within the time listing that the hearing had. Rather than reach a conclusion on liability and risk having to ask the parties to come back to deal with quantum should the need arise, the Tribunal decided that we would hear evidence and argument on both quantum and liability, the latter being heard in case it was necessary. The Tribunal said that it would deliberate and reserved our judgement.

5. The Tribunal heard from the following people:

- The Claimant;
- Joanne Kent;
- Florence Humphreys;
- Jo Cottrell;
- Dan Hanvey;
- Karen Bryson;
- Jennifer Jenkins;
- Graham Gordon;
- Alex Watson.

What the case is about

6. The Claimant initially claimed for unfair dismissal, and both direct and indirect age discrimination. She subsequently withdrew the claim for indirect age discrimination, and an order dismissing that element of her claim was made on 15.09.2021.

7. The case management order of Employment Judge Christensen of 03.08.2021 summarised the case, and included a list of issues. The issues were subsequently modified, in that claims that had been made of indirect discrimination were withdrawn, and Employment Judge Midgeley's order of 21.02.2022 referred to a modified list of issues having been agreed between the parties.

8. The advocates for the parties performed their duties with considerable skill in the course of this hearing, and we were presented with a list of issues about which there was little disagreement, and which was revised towards the end of the hearing. The issues identified by the parties were as follows:

Background

1. *The Claimant makes the following claims against the Respondent:*
   a. *Unfair dismissal*
   b. *Unlawful discrimination due to her age, namely:*
      i. *Direct discrimination*
      ii. *Indirect discrimination*
      iii. *Harassment*

Unfair dismissal

2. *Did the Claimant resign because of an act or omission (or series of acts or omissions) by the Respondent? The Claimant relies upon the following alleged acts/omissions:*

   a. *the Respondent's failure to promote her, or grant her the job title of Lead Designer - leading up to and including her appraisal in November 2019;*
   b. *the unreasonable workload placed upon the Claimant during summer 2019 with the implicit incentive of promotion, which was subsequently denied;*
   c. *the recruitment, promotion and recognition of other (younger) individuals which undermined the Claimant's standing (or perceived standing) within the Respondent's design team: Alex Black, Chris Bloor-Evans, Thom Davis, Jo Kent and Rachel Heuston.*

3. *If the Claimant relies on a "last straw", what was the "last straw"? The Claimant relies upon the following alleged act/omission as the "last straw": the Respondent's failure and refusal to recognise and reward the Claimant for her commitment and hard work by refusing to promote her/provide her with the job title "Lead Designer" – as set out at para 2(a) above.*

4. *Did the Respondent's conduct amount to a fundamental breach of contract? The Claimant is relying upon the implied duty of mutual trust and confidence. The Tribunal will therefore need to consider whether the Respondent, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the*

relationship of trust and confidence between the parties – Bournemouth University Higher Education Corp v Buckland [2010] EWCA Civ 121.

Remedy

5. *What is the Claimant entitled to by way of basic award. Is it just and equitable to make a reduction to the basic award under s.122(2) ERA 1996?*

6. *If the Tribunal concludes that the Claimant was unfairly dismissed, has the Claimant suffered any loss: the ET will need to consider both a compensatory award and a basic award? If so:*

    a. *Has the Claimant complied with her duty to mitigate any loss pursuant to section 123(4) of the ERA 1996 and, if not, what deduction should be made as a result?*

    b. *Should an alteration of up to 25% be made to reflect any unreasonable failure by the Claimant or the Respondent to comply with the ACAS disciplinary code pursuant to section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992?*

    c. *Should a percentage reduction for any contributory conduct on the part of the Claimant be made pursuant to section 123(6) ERA 1996?*

Discrimination

Direct discrimination

7. *Did the Respondent subject the Claimant to the following alleged treatment:*
    a. *the circumstances set out in 2a;*
    b. *the circumstances set out in para 2b;*
    c. *failing to take into account the effect the Claimant's workload was having on her health and wellbeing; and*
    d. *requiring the Claimant to manage more junior members of the team to achieve promotion..*

8. *If so, has the Respondent treated the Claimant less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators: Joanne Kent; Alexandra Black; Chris Bloor; Emma Rowley; Charlotte Robinson; Rachel Houston; Thom Davis.*

9. *Was such less favourable treatment because of the Claimant's age?*

Harassment

10. *The Claimant relies upon the following conduct: see paragraph 2 and 7 above.*

11. *Did the Respondent engage in unwanted conduct related to the protected characteristic of age?*

12. *If so, did the said unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?*

Remedy

13. Is the Claimant entitled to compensation in relation to any discrimination or prohibited conduct shown?

14. If so, what level of compensation in respect of injury to feelings is the Claimant entitled to recover?

9. It does not seem appropriate to us to deal with remedy for any issue before determining liability in total. In general, we think the list set out above adequately sets out the scope of the dispute and, in large part, we will stick to that list.

10. The parties' advocates agreed a chronology and cast list before the start of the hearing, which was very helpful.

Law

Unfair dismissal

11. There was little difference between the parties on the applicable law.

12. The Claimant claims that she was unfairly dismissed. As she resigned from her job with the Respondent, any dismissal would be constructive. The parties agreed that this requires that;

(a) There must have been a repudiatory breach of contract by the Respondent. In this case, the Claimant relies on the implied term that "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (Malik v Bank of Credit and Commerce International SA [1997] IRLR 462);*

(b) The Claimant must have left in response to the breach, and;

(c) The Claimant must not have affirmed the contract.

13. As to the first requirement, the Respondent submitted (and the Claimant did not dispute) that we should heed the guidance of Underhill LJ in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 (approving Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493):

"[39] Against the background of that summary Dyson LJ addressed the last straw doctrine specifically in paras [15]–[16] of his judgment ([2005] 1 All ER 75 at 81–82, [2005] ICR 481 at 487–488), which read:

15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual

incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the 'last straw' situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application.…

[40] The particular issue in Omilaju was, as Dyson LJ formulated it at para [19] ([2005] 1 All ER 75 at 82, [2005] ICR 481 at 488), "what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract ?". He answered that question as follows ([2005] 1 All ER 75 at 82–83, [2005] ICR 481 at 489):

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

14. Regarding the second requirement, the Respondent submitted, without demur, that "*where no reason is communicated to the employer at the*

time, the fact finding tribunal may more readily conclude that the repudiatory conduct was not the reason for the employee leaving" - the ET is entitled to "reach its own conclusion, based on the "acts and conduct of the party", as to the true reason": see Weathersfield Ltd v Sargent *[1999] IRLR 94 per Pill LJ*. Where there is more than one reason why an employee leaves a job, the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause: see Wright -v- North Ayrshire Council [2014] IRLR 4.

15. Regarding the third requirement, the Respondent submitted – again, without demur from the Claimant, that "*an employee must make up his mind soon after the conduct of which he complains; for, if he continues his employment for any length of time without leaving, he will lose his right to treat himself as discharged (*Western Excavating (ECC) Ltd v Sharp *[1978] QB 761 per Lord Denning)*".

16. We are mindful of the guidance given by the EAT in Chindove -v- William Morrisons Supermarket PLC UKEAT/0043/14/BA @ paras 25-27:

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.
26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 *, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.*
27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding

to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant here was off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go. All the more so, since there seems, on the short findings of fact of this Tribunal, that there was no reason other than the employer's conduct towards him for his choosing to go. We simply cannot say whether this Tribunal had in mind these necessary factors. It did not set out the law. It did not set out the facts which caused it to apply the law. It did not honour rule 30(6). It did not deal with the detailed statement which the Claimant produced in respect of his constructive dismissal though this may be unduly critical of the Tribunal's judgment. The reference to time looks as though the Tribunal simply thought that the passage of time was sufficient in itself. The decision is, effectively, unreasoned. Mr Robinson said what he could, as best he could, but acknowledged the great difficulties that lay in his way. We have no doubt that the appeal on this ground, too, has to be upheld.

17. A constructive dismissal is not necessarily unfair.

Direct discrimination

18. Direct discrimination is defined in the Equality Act 2010 as follows:

13 Direct discrimination

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

19. Although the list of issues prepared before Employment Judge Christensen in August 2021 referenced s13 of the Equality Act, it seems to us that s39 is also relevant. That provides as follows:

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.
(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.
(3) An employer (A) must not victimise a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.
(4) An employer (A) must not victimise an employee of A's (B)—
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.
(5) A duty to make reasonable adjustments applies to an employer.
(6) Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—
(a) unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or
(b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.
(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.
(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

20. The parties did not address us on specifically on s39.

21. In order to make out a claim for direct discrimination, there must be less favourable treatment, and it must be because of a protected characteristic. The test for determining what constitutes less favourable treatment should not be too onerous, and the Tribunal should not disregard the Claimant's perception: see R -v- Birmingham City Council, ex p Equal Opportunities Commission (No. 1) [1989] A.C. 1155.

22. Although it is for the Claimant to establish that there has been unfavourable treatment and that it was because of a protected characteristic, s136 of the Equality Act 2010 provides as follows:

136 Burden of proof

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

…

Harassment

23. S26 of the Equality Act 2010 provides as follows:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

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

24. In order to succeed in this element of her claim, the Claimant must establish that there was unwanted conducted relating to her age, and that that conduct had the purpose or effect of i) violating her dignity or ii) creating an intimidating, hostile, degrading humiliating or offensive environment for her.

25. The Respondent drew our attention to the EHRC's guidance "Technical Guidance to Sexual Harassment and Harassment at Work", published in January 2020 pursuant to s13 of the Equality Act 2006. We are mindful of that guidance, and do not set out here.

Jurisdiction

26. The Respondent contends that the Claimant's allegations of discrimination are out of time.

27. S123 of the Equality Act 2010 provides as follows:

> ***123 Time limits***
> *(1) Subject to section 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.*
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

28. Whether a complaint is made in time is a question going to the Tribunal's jurisdiction.

29. We will deal with the law relating to remedy if necessary below.

What happened

30. Before we set out our findings as to what happened, we will briefly indicate the evidence of each of the above. It is important, however, to note that there was relatively little difference between the parties'

respective cases as to what happened. It is more a question of *why* things happened.

31. Ms Kent gave evidence for the Claimant. She is a fashion designer, and from May 2015 until around July 2020 was employed by the respondent, initially as a designer and then as a senior designer and lead designer. She was made redundant in 2020. She told us that the claimant was a well-respected colleague. She said it was difficult to understand why some people were appointed senior designers whilst others were not. She described a high-pressure working environment, particularly at the time when the Claimant was required to take on the designing of women's knitwear to cover for a colleague who was on maternity leave. She described the Claimant as being very stressed.

32. She said that, as far as she was aware, it was not "*entirely true*" that one had to manage a more junior employee in order to move on to the level of lead designer, citing Mr Bloor-Evans as an example of somebody promoted to senior designer before being given assistance to manage. She also said that Alex Black was brought in as a lead designer and did not have a junior or assistant to manage. Indeed, Ms Kent herself moved to the Centre of Excellence as a lead designer without managing anyone, although before that move she had managed three people, but that was after she had been promoted from Designer.

33. Florence Humphreys is an HR adviser with the respondent. She described having first-hand experience of its approach to diversity and inclusion, both in her own career advancement and in her role as an HR adviser. She said that the Respondent placed a priority on making sure everyone in the business was treated fairly and equally, irrespective of their age or any other protected characteristic, and said that she personally subscribes to those values. She said those values were reflected in the Respondent's promotion policies, which in her experience focused solely on skills, experience and merit. Her involvement with the Claimant's case was in the grievance process to which we refer below.

34. Jo Cottrell is employed by the respondent as head of the creative centre. She spoke of a working culture similar to that described by Ms Humphreys. She had been personally involved in efforts around diversity and inclusion. In her statement, she spoke about the 2018 reorganisation of the design function within the respondent, which led to the creation of the roles of Assistant Designer, Designer and Lead Designer. She said that this was to provide greater clarity and structure to the different roles.

35. Ms Cottrell described promotions within the design team as being decided by the Design Management Team. She said that first of all, the team would consider whether a candidate had worked across different product areas. She said the candidates were required to have worked across categories in a way that demonstrated their independence, this DMT referring to this as "with minimal referral". Secondly, the DMT would want to see evidence of leadership experience of more junior members. She acknowledged that this was referred to differently in different documents; "*to be a leader of people*" or "*managers of people*", she said that what the DMT sought was proof of leadership and people

management. The third element that was used, from 2015/16 to 2018, was a candidate's Performance and Potential ratings.

36. Ms Cottrell explained that promotional decisions about the claimant were taken by the DMT collectively. The DMT consisted of herself, Dan Hanvey, and Graham Gordon. This team operated alongside Jennifer Jenkins, who was what Ms Cottrell described as "*our HR business partner*." Decisions on promotions had to be unanimous, Ms Cottrell told us. There was no formal policy to that effect, but it was a decision that the DMT had reached.

37. Speaking about the specifics of the Claimant, Ms Cottrell said that she did not consider the Claimant to have been able to work with minimal referral, even on her own product line. She also said that she did not find sufficient evidence of the claimant's experience of leading others. She said that the Claimant had not achieved broad and full stretch in her performance and potential rigid ratings. She denied that the Claimant's age played any part in decisions not to promote her.

38. Ms Cottrell investigated the grievance that the Claimant brought following her resignation. We deal with this below.

39. Ms Cottrell has been involved in the Respondent's Senior Women's Forum, but in cross examination conceded that this was not about age, but rather gender equality and the promotion profile of female leadership.

40. Perhaps the most remarkable element of Ms Cotrell's evidence came when she was asked about unconscious bias. Not only did she deny that it was a problem at the Respondent, she went further, saying that the Respondent's promotion criteria completely removed the risk of it. The Tribunal found this answer to be shockingly complacent.

41. Dan Hanvey is the Respondent's head of collections. In his statement, he said that he had observed a clear agenda to promote diversity and inclusion and deal with staff in a fair and consistent way. He said that he shared these values, and they were embedded in the HR processes promotional decisions. He said that the working environment at the Respondent reflect those values. He professed to feel strongly about promoting equality both inside and outside the office, saying that he paid no attention to age, gender or other protected characteristics.

42. Mr Hanvey was a member of the DMT that discussed promotion decisions. In his statement, he said that they would "*generally discuss each candidate for promotion on their merits and then make a collective decision as to who would be promoted*". He said that the DMT followed the Respondent's criteria, which were designed to ensure consistency, transparency and fairness.

43. Mr Hanvey said that, having worked across numerous categories throughout his career, it was clear to him why this consideration was so important. Working across multiple categories shows that one was ready to work with different teams, different materials, and different timelines. Regarding leadership experience, he said that it was not good enough for candidates to have occasionally delegated work or to be temporarily

assigned an assistant; the Respondent was looking for material leadership experience. The third element of the DMT used was a candidate's Performance and Potential ratings.

44. Mr Hanvey said that the Claimant was not, in so far as he could see, able to work with little or no referral. She would frequently seek his opinion in support regarding specific ideas about new products. Although he professed to be happy to participate in all aspects of the design function, as he was head of the team, he said that he viewed the level of support sought from him to be greater than that required by other designers. Even after he ceased being her line manager in 2018, he said that she still scheduled meetings with him to seek guidance on technical aspects of her work. He said that he did not think that she would be able to develop a product range with relative independence.

45. The Mr Hanvey also said he did not consider the assignment of Ms Peterson to work with her as material leadership experience because it was a temporary assignment. it was not intended that the Claimant should become Ms Peterson's line manager. He said that he rejected any argument that the Claimant had not be given the opportunity to lead others, and was therefore deprived of the opportunity for promotion.

46. Mr Hanvey also said that the Claimant's Performance and Potential scores fell below the level required in order to achieve promotion.

47. Mr Hanvey specifically addressed the comparisons advanced by the claimant. He said that Alex Black had been recruited as a Lead Designer, having worked across multiple categories (jersey and woven products) with minimal referral during her previous job and having shown evidence of leadership experience.

48. He said that Jo Kent had been recruited as a Designer in 2014, and later promoted to Senior Designer, in line with Superdry's standard process. She had worked across various ranges (sweats and jersey) and a capsule collection. She had very strong Performance and Potential ratings. She had also shown evidence of leadership before joining Superdry.

49. Mr Hanvey said that Max Leung and Thom Davies had been promoted prior to him joining the DMT, and he was not involved in the decision to promote them.

50. Karen Bryson is a Design Manager with the Respondent. She became the Claimant's line manager in or around June 2019. She described the Claimant as a talented specialist knitwear designer, and a warm and personable colleague. She said that she was well aware of the Claimant's desire to be promoted to Lead Designer status, and that the Claimant felt embarrassed that she was still in the role of Designer.

51. She describes the Claimant being given Amy Peterson, a Junior Designer, to assist her on a temporary assignment. Soon afterwards, however, Ms Peterson went on sick leave, and Ms Bryson and Dan Hanvey stepped in to provide some assistance with the capacity to do so. She describes discussions with the Claimant herself, and with Ms Cottrell,

about what could be done to offer the claimant's support. She also says that she was aware that Mr Hanvey provided frequent assistant to the Claimant.

52. Ms Bryson says that, despite the efforts to assist her, she often met with resistance. She says that, whilst the Claimant had a lot of respect for Mr Hanvey, she responded less well to Ms Bryson's attempts to assist. Ms Bryson in particular referred to offers she made to assist the Claimant with the use of Pen Tool. She described the Claimant's attitude towards upscaling and learning in this area as "*a bit reluctant*", observing that it contrasted with that of her peers.

53. Jennifer Jenkins' role at the Respondent is that of Head of People Partnering. Before occupying that role, she worked as HR manager, HR project manager, and Senior HR Business Partner in the Respondent. She did not give a statement for this case, but told us that, when she started with the Respondent in 2011 there was already an equality and diversity policy in place. That policy had been updated in 2016, and further reviewed in 2020. She said that, in so far as she was aware, age had never been raised as an issue. She professed to be unconcerned by Ms Cottrell's answer that policies provided a guarantee against unconscious bias.

54. Graham Gordon is the head of the Centre of Excellence. He described a positive working relationship with the Claimant. He said that they shared a real passion for craftsmanship and top-quality design, and the Tribunal was impressed with the enthusiasm with which he spoke of design.

55. Although Mr Gordon was a member of the DMT, he said little about decisions whether or not to promote the Claimant. He did not discuss at all specific DMT meetings considering that question.

56. Alex Watson's role was Fulfilment Director. She had virtually no involvement with the claimant in day-to-day work. She first became involved in any meaningful in the investigation of an appeal against the outcome of the grievance the Claimant raised. We deal with this below

The Claimant joins Superdry

57. The Claimant joined the Respondent in September 2015. Before joining the Respondent, the Claimant told us that she had worked in the fashion industry for over 30 years. She has a degree in knitwear design, and has worked or designed for a number of well-known companies. In 2004, she achieved the level of senior designer at Fang Bros and also at Boden.

58. The Claimant's unchallenged evidence was that she had performed very well indeed as a designer for the Respondent. In the first season in which she was responsible for designing the Respondent's range of men's knitwear, sales – which had been falling - increased by 63%, and significant levels of growth followed in subsequent years. Indeed, the weight of the evidence from the Respondent's witnesses was that the Claimant was an excellent knitwear designer, and we find that that is so.

59. When the Claimant joined the Respondent, she did so with the title "*Designer*". She was told that there was no hierarchy within the design studio, with all designers having that title. This was not challenged, and we accept that it was so. She accepted the designation "Designer" reluctantly, because there was no role of Senior Designer or Lead Designer in existence at the Respondent at the time at which she was hired. She was also assured that her salary reflected her position.

<u>The Claimant's ongoing employment with the Respondent</u>

60. Initially, the claimant worked solely on men's knitwear. After six months, she additionally took over men's knitted accessories.

61. In 2017, a hierarchy emerged in the menswear design department. Two designers were promoted to Senior Designer level.

62. The Claimant raised this issue in an appraisal meeting with her manager, Dan Harvey, in March 2017. Mr Harvey explained to her that, in order to rise to the level of senior designer, she needed to undertake other responsibilities, including managing other members of staff, and they agreed that this was something towards which she could progress. Notes of the appraisal meeting were made available to this Tribunal, but were not disclosed to the Claimant at the time.

63. In 2018, as we set out below, a further change took place.

64. The Claimant did not achieve the promotion for which she had hoped. In 2019, the Claimant took over responsibility for women's knitwear. She did so to cover a colleague going on maternity leave, but did so during July and August, which were the busiest two months of the year for knitwear designers.

65. In December 2019, the Claimant was taken off designing knitwear and put into a department called the Centre of Excellence. In his evidence before us, Graham Gordon described this as a sort of "*in-house atelier*", and it may be that that gives a better idea of what was intended. The Claimant told us that there was no consultation about this process, either individually or collectively.

66. In April 2020, the Claimant was placed on "furlough", referring to the scheme that was in place due to the Covid-19 pandemic. She remained on furlough until July 2020. When she returned from furlough, the claimant was given to understand that she would be required to use a "Pen Tool".

67. Also on her return from furlough, the Claimant was told that she would be designing the Autumn Winter 2020 knitted accessories range, for both men and women. This felt like a demotion. Nonetheless, she says that she took this in her stride, but struggled to get to grips with the "Pen Tool".

<u>Senior Designer status</u>

68. In 2017 the Respondent introduced the position of Senior Designer into the hierarchy. The Claimant told us that two designers, Jo Kent and Thom Davies, were promoted to Senior Designer. The Claimant raised the

question of promotion to Senior Designer in her Performance and Potential appraisal with Dan Hanvey, in March 2017.

Performance and Potential reviews

69. Performance and Potential reviews took place twice a year, in or about April and October.

70. In the Performance and Potential reviews, performance was rated using a colour scheme. Performance ratings could be red, amber, green, or blue. Red meant "*requires focus now*", and "*will always mean that urgent action from the employee would be required with the support of their manager*". Amber meant "*areas to develop*", "*always need action from the employee with the support of their manager*". "Green" meant "*great job*" and is described in the performance ratings as "*a great place to be*". Blue is described in the performance rating as a brilliant job, the rating going on to say "*excelling at leading the way. Remember – not everyone has to be blue, it's not a race competition*".

71. Potential reviews were made not by reference to the colour scheme, but by reference to the terms "mastery", "broaden", and "stretch". Mastery was the lowest level praise of the three terms that. Broaden came above mastery, and stretch above broaden.

72. It is right to say that the Tribunal did not find these categorisations particularly clear. An employee whose performance is described as "great" may be in some confusion as to whether their performance is better or worse than a colleague whose performance is described as "brilliant". Similarly, an employee whose potential level is described as "mastery" may conclude that they are perceived by the Respondent to be a master of their role, and perceive that someone who is given "broaden" as their potential assessment needs to broaden their potential if they are to achieve mastery. It may be that the wish to use positive language, and in the case of the colour scheme come up with catchy phrases the first letter of which match the relevant colour, was prioritised over clarity.

73. Mr Hanvey explained to her that, in order to rise to the level of senior designer, the Claimant needed to undertake other responsibilities, including managing other members of staff. She said that that was something that it was agreed she could progress towards, but she heard nothing more about it after that appraisal.

74. A job description of Senior Designer was included in the documents before us. It said that the job title was "*to lead your team within your product area including an inspirational range across both menswear and womenswear, driving newness in the department and developing Superdry's existing range*." Beneath that description was a heading "*I know I am doing a great job…*", followed by a series of bullet points.

75. The March 2017 Performance and Potential review includes pages with comments by both the Claimant and Mr Hanvey.

76. The review required the Claimant to give a rating to her delivery against key areas of focus in the previous six months, and then rate

herself in three boxes, "*lead the business*", "*lead others*", and "*lead* self". The Claimant identified that she planned to lead the business in ways including developing new ideas and techniques to a new supplier and to work closely with an existing supplier. Insofar as leading others was concerned, she said that she felt herself to be a team player who would help others in any way that she could, whether that be supplying advice on knitwear or helping out when required. Insofar as leading herself was concerned she identified that she rose to challenges calmly, professionally and positively, and that her focus was on delivering the best possible men's knitwear/knitted accessories ranges. She identified that she had introduced a new knitwear supplier to the Respondent.

77. The Claimant rated her potential as "mastery". She said that she saw the coming seasons as a period in which to build on her knitwear successes, that her priorities would be to maintain a successful core knitwear range and to develop a knitwear range aimed at the younger customer.

78. Mr Hanvey also had to go through the same assessment exercise for the Claimant. His assessment showed an agreed rating of great for the claimant's performance against key areas of focus in the previous six months and in the three leadership categories we have mentioned. Commenting on her overall rating, he said that the Claimant had delivered on all the key areas of focus over the previous six months and had achieved all requested of her. He said that he planned on cascading key areas of focus down to her. As far as leading the business was concerned, he said that the Claimant had been a real asset to his team, commenting on how she imparted her knowledge and shared it with other members of the company. In the box dealing with leading others, Mr Harvey commented that the Claimant had strong relationships and a good understanding of what the respondent wished to achieve with its supply base partners, and knew whom best to collaborate to achieve the best results and outcomes. Insofar as leading herself was concerned, he commented that the Claimant delivered with maturity and drive, was always positive and worked around situations, focused on bigger concerns and was always looking to move the product on. The key performance review was overwhelmingly positive. It is difficult for the Tribunal to understand why it was described as great rather than brilliant.

79. Mr Hanvey also rated the Claimant's potential as mastery rather than broaden or stretch. In his manager comments, he said says "*I plan in building more structured time in with Rachel on a weekly basis looking at topline collection and strategic views, I feel this will help how we tackle collections as recently we have caught up but more on an ad hoc basis this will really help. Rachel discussed with me what was required to step up into a senior designer position within the brand, and although Rachel has the maturity and attributes that we could make her great in this role I discussed that it would be the case of taking on different design areas managing designers on different product categories and delivering them.*"

80. Although these notes were not shared with the Claimant until these proceedings had been started, it is difficult to see how, had she read them at the time, she would have been aware as to what more was required of her in order to obtain recognition as a Senior Designer.

81. Questioned by Mr Platts-Mills, the Claimant accepted that a requirement to design across more than one category was discussed with her. This takes us to a question that took on great importance in the course of the hearing: the meaning of categories.

82. The advocates were not as one as to whose definition of categories was the important one. On behalf of the Claimant, Mr Holt contended that her definition of what a category was is the one that should matter. Mr Platts-Mills, on behalf of the Respondent, said that it was for the Respondent to decide what a category was and whether what the claimant worked on fell within one category or more than one category. What the advocates did agree on was that category is not a contractual term for the Tribunal to interpret.

83. We agree with Mr Platts-Mills that it is the Respondent's understanding of category that matters. An employer is entitled to decide how it is going to categorise the work that it requires an employee to do, in this case to allocate the items that a designer designs to a particular product category. That is not, however, the end of the matter. If the Claimant was going to be required to show that she could design across categories, the Respondent needed to make sure that she understood what it meant by categories.

84. We find that categories were not clearly understood by either party. It might have been said that categories had the quality sometimes attributed to elephants – difficult to describe but one knows them when one sees them. But whether, for example, men's knitwear and men's knitted accessories constituted one category or separate categories did not seem clear even in the Respondent's mind, and any clarity that did exist was not shared with the Claimant. If categories were as fundamental to promotion as the Respondent contended before us, it is surprising that they were not the subject of any written definition or guidance.

85. Categories are not, we understand, the subject of any agreed definitions across the industry. That is unsurprising. But it made it all the more important that there be some clarity as to the Respondent's understanding of what categories were. The lack of any clear understanding, and still less of any clear understanding that was communicated to the Claimant, left room for confusion and caprice in assessing whether she was designing across multiple categories or not.

86. It is clear to us, and we find, that the claimant was happiest working with men's knitwear. It is also clear to us, and we find that the Claimant understood that her work on men's knitted accessories constituted work in a different category to men's knitwear. At no point was the Claimant told that anybody at the Respondent did not regard this to be the case. As we discuss below, the Claimant also went on to work on women's knitwear.

87. We find that the Respondent probably did not have a clear position that men's knitwear and men's knitted accessories were a single category. We find that the Respondent probably more often than not regarded men's knitwear and men's knitted accessories as different categories. We note that the Claimant initially did not work on men's knitted accessories. We

find that the Respondent did not regard women's knitwear to be in a single category with men's knitwear or knitted accessories. We therefore find that the Claimant's understanding that she was working across more than one category was a reasonable one.

88. The Claimant's October 2017 Potential and Performance reviews had seen her given a mastery rating in potential. Mr Hanvey rated her overall as "*great mastery*" – an assessment that does not appear to correspond with one of the recognised labels that the respondent replied, but might reasonably be interpreted as higher than mere mastery. She had been rated "great" in all her leadership ratings.

89. In April 2018, "lead others" has been marked in amber as an area to develop. Her "leads self" rating was great, her potential rating continued to be great, and her overall April 2018 rating was great/mastery.

90. The documents before us disclose other things. They show that flight risk was assessed. The risk of the Claimant leaving the Respondent was assessed as low, whilst the impact of her leaving was assessed as medium. This flight risk assessment was neither discussed with the Claimant before it was made nor disclosed to her after it was made. The review also noted that she was a candidate for Senior Designer, although this label had either been changed to Lead Designer or was surely shortly about to be changed to that.

91. The Claimant's agreed rating for April 2018 was blue for brilliant. Her comments gave a detailed explanation as to her performance in Autumn/Winter 2018 and for men's knitted accessories, showing significant growth. The value of men's knitwear sales grew significantly, and the units of sales grew. She noted positive feedback for ranges. She mentioned her pride in her involvement with the Prince's Trust. In questioning, she explained that she rated herself as brilliant because she had achieved outstanding sales and growing the business in both men's knitwear and men's knitted accessories. This terminology – which the Respondent does not appear to have queried at the time – is indicative that she considered men's knitwear and men's knitted accessories as separate categories. She said that she would not describe herself as brilliant at everything because she doesn't so regard herself.

92. Regarding the potential description as mastery, the Claimant said that she did not realise at the time that she would not be promoted if potential was only rated mastery, that she needed to be in broaden or stretch if she was to achieve promotion.

93. At some point after April 2018, the Performance and Potential reviews were superseded by the "Clear Blue Water" criteria.

Clear Blue Water

94. The Clear Blue Water criteria were identified in a document before us. Designers were required to show the following qualities:

- *Support specific category focused strategy creation to deliver an innovative and commercial range for numerous categories;*
- *transfers category strategies/KP's into meaningful and clear team priorities;*
- *design is an innovative and current product create collection in line with the category strategy with limited referral;*
- *experienced and skilled designer;*
- *leader of people.*

95. In the same document, lead designers were stated to be required to show the following qualities:

- *Supports category focused strategy creation to deliver an innovative and commercial range for numerous categories;*
- *translates category strategies/KP's into meaningful and clear team priorities;*
- *driver of category commerciality, brand DNA and innovation within their focused categories;*
- *significantly currently experienced, highly skilled designer;*
- *leader of managers and people.*

Lead Designer role

96. In August 2018, Jo Cottrell circulated an email dealing with the restructure of the design team at the Respondent. The email sent out a number of changes, identifying as the main ones: – the Senior Designer role was to be replaced by two newly created roles – Design Manager and Lead Designer; Assistant Designer role was retitled Junior Designer; Trainee Designer was retitled Assistant Designer. The category of "Designer" continued to have the same title. Attached to the email were organisational charts which identified a Centre of Excellence being created, with the Claimant being identified as the person responsible for knitwear.

Promotional criteria

97. The Respondent's position regarding promotion was set out in the statement of Florence Humphreys. Ms Humphreys said that the Respondent used the following criteria for promotions:

- evidence of working across multiple categories with minimal referral;
- evidence of leadership experience;
- in the period 2015 – 2018, performance appraisal scores;
- within the design team, the job specification for more senior roles using

clear blue water criteria.

98. Ms Humphreys went on to say that in order to be promoted to lead designer, a candidate would need experience of working across multiple categories with minimal levels of referral to more senior colleagues for support and guidance. The candidate must have experience leading more junior colleagues. Thirdly, candidates' Performance and Potential ratings

would need to be broaden or stretch for potential, and their performance rating blue.

99. The Clear Blue Water criteria have been referred to above.

100. Challenged by Mr Platts-Mills, the Claimant told us that they were applied to some people, but not others. She identified one individual, Alex Black, who had not gone through the performance and potential appraisal process. She couldn't say whether the promotional criteria described by Ms Humphreys were not applied to anyone other than herself or Alex Black. She explained that Alex Black came in as a Lead Designer, but didn't manage anybody whilst at Superdry. She said that Chris Bloor-Evans didn't manage anyone at the time he came into Superdry as a Senior Designer.

101. The Claimant was taken to a job description. This document contains a lengthy list of bullet points, and we do not set them out in full so as to not unduly extend these reasons. The third of the bullet points reads as follows: *"I have effectively led my categories, taking autonomy and ownership of key business decisions to enable business commerciality*". The Claimant was asked about the use of the plural, "categories" in this sentence. In answer to this, the Claimant responded that she had led across a number of categories, saying that she had led across men's knitwear, women's knitwear, and both men's and women's knitted accessories. But any force in Mr Platts-Mills identification of the use of the plural in the third bullet point is undermined by the use of the word "category" in the singular in numerous subsequent bullet points in the very same document. The fourth bullet point reads "*I have supported the development of my category strategies to deliver the wider 5.0 strategy*"; another subsequent bullet point reads "*I have collaborated with the wider business to influence and championed delivery of my specialist category critical path requirements*". Whilst in these two instances the use of the singular may not necessarily exclude a requirement that plurals be led, another subsequent bullet point reads "*I have collaborated with key stakeholders to influence my category and challenge the status quo where necessary to deliver my category strategy*"". Another bullet point refers to *"translating the strategy for my specialist category into meaningful and clear priorities in collaboration with the lead designers*". The document about which the Respondent chose to cross examine the Claimant, far from making clear what was required in order to be promoted to Lead Designer, reveals a degree of ambiguity, if not confusion, on the part of the Respondent.

102. Mr Platts-Mills asked the Claimant about the scope of her activities at the Respondent. She said that she had led across multiple categories as we've already discussed. Regarding minimal referral, the Claimant was capable of working self-sufficiently, and we understand that she often did so. However, in the Design Team ideas were bounced around, and we find that the Claimant was a willing participant in bouncing ideas around. We note that assessment of her dealings with colleagues and others were largely positive. She had worked with junior colleagues. She had not delivered a performance review of an Assistant Designer, but she had dealt with holiday requests in the past, although not whilst at the Respondent. Asked about dealing with disciplinary matters, her answer

was that she had not done so whilst at the Respondent, carrying with it the implication that she had done so elsewhere. She had held regular meetings in an HR capacity

103. A distinction emerged in the course of the hearing between management and line-management. Line management we understood to encompass things like performance and potential reviews, approving holiday requests, and suchlike. By manage, it appears that the respondent meant – at least sometimes – something else: communication and interacting with colleagues at different job levels. The Claimant interacted with different levels of seniority in the business, and we have noted above about positive appraisal of her management skills

104. The Respondent used the terms "management" and "line-management" interchangeably. However, an earlier Performance and Potential review had rated favourably the Claimant's managerial ability, referring to her dealings with colleagues. That may well amount to management, but it is not line management as either the Tribunal or the Respondent itself understand the latter term. Line-management involves directing reporting, assignment of tasks, reviewing the quality of performance, approval of holiday requests and suchlike.

105. A third term adds to the confusion: leadership. In the documents to which we have already referred, "leadership" is at times the quality that is required. Leadership may well involve some degree of management sometimes, but it strikes the Tribunal as self-evident that a person can be an excellent leader but a poor manager, and therefore that leadership and management are not synonyms. As for line-management, that is synonymous with neither.

106. The Claimant told Mr Platts Mills that, when she joined the Respondent, she was not designing men's knitted accessories. She only started working on those for the Respondent some time later.

107. The Claimant was asked expressly by Mr Platts-Mills whether there was discussion with her needing to work on more than one category. She says that there was discussion of this, that she would need to be managing somebody else and to take on other categories. The Tribunal notes, however, that to be told that she needed to work on other categories is not the same thing as being told that her then-current work fell into a single category.

108. On the need to manage somebody else, the Tribunal noted that the requirement that she be a "*leader of managers and people*" was similar to the requirement to be a "*leader of people*" set out in the requirements of Designers. Indeed the third product bullet point quoted above for Lead Designer is in exactly the same terms as the third bullet point for Designer. Both documents feature a "*the behaviours I need are*" set of boxes, and under the heading "*lead others*", both documents set out a list of behaviours that are exactly the same for both roles.

Workload

109. The Claimant complains that her workload was unreasonably increased, and that this was not recognised by the Respondent. In May or June 2019, the women's knitwear designer, Sheri Matthews, went on maternity leave. The Claimant was told by Dan Hanvey in June 2019 that she would be designing the autumn and winter 2020 men's knitwear, men's knitted accessories and women's knitwear and knitted accessories ranges. In order to help with the additional workload Ms Peterson, a junior colleague, began reporting to the Claimant from the end of June 2019.

110. The Claimant told us, and we accept, that this was extremely challenging. She was, in effect, being asked to do a very significant part of Ms Matthews' job, in addition to her own, already very demanding workload, with the help of only one assistant. The challenge was compounded by the fact that Ms Peterson was taken ill for 2 ½ weeks at the end of July, and that after she came back, her previous line manager had approved two weeks of holidays in August, which was the peak design time.

111. This left the Claimant doing close to two full-time jobs, at the busiest design period, practically alone. She told us, and we accept, that she was at breaking point because of the volume of work she had to perform. She says that on two occasions she broke down to Dan Hanvey, on the 23rd and 25th July 2019 due to her workload. Mr Hanvey's response was to tell her that this could be really good for her. She inferred from that, that meeting the challenges presented could assist her in getting the promotion that she felt she deserved.

112. Mr Harvey was asked about this. He disputed that the Claimant had taken on the entirety of Sheri Matthews workload, saying that she had taken of the knitwear aspect of it, but that Sheri Matthews had other categories. He said that he intended his comment to be a positive comment to make her feel better. He was not a line-manager, but was design head and he valued her as a colleague and didn't like seeing her upset. However, he was aware that she wanted promotion. He recognised, albeit somewhat reluctantly, that taking on additional work could be good for her could be interpreted as meaning it could be good for her ambitions. He said that what he meant at the time was designing for both men and women could be good for her, and that he didn't mean it any other way.

113. Regardless of how Mr Hanvey may have intended his comment, we consider that any objective hearer of such a comment in the circumstances in which it was made would conclude that he was saying that taking on Ms Matthews' workload – or part of it – would be good for the Claimant's ambition for promotion. We accept that the Claimant so interpreted his comment, and find that it was reasonable for her to have done so. Indeed, we think that is how any reasonable person would have interpreted the comment.

114. When Ms Peterson was able to assist the claimant, the working relationship does not seem to have been harmonious. In fairness to Ms Peterson, we are mindful that we did not hear from her. The Claimant told us that she believed Ms Peterson to be a very talented designer, but easily distracted. Ms Bryson, the Claimant's line manager, felt that the Claimant micromanaged Ms Peterson rather than letting her make mistakes, and in

her statement the claimant was inclined to agree to an extent. She explained that she could not allow any mistake Ms Peterson might make to go out to suppliers, because of the impact that would have on the business and the lack of time to put such mistakes right.

Furlough

115. We have already mentioned the time the Claimant spent on furlough. The Claimant said that she had not been contacted in furlough. The documents before us contained an email from Karen Bryson to Joe Cottrell setting out that she had called the claimant on 13th March, 17th March, 31st of March and 10 June. Of these dates, only the latter is during the furlough period.

116. It seems to the Tribunal that the Claimant's principal complaint regarding furlough is that she was not told of a requirement that she work with Pen Tool, a subject we have touched on above and to which we now turn.

Pen Tool

117. Upon her return from furlough the claimant was required to work with Pen Tool. This requirement was first communicated to her by Ms Peterson. This is a computer aided design tool, the detail of which is not relevant to this dispute.

118. The Claimant told us that she had difficulty working with Pen Tool, but that she learnt how to do so. She said that one can use computer-assisted design software without the Pen Tool, and the Pen Tool proficiency isn't necessarily an integral part of working as a designer. The Claimant was taken to a document in the bundle before us, a job description for men's knitwear designer (n.b. not "*men's knitwear and accessories designer*") in which a bullet point identifies as one of the key responsibilities "*fully utilise the relevant CAD systems, i.e. Illustrator, photoshop et cetera*", but the Claimant said that she had not seen this document before and that it did not correspond to her understanding of her job description when she joined the Respondent. Indeed, the Claimant said, and it was not challenged, that she had been employed by the Respondent not having had any expertise on Illustrator, and being told by Jim Holder that Illustrator skills were not important and should not hold her back in designing knitwear. Nonetheless, she learnt how to use Illustrator. She said that Alex Black didn't have Illustrator skills when she was joined as a Senior Designer and she was under the impression that Chris Bloor-Evans could not use Illustrator.

119. The Claimant's case is that she was told that she had to use Pen Tool, and that she was told this on her return from furlough. Had she been told it during furlough, she could have used that time to familiarise herself with this tool. Whether this was consciously thought through by the Respondent to make life difficult for the claimant we doubt. She was a designer doing valuable work for the Respondent. We do not think the Respondent wanted to lose her, and we are mindful that the Respondent may been less than clear about what it was permitted to do whilst she was on furlough. We think that the failure to advise the Claimant about Pen

Tool was more likely to be a consequence of the Respondent's doubts as to what was permitted during furlough. That the requirement to use Pen Tool was communicated by Ms Peterson rather than the Claimant's line manager in a return-to-work meeting work (there was no return-to-work meeting) was a discourtesy. The Tribunal considers that the substantial point here is that Ms Peterson must have been privy to conversations with higher management regarding the Claimant and the requirement that she use of Pen Tool.

Centre of Excellence

120. Towards the end of 2019, the Respondent decided to undertake a reorganisation. A document entitled "*business case for change-pool*", was in the documents before us. The document set out the structure of the CoE at the time, and proposed changes to its structure. The position was that there were five Lead Designers in design, with four being required in the future. There were eight Designers in Design and the proposal was that six would be needed in the future. There were two Junior Designers and it was proposed that one would be needed in future. None of the positions was to be deemed specialist.

121. It was also proposed that there should be a Centre of Excellence, that would "*deliver innovation, craftsmanship, technical and sustainable developments across apparel footwear and accessories but in addition to this with own-perfecting these to be the best they can be and did in the style choice collections, so we are not recreating every season*." Graham Gordon was to lead the centre of excellence as head of Centre of Excellence, and Dan Hanvey was become head of collections. There was to be a "no over-designing" policy, reducing the workload by 40 to 50%.

122. The structure of the Centre of Excellence was set out in a chart in the document to which we have just referred. At its head was Dan Harvey. Underneath him was Design Manager Karen Bryson. Underneath her six people, all apparently at the same level and reporting to Ms Bryson. Four of them, Charlotte Hale, Alexandra Black, Thom Davies and Jo Kent, were to have the title Lead Designer. The Claimant was to have the title Designer, and Jessica Evans was to have the title assistant designer.

123. On a subsequent page of the same document is another chart, that sets out what the future structure of the Centre of Excellence was to be in future. Underneath the head of the Centre was to be, in so far as concerns this case, the Design Manager and under that role two Lead Designers above a Designer and a Junior Designer. The chart suggests that the Designer would report both to the Lead Designer(s) and to the Design Manager.

124. It is clear from the chart that redundancies were contemplated in the Centre of Excellence. We accept the Claimant's evidence before us that, in the Design Team, there was a level of concern about redundancies.

125. The Claimant had been allocated to the Centre of Excellence in December 2019. She had been taken off designing men's and women's knitwear range and put in the Centre of Excellence. Although she told us that staff were told that, if they were not happy with the changes, they had to speak up, she said that that would have been difficult to, as it would have led to her being perceived as negative. The Claimant spoke of concern about "*casting a shadow*".

126. We accept what the Claimant says about this. We also find that the Claimant was upset about her move to the Centre of Excellence. Although she had been unhappy with the volume of her workload having to design both men's and women's knitwear, she appears to have taken the move to the Centre of Excellence as a slight, where she was working accessories – what she described as "*key fobs and beanies*".

127. In the circumstances, we understand why she did so. The Centre of Excellence idea was explained colourfully by Mr Gordon. He described the idea as being of in-house atelier, a place to create advanced ideas, to think about the longer term and be more innovative. He envisaged it focusing on four pillars; innovation, sustainability, craftsmanship and customisation. He said that the attempt to get this atelier going towards the end of 2019 didn't really succeed because it was done at the wrong time, the wrong moment in the business. People had been taken out of the design team which was going through rebrand reset. There was to be a second attempt to develop this idea in 2020, and it is to that which we understand the revised plan for the Centre of Excellence related.

128. Mr Gordon said that, day-to-day, not much would have changed for the Claimant. She would be doing the same thing, just under a different label. Under the second iteration, things would have changed significantly. She would have been working on something he called the graphene project, about which he spoke with some excitement. This was a prototype material to which the Claimant had introduced the Respondent. It is not necessary to go into the detail of it, save to repeat the enthusiasm with which Mr Gordon spoke of it. She would have been a knitwear specialist, but stretching herself, working in new areas, with advanced textiles with a technology company.

129. Mr Gordon said that he was disappointed when he found out that the Claimant was leaving. He thought that an idea she had created dealing with the graphene project was "*epic*", and she would have been "*amazing*". Mr Gordon added, however, that the Claimant did not know of his enthusiasm for her, and that she did not have his vision of the second iteration of the atelier, because he had not shared it with her.

130. We were impressed with the enthusiasm with which Mr Gordon spoke of the Centre of Excellence. We were also impressed with the enthusiasm he had for the Claimant's abilities. It is highly regrettable that the Respondent did not communicate its vision of the Centre of Excellence,

and of the Claimant's place in that Centre of Excellence, more effectively to her. It may well have been an excellent forum for her talents.

131. We accept that Mr Gordon's enthusiasm for the Claimant's abilities was genuine. However, we note that the future organisational plan for the Centre of Excellence envisaged her being underneath roles that were then on the same level of as her, albeit titled Lead Designer. However valuable the Claimant was to the respondent, however enthusiastic Mr Gordon was about her and the "*epic*" work she might do at the Centre of Excellence, the organisational chart still communicated something different.

<u>Comparators</u>

132. The Claimant put forward the comparators identified above. She did not seek to rely on a hypothetical comparator.

133. The Respondent disputed that the persons put forward as comparators were apt for comparison with the Claimant;

(a) Alex Black was recruited as a Lead Designer in January 2020. In September 2020, she was aged 44 or 45 – different ages were given at different times. Ms Bragg did not give evidence before us, but his statement was before us. In it, she says that she was hired as lead designer, but never formally had responsibilty for supervising any specific junior member of the team. We were invited to consider her CV which identified that she had worked closely with senior buyers and management as a lead designer for two key departments within the womenswear division;

(b) Chris Bloor-Evans joined the Respondent as a Senior Designer in 2017. Mr Bloor Evans was aged 37 as of July 2020. Ms Cottrell said that he had been recruited in the light of evidence that he met the requisite criteria, in particular having worked in his previous senior role outside the respondent across multiple categories with minimal referral, and had experience of leading a team with another fashion brand. The claimant again accepted that Mr Bloor Evans had more experience and leadership than she had;

(c) Thom Davies joined the Respondent as a Designer in 2011, promoted to Senior Designer in 2016. As of July 2020, he was aged 37. He was promoted by Mr James Holder, one of the respondent's cofounders, and evidence that he had worked across multiple categories, and was also responsible for managing others, was unchallenged;

(d) Jo Kent joined the Respondent as a Designer in 2014, promoted to Senior Designer in 2014. Aged 41 in September 2020. She is said to have shown evidence of leadership in roles before joining the respondent;

(e) Rachel Heuston was promoted from Designer to Lead Designer in November 2020. She was 35 years of age as of July 2020. Ms controls evidence was that she was promoted because she met the promotion

criteria, including working on various categories with minimal referral, "leadership and mentorship over junior members of the team";

(f) Charlotte Robinson was recruited as a Senior Designer in June 2018. Ms Robinson was 32 years old as of July 2020. She was described as having exhibited leadership experience;

(g) Emma Rowley was recruited as a Senior Designer in April 2016. Ms Rowling was 37 years of age as of July 2020. Again she was described as having exhibited leadership experience;

(h) Max Leung was described by the claimant as the only other designer approaching the same age as her. He was made a lead designer on the basis that he had a designer for junior designer to manage, said the claimant. Ms Cottrell explained that he had been promoted to senior designer in 2016 by James Holder. The decision to promote him was made despite working on a single category at the time of his promotion. It was made on the basis of very strong performance and potential source. Ms Cottrell said that this promotion was quotes clear evidence that SuperDrive does not discriminate on the basis of age". Mr Leung was then appointed in 2018, which Ms Cottrell again said was evidence that the respondent does not engage in age discrimination. Mr Leon later left the respondent, only to be recruited back to it;

134. For reasons that we explain further below, we consider that the Respondent is right to say that the comparators are not, save for the characteristic of age, on all fours with the Claimant. Leaving aside that the requirement is not that the comparators be on all fours, but rather that all relevant circumstances be the same, we consider that the Respondent's analysis constitutes an invitation to us to fail to see the wood for the trees. We think that the better approach in this case is that identified by Lord Nicholls of Birkenhead in the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 [2003] I.C.R. 337, asking why the complainant was treated as she was.

Resignation

135. The Claimant handed in her notice on 23 July 2020. She told us that, in the lead up to this, she had felt much frustration and emotional stress, and decided that enough was enough. She said that she had made herself ill with the stress of the previous year, and couldn't continue to work in an environment where unreasonable pressure was placed on her, combined with the refusal of management to give her the recognition that she felt his skills and experience deserved. She described feeling humiliated and degraded when junior members of staff asked why she was not a Lead Designer. On 21st July 2020, she spoke with Ms Bryson about not being happy. Ms Bryson suggested that she speak to Mr Gordon.

136. The following day, she had a Skype conversation with Mr Gordon, in which she became tearful. She explained to him how she felt continually embarrassed and humiliated by his situation, and how she felt demoted. She described him as "rather arrogantly" trying to correct her, that she meant to say demotivated. She explained that she had been subjected to an unacceptable level of stress in her life, which had become apparent to

her whilst she was on furlough. Mr Gordon expressed regret that she felt like that, and hoped that she would change her mind.

137. On 23rd July 2020, the Claimant handed in her notice. She told us that, despite being angry and upset, she wanted to leave Superdry in as pleasant a manner as possible, and also to attempt to regain some dignity. She also hoped for a good reference from the Respondent. Ms Cottrell replied to say that the Claimant would have to work a three month notice period, as the design department was shortstaffed - it will be recalled that a number of redundancies had been made. The Claimant said that she found this demoralising.

138. The Claimant was further demoralised when, on 1 September 2020, Mr Gordon circulated an email explaining that Beth Spooner had been recruited to the Centre of Excellence as a Lead Designer. This was shortly after two Lead Designers, Ms Kent and Ms Black, had been made redundant. The Claimant described it is "*galling*" that she had been denied what she felt was her rightful elevation to Lead Designer, having resigned in distressing circumstances, only then to be invited to celebrate the recruitment of Ms Spooner. It was further galling for the Claimant, she said, that Ms Spooner did not have any supervisory or managerial responsibility, and had about 20 years less experience than her. She said that this was all the worse because a Lead Designer was going to be employed, she perceived, to replace her, meaning that there would be three Lead Designers all managing a single Junior Designer.

139. The following day, the Claimant emailed Mr Gordon to ask if she could leave a month early. The day after, she went into the office, but could not bring herself to stay, and returned home. She said told us that she could not cope with the environment and the sense of humiliation that she felt there.

Post -resignation

140. The Claimant presented a formal grievance on 7th September 2020. The grievance was rejected. The Claimant felt that her grievance was dealt with dismissively. The claimant identified a number of points where she felt that the Respondent had not dealt with her grievance fairly:

(a) she contrasts Ms Cottrell writing "*I don't feel you have the relevant experience to lead other categories with minimal referral*" with Mr Hanvey's comments in his interview with Alex Watson, as part of the investigation into the grievance, in which he said "*she has the experience to go and do her job. If someone is more junior than you would need more referral*". This is not the first occasion on which Ms Cottrell has said that the Claimant was not able to work with minimal referral. On this point, the Tribunal did not find Ms Cottrell's evidence impressive. That the Claimant was able to work so successfully without, on the Respondent's case, leading anybody, is indicative of being able to work highly successfully with minimal referral. The Tribunal finds that the Claimant was so capable of working, and that the Respondent's decision-makers did not genuinely believe otherwise. The Tribunal finds that the Claimant may well have bounced ideas around the Design Team – this is unsurprising, given that she was working alone - but does not find the

Claimant did this beyond what was ordinary in the Design Team. We were told that the Design Team did not work in siloes. The Tribunal does not accept Ms Cottrell's evidence on this point. It finds that Ms Cottrell evidence is likely to be an after-the-event explanation for the failure to promote the Claimant, rather than an accurate statement of the picture as it then was;

(b) The Claimant was accused of being negative. She contrasted this with comments made in her 2017 appraisal. The Tribunal thinks it is likely that, at times, the Claimant did let her frustration and sense of humiliation show. That said, the Claimant continued to be a high performing designer, on whom the Respondent was happy to place significant responsibility for the creation of product. It seems to tribunal improbable that she was a negative influence. Again, the Tribunal thinks it probable that Ms Cottrell is engaging in after-the-fact explanation, seeking to reverse engineer the Respondent's decisions;

(c) The Claimant was said by Ms Bryson to be "*scatty*". "*Scatty*" is a term that strikes the Tribunal as loaded with subjectivity, the sort of term that verges on a term of abuse and which the Tribunal would not expect to be used to describe a younger, male colleague. Ms Bryson managed the Claimant in a time during which she was doing a significant part of another colleague's job. If the Claimant was showing stress, that is entirely understandable. The Tribunal thinks it improbable in the extreme that the Respondent would have put this considerable burden on the Claimant were she showing signs of being "*scatty*";

(d) it was said that the Claimant micromanaged Ms Peterson. The Claimant acknowledged that this may be so to an extent. In her evidence, the Claimant expressed concern that Ms Peterson may allow product to go out without proper checks. Her concern put the Respondent's business interests above Ms Peterson's personal development. What is, of course, self-evident, is that an allegation of micromanaging a subordinate is in some tension with the Respondent's broader theme that the Claimant wasn't managing anyone.

Specific findings on issues
Unfair dismissal

141. It is not disputed that the Respondent failed to promote the Claimant, or grant to the job title of Lead Designer.

142. We find that the Claimant did have an unreasonable workload placed on her in the summer of 2019. She was required to perform, in addition to her own very substantial workload, a significant part of Ms Matthews' workload. Although she had the theoretical assistance of Ms Peterson, she was away for a significant part of the July and August, which we accept was the busiest time. When Ms Peterson was available to assist the Claimant, we find that the working relationship between them was not ideal, in some part due to the high standards that the Claimant set.

143. We find that the Respondent did recruit, promote, and recognise the individuals named in the list of issues. We find that this undermined the Claimant's standing within the Respondent – Ms Peterson asked her

expressly why she was not a Lead Designer – and it undoubtedly undermined the Claimant's own perception of her standing within the business.

144. We find that the Claimant did resign from her post as a result of these acts and omissions. We accept that the Claimant had every reason to anticipate promotion to Lead Designer status. She had been given no clear and satisfactory explanation as to why she had not been promoted, which would have allowed her to understand what was required of her in order to gain promotion.

145. We find that the Respondent's above acts and omissions did amount to a fundamental breach of the Claimant's contract of employment, that of mutual trust and confidence. In treating the Claimant as it did, the Respondent behaved in a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties. Although evidence of demeanour is to be treated with great caution, it is plain from the Claimant's reaction at times before us that her trust and confidence in the Respondent has, in fact, been destroyed.

Direct discrimination

146. In addition to the findings above, we find that the Respondent did fail to take into account the effect that the Claimant's workload was having on her health and well-being. The Claimant had a very considerable workload, as was known to the Respondent. Other than offering her what can only have been reasonably interpreted as an indication that coping with this workload would assist in her ambition for promotion, and the assistance of a colleague who was, in fact, often not around to assist, the Respondent did nothing. The Respondent did nothing despite the Claimant breaking down to Dan Hanvey.

147. The Respondent did require the Claimant to manage more junior members of staff. It required her to manage Ms Peterson. It also complimented her managerial ability in assessment(s), but understanding management to be a broader concept than line management.

148. We do not find that the requirement to manage the Ms Peterson was less favourable treatment than the Respondent would have administered to the comparators on whom the Claimant relies. But we do find that for the other reasons we have identified, the Claimant was treated less favourably. The Claimant was not promoted, saw her workload significantly increased, and was offered minimal and ineffectual assistance to cope with this workload. Why did the Respondent do this?

149. Mr Platts-Mills submitted that the comparators put forward by the Claimant were not appropriate, in that all relevant circumstances between her and the comparators were not the same, or were materially different. The Claimant did not rely on a hypothetical comparator.

150. We think that in this case, the warning of Lord Nicholls of Birkenhead in Shamoon -v- Chief Constable of the RUC is apt. In order to understand whether the differences between the Claimant and the proposed comparators are material, we need to understand why the Claimant was

treated as she was. This seems to us to be a case in which the Tribunal should concentrate on the reason for the Claimant's treatment.

151. We find that the Respondent did this in significant part because of the Claimant's age. We have already noted that the Claimant's flight risk was assessed as low. We consider that older members of staff are likely to have a perceived lower flight risk. Moreover, the flight risk assessment appears to be based on nothing more than managerial conjecture. The inclusion of an assessment criterion that is likely to operate to the disfavour of the Claimant, as an older person, and the apparent lack of any objective criteria by which flight risk was to be assessed-it was not even discussed with the Claimant - are problematical for the Respondent.

152. We do not accept the reasons advanced by the Respondent for not promoting the Claimant. The Respondent's criteria for promotion were flawed: they left undefined what key elements of the criteria were and used ambiguous if not positively misleading terminology. We find that the Respondent's decision-makers – principally Ms Cottrell and Mr Hanvey – have sought to use these criteria to justify a refusal to promote the Claimant that does not stand up on its own terms. To fail to promote the Claimant on the basis that she could not work cross-category (when she could, and did), that she couldn't work with minimal referral (which she could, and did) and that she lacked managerial/leadership experience (she did not) is a set of facts from which the Tribunal could infer that the Respondent discriminated against the Claimant.

153. In those circumstances, s136 of the Equality Act 2010 applies. This reads as follows:

> (*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*

154. In this case, we do not have to rely on s136. We are able to find, and have found, that the Respondent's actions were because of the Claimant's age. Had we not been able to so find, we would have found that the Respondent's failure to promote the Claimant in the circumstances of this case was a fact from which, in the absence of any other explanation, the Tribunal could find that the Respondent had contravened s13 of the Equality Act 2010 and that the Respondent had not shown that it did not contravene that provision.

155. We find that the decision makers – in this case, the DMT, principally Ms Cotrell but also Mr Hanvey - decided not to promote the Claimant, and to subject her to an over demanding workload with little or no real assistance, because she was an excellent designer on whom they could rely to create products that would sell well, and because they judged that there was little risk of her leaving the business no matter how she was treated. We find that they probably thought this in significant measure because of her age. We find that a similarly valuable designer who was significantly younger than the Claimant probably would have been promoted to Senior Designer or, later, to Lead Designer.

156. We do not accept that the Claimant had not shown an ability to lead across categories. We find that the claimant had worked across what the respondent considered to be a number of categories-or at least, some of the time it did. We note that when she started working for the respondent, the claimant had worked on men's knitwear but not on men's knitted accessories. If men's knitwear and men's knitted accessories had been a single category, we find it bizarre that she only started working in the latter six months after she started working on the former with the Respondent. Later, she worked on women's knitwear, and women's knitted accessories. We note that at no point did the Respondent say to the claimant clearly and unambiguously that what she clearly perceived to be different categories were not so regarded.

157. We did not find Ms Cottrell to be an impressive witness. Ms Cottrell's shockingly complacent answer that the Respondent's policies eliminated all risk of unconscious bias was just one example of an unsatisfactory answer. Another was her evidence to the effect that the Claimant was not able to work with minimal referral.

158. When her answer re unconscious bias was explored with her, she appeared to consider that a requirement for unanimity on promotional decisions in the DMT would adequately guard against any unconscious bias on the part of one of its members - ignoring the possibility that one unconsciously biased member would suffice to block the promotion of a deserving candidate. Ms Cottrell did not strike us as an unintelligent woman. That one unconsciously biased member of the DMT could block a promotion must have been obvious to her when she was questioned about it before us, even if it may not have been obvious to her at the time.

159. Pressed on who would determine what is a "category," Ms Cottrell said that it was a business wide decision, not necessarily within the design department. If there were disputes about categories, she said that to resolve them would depend on what kind of dispute it was. Challenged about an answer that she gave in the grievance investigation about whether all the designers worked on at least one garment outside of their primary category, Ms Cottrell had answered "*with the exception of Max yes – accessories designer*". Asked about this answer in cross examination, Ms Cottrell said that this answer was taken out of context. The Tribunal does not accept this. Ms Cottrell was asked a clear question – "*do they all design at least one garment outside of their primary category*". To that question she gave a clear answer. Earlier in the same meeting, she had been asked "*do any other lead designers fall short of these behaviours or requirements? She mentions people coming in without designing cross category or having direct reports?*" Ms Cottrell answered "*yes there is. Max returned to the business at Jules' request and assumed the position of Lead Designer…*". These answers indicate that Ms Cottrell's answers in the grievance investigation may have been given with excessive concern for defending the Respondent's position and insufficient concern for accurately reflecting the true picture. We have the same concern about her answers before the Tribunal.

160. Ms Cottrell said before us that she had subsequently investigated Max Leung's position, and discovered that he did have experience of designing

in other category areas. That is, the Tribunal considers, no answer to the criticism that was made; as far as the Respondent knew, Mr Leung lacked cross-category capability, but was nonetheless made a Lead Designer.

161. Ms Cottrell denied having a discussion with Mr Hanvey about whether the Claimant met the criteria for promotion. The Tribunal has real difficulty accepting the truth of that answer.

162. Mr Hanvey was questioned about his evidence regarding the "minimal referral" criterion. In his statement, he had said that "*I could not see that Rachel was able to work with little to no referral*". Shortly before being asked about this, he had said that he was comfortable that she could work with minimal referral within the speciality of knitwear. He was taken to a question in the grievance investigation, where it was put to him that "…*Another conversation with you, you said one of the best things about working with her was the fact that she needed minimal referral"*. His answer to that question in the grievance process was:

I am really respectful of her experience. Once you told her what was needed she would go off and do that. It doesn't take away that if you're an experienced designer, she has the experience to go and do her job. If someone's more junior then you would need more referral. She could go off and deal with suppliers and put that into action. I would agree she could do that. Has she got the skillset to lead but does she have certain behaviours that make it possible to be that role?

163. It is clear from that answer that, in the grievance investigation, Mr Hanvey did not dispute the premise that he had indeed accepted that one of the Claimant's strong points was her ability to work with minimal referral. His answer before us was to similar effect. Quite why his statement professed a doubt as to something that, we find, he regarded as one of the Claimant's strengths is baffling, and we do not accept what he said in his statement about this.

164. We do not accept that the Claimant lacked managerial experience. We accept - indeed it was not challenged - that the Claimant had managerial experience with former employers. We have already referred above to the distinction between management, line-management and leadership – a distinction that the Respondent often ignored. We have already also noted that the Respondent had praised her managerial - as opposed to line-management - ability.

165. In her evidence before us, Ms Cottrell said the Respondent had no hard and fast rule or metric regarding management. The Tribunal accepts this answer. We find that it is consistent with a promotional framework lacking in objectivity, in which employees would be at a loss to know exactly what was required of them in order to achieve promotion. Not only was the Claimant supposedly required to work "cross-category", with category not defined, she was required to fulfil an unspecified managerial requirement, that risks being in some tension with the requirement that she work independently.

166. Ms Cottrell denied that the Respondent might promote in order to retain talent that might otherwise leave. At first blush, that answer appears

to be consistent with the position regarding the Claimant; the Tribunal doubts that the Respondent wanted to lose such an obviously talented designer. But Ms Cottrell's answer is in tension with the fact that recruitments were made of individuals, presumably talented individuals, outside the normal process and that Mr Leung was a Lead Designer despite, as far as the Respondent knew, not meeting one of the requirements for that post.

167. Ms Cottrell claimed to be surprised that the Claimant had made a complaint. Given that the Claimant had been asking about promotion since 2017, Ms Cottrell's expression of surprise is simply not credible. Equally incredible was her assertion that she saw no issue in investigating the grievance herself, despite the fact that she was on the DMT that considered promotion.

168. Ms Cottrell was challenged about whether, in order to progress over the age of 50 in the Respondent, one had to be exceptional, or close to one of the co-founders, Mr Leung having been recruited by one of the cofounders. Ms Cottrell answered, "*that is how it looks in this case but not how it is….*". We agree that that is how it looks.

169. Ms Cottrell was asked if Ms Peterson had been in any sense the Claimant's responsibility in July 2019 her answer was that the Claimant was responsible for making sure that any work allocated to Ms Peterson was properly executed, but that she was not responsible for Ms Peterson. That answer struck the Tribunal as an attempt to dance on a pinhead.

170. Mr Hanvey's evidence before us was that he was unaware that the Claimant had managed junior colleagues at at least one previous employer. He said that the first he knew of this was at the Tribunal. Her CV showed that she had managed at more than one previous employer. Mr Hanvey's understanding of what was required to fulfil the "management" criterion was, responsibility for assigning work to a person, supporting them, mentoring, coaching, assigning work with clarity.

171. We may have been more ready to accept an argument from the Respondent that the Claimant had not demonstrated sufficient line-managerial capability. The Claimant's management of Ms Peterson was not a conspicuous success. It would be unfair to read too much into that, both because we did not hear from Ms Peterson and because the episode only lasted a relatively short time.

172. But the Respondent's case was not that the Claimant had managerial experience, and that her managerial experience had shown her to be not gifted as a manager. The Respondent's case was that she lacked managerial experience. We do not accept that that is so.

Harassment

173. We find that the conduct we have described did relate protected the characteristic of age.

174. We find that this conduct did have the effect of violating the Claimant's dignity, and creating a hostile, degrading, and humiliating environment for

her. The Claimant became distressed at times when giving evidence. We have already noted the risks of using demeanour as a basis for findings. But we could not fail to be struck by the Claimant's obvious emotion when discussing matters. At one point, she became tearful and exclaimed, "*who is going to employ a woman of my age?*" The Claimant's obvious emotion appeared to us to be entirely genuine and it was not suggested on behalf of the Respondent that it was not genuine.

Jurisdiction

175. Jurisdiction is not identified as one of the issues in the list of issues. That said, the Respondent has made an argument that certain instances of discrimination are outwith the Tribunal's jurisdiction. The Tribunal does not accept these arguments. The Tribunal considers that the discrimination from which the Claimant suffered constituted conduct extending over a period, within the meaning of S123(3) (a) of the Equality Act 2010.

176. In the alternative, we would hold that the claims in respect of all matters brought within a period the Tribunal thinks just and equitable, pursuant to S123(1)(b) of the Equality Act 2010. The Claimant presented her claim following her unfair constructive dismissal (as we have found it to be). We note that the parties did not address us on our S123(1)(b) discretion, and we base our decision on S123(3)(a) of the Equality Act 2010.

Remedy
General

177. As the Claimant claims for both unfair dismissal and direct discrimination, the Tribunal has to be mindful of s126 of the Employment Rights Act 1996 (hereafter "ERA"), which provides as follows:

126.— Acts which are both unfair dismissal and discrimination.
(1) This section applies where compensation falls to be awarded in respect of any act both under—
(a) the provisions of this Act relating to unfair dismissal, and
(b) the Equality Act 2010.
(2) An employment tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the tribunal (or another employment tribunal in awarding compensation on the same or another complaint in respect of that act.

Basic Award

178. The ERA ss119, subject to ss120 to 122 and 126, provide for the basic award.

179. We have the assistance of a Schedule of Loss, and a Counter-Schedule. There is no dispute that the figure provided for by s119 is £4,035.

180. S122 of the ERA provides as follows:

122.— Basic award: reductions.

(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

(3) Subsection (2) does not apply in a redundancy case unless the reason for selecting the employee for dismissal was one of those specified in [section 100(1)(a) and (b), 101A(d), 102(1) or 103]1; and in such a case subsection (2) applies only to so much of the basic award as is payable because of section 120.

(3A) Where the complainant has been awarded any amount in respect of the dismissal under a designated dismissal procedures agreement, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that award.

(4) The amount of the basic award shall be reduced or further reduced by the amount of—

(a) any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or

(b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise).

(5) Where a dismissal is regarded as unfair by virtue of section 104F (blacklists), the amount of the basic award shall be reduced or further reduced by the amount of any basic award in respect of the same dismissal under section 156 of the Trade Union and Labour Relations (Consolidation) Act 1992 (minimum basic award in case of dismissal on grounds related to trade union membership or activities).

181. There is no suggestion that subsection (1) applies here, or s3 or 3(A), or (5). There is no reduction required by subsection (4).

182. We were not addressed expressly on subsection (2), but we take into account the Respondent’s submissions of a similar nature regarding the compensatory award. We do not consider that it would be just or equitable to make any reduction to the basic award. Accordingly, the Tribunal makes a basic award of £4,035.

Compensatory award

183. Compensatory awards are provided for by s123 of the ERA, which reads as follows:

123.— Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in

consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122 in respect of the same dismissal.
(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
(5) In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—
(a) calling, organising, procuring or financing a strike or other industrial action, or
(b) threatening to do so,
was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.
(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
(6A) Where—
(a) the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and
(b) it appears to the tribunal that the disclosure was not made in good faith,
the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the complainant by no more than 25%.
(7) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.
(8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

184. S124 provides for an upper limit of any compensatory award. This is not relevant in the case before us, because the Claimant has also succeeded in her claim for direct discrimination. Compensatory awards for direct discrimination are not subject to an upper limit, and it seems to us

that the loss that she has suffered as a result of that direct discrimination is indistinguishable (insofar as financial losses are concerned) from that which she has suffered as a result of the unfair dismissal.

185. S124A deals with the reduction or increase of awards under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 or s38 of that Act. S124A is not said to be relevant to this case.

186. We have already referred to S126 of the ERA. We will consider the parties respective contentions as to losses in addition to the basic award together.

187. The Equality Act 2010, s124, provides as follows:

124 Remedies: general
(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
(2) The tribunal may—
(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
(b) order the respondent to pay compensation to the complainant;
(c) make an appropriate recommendation.
(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.
(4) Subsection (5) applies if the tribunal—
(a) finds that a contravention is established by virtue of section 19, but
(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by [the county court]3 or the sheriff under section 119.
(7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may—
(a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
(b) if no such order was made, make one.

The Parties' Contentions

188. The Claimant submitted an updated Schedule of Loss, showing her claimed losses up to 24th January 2022. In that Schedule, she seeks an award based on the following:

Financial loss

(a) basic salary (effective date of termination 22.10.2020 to 24.01.2024) - 65 weeks x £621.77 (net weekly pay): £40,415.05;

(b) Loss of pension benefit (65/52 x £2611.68): £5,335.43;

(c) Loss of Sharesave (65/52 x £400): £500.00;

(d) Loss of statutory rights £350

Total as to 24th January 2022 £46,600.48.

Future loss

(a) the Claimant's claim for future loss is based on six months of earnings with six months loss of pension and sSharesave, all based on the above figures. The total future financial loss claimed is £18,707.28;
(b) the Claimant claims £7500 in compensation for injury to feelings. She has not referred to the updated Vento guidelines, instead referencing the case of Mathias -v- C. RO Ports Sutton Bridge Ltd ET/260 1416/12.

189. The Respondent contends that any compensatory award should be limited to a maximum of six months' pay and benefits. It says that this would amount to £27,120.76. It suggests a figure of £350 for loss of statutory rights, bringing a total of £25,960.76.

190. The Respondent goes on to submit that the Claimant's compensation should be reduced to nil. In making this submission, it relies on (a) contributory fault; (b) the principal in Polkey -v- AE Drayton Services Ltd [1988] ICR 142, and; (c) an alleged failure of the Claimant's part to mitigate her loss. Consistently with that approach, it invites the Tribunal to make no award for future financial loss.

191. The Claimant told us that the last two years at Superdry had had a detrimental effect on her, continued after she left. She told us that she felt depressed, loss of self-esteem and confidence, and had trouble sleeping. She was prescribed antidepressants by her doctor. Her difficulties were compounded by the fact that her mother started to experience ill-health after she left the Respondent.

192. She told us that, over the last 18 months, she has taken to making blinds and curtains, and was in the process of setting up a campsite on some woodlands that she owns with her husband. She exhibited invoices for this activity. Since the New Year, she has re-found her confidence and has begun looking for senior designer jobs again.

193. Cross-examined by Mr Platts-Mills, the Claimant spoke with obvious feeling about her time at Superdry. She was proud of what she had achieved with the Respondent. She was proud of setting up a project with the Centre of Excellence and a company dealing with graphene. She spoke of another employee who she felt had been pushed out and ridiculed at the age of 61.

194. The Tribunal is mindful that we had not heard about this other employee until the Claimant came to give evidence on remedy. We had no other evidence about him one way or the other, and have not considered this point. That said, and with appropriate caution about the potential for demeanour to mislead us, the Tribunal is satisfied that the Claimant's

experiences at Superdry had a devastating effect on her. We accept that it was reasonable for the Claimant to take the time that she did before starting to look for senior designer roles, and we accept that her efforts to mitigate her loss were reasonable. Indeed, we consider that, in limiting her claim for future financial loss to 6 months, the Claimant has shown some restraint.

195. The Tribunal does not accept any of the arguments regarding reduction of the compensatory award advanced by the Respondent. We do not find the Claimant to be guilty of any contributory fault. We see no basis for an application of the principle in Polkey. And we have already indicated that we do not think that the Claimant has failed to mitigate her loss.

196. The question is put in the list of issues as, is it just and equitable to make a reduction to the basic award under section 122(2) of the employment rights act 1996?

197. We do not think that it would be just and equitable to make any such reduction. It is in some ways a tragedy that the atelier project was not explained to the Claimant. It seems to us that it may have been an excellent forum for her talents. As Mr Gordon colourfully put it in his evidence, her work there could have been "*epic*". That that did not happen is not, we find, in significant part, due to the Claimant. She had reached the end of her tether.

Direct discrimination/harassment

198. We consider that the financial losses caused to the Claimant by the direct discrimination and harassment she suffered are indistinguishable from those caused by her dismissal. The application of the statutory cap would risk causing the Claimant an injustice, and we will therefore make the compensatory award pursuant to the provisions of the Equality Act 2010.

199. Having already identified the Claimant's financial losses, we have to consider her claim for injury to feelings. It is surprising that the Claimant did not frame her argument for compensation for injury to feelings by reference to the updated Vento guidelines. Had she done so, the Tribunal may well have concluded that an award in the middle bracket of those guidelines was justified. She having chosen to limit her claim for injury to feelings to £7,500, it would be unfair to the Respondent to make a higher award.

200. The Tribunal considers that the award is sought for injury to feelings is modest in the circumstances. The Claimant suffered discrimination that caused her significant injury to feelings, for a number of years. This was not anything comparable to a one-off incident. The Tribunal awards her £7,500 for injury to feelings.

201. The Tribunal makes a basic award of £4,035.00, an award of £45,090.48 for losses to the date of the hearing, an award of £18,707.28 for financial losses after the date of the hearing, and £7,500 for injury to feelings. This comes to a total of £75,332.76.

202. No award was sought in respect of failure to follow the ACAS guidelines, and therefore the Tribunal did not consider it fair to the Respondent to consider any such award.

203. As the Tribunal's making its award pursuant to section 124 of the Equality Act 2010, the award is not subject to any statutory cap that would require it be reduced.

204. We have considered whether we should make a recommendation pursuant to s124(2)(a) of the Equality Act 2010. We were not asked to make a recommendation, and heard no representations on what an appropriate recommendation would be. In the circumstances, we do not consider it appropriate to make a recommendation.

Interest

205. The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996/2803 (hereafter in this part, "the Regs"), reg 6, provide as follows:

(1) Subject to the following paragraphs of this regulation—
(a) in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;
(b) in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5 and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation.
(2) Where any payment has been made before the day of calculation to the complainant by or on behalf of the respondent in respect of the subject matter of the award, interest in respect of that part of the award covered by the payment shall be calculated as if the references in paragraph (1), and in the definition of "mid-point date" in regulation 4, to the day of calculation were to the date on which the payment was made.
(3) Where the tribunal considers that in the circumstances, whether relating to the case as a whole or to a particular sum in an award, serious injustice would be caused if interest were to be awarded in respect of the period or periods in paragraphs (1) or (2), it may—
(a) calculate interest, or as the case may be interest on the particular sum, for such different period, or
(b) calculate interest for such different periods in respect of various sums in the award,
as it considers appropriate in the circumstances, having regard to the provisions of these Regulations.

206. We did not hear representations from the parties as to the calculation of interest, or whether it would cause serious injustice to depart from the starting point provided by Reg 6(1), for understandable reasons. That said, we are obliged by Reg 2(1)(b) of the Regs to consider whether interest should be awarded even if no party applies for interest.

207. In order to assess whether an award of interest would cause serious injustice, it is appropriate first to calculate what interest would be payable.

Calculation of interest
Start date

208. The start date provided for by Reg 6(1)(a) is not entirely clear in this case. It seems to the Tribunal that the best identifiable start date is the date of the Claimant's March 2017 review. The exact date of the review in that month is not entirely clear to us, but as reviews generally took place in April, we understand, we will take 31st March 2017 as the start date.

209. The calculation date is 8th June 2022. There are 1,895 days between those dates.

210. The mid-point date between the start date and the date of calculation is 3rd November 2019.

Rate

211. The rate of interest is provided for by Reg 3(2) of the Regs is 8%.

Sums subject to interest

212. Interest is not awardable in relation to losses which will arise after the day of calculation. This includes not only future losses, but also pension losses – see Ministry of Defence -v- Cannock & Ors [1994] ICR 918.

Calculations of interest

213. The £7,500 award for injury to feelings carries interest at 8% from 31.03.2017. 8% of that sum is £600, or £1.64 (rounded down) per day. Over 1,895 days, that comes to £3,107.80.

214. Interest on the other elements of the award that attract interest must be calculated from the halfway point. There are 948 days between that date and the date of calculation.

215. The Claimant's basic award, her past financial losses set out in her Schedule of Loss (save for her pension benefit). Those sums come to £39,755.05.

216. 8% of that sum is £3,180.04 (rounded down), or £8.71 (again rounded down) per day. Multiplied by 948, that comes to £8,257.08.

217. We do not consider that there would be any injustice, let alone serious injustice, caused if we award the Claimant £3,107.80 interest on her compensation for injury to feelings, or in awarding her £8,257.08 interest on her other past losses. We have already observed that her Schedule of Loss, in particular regarding her claim for injury to feelings, struck the Tribunal as restrained.

Grossing up

218. That would bring the total to £77,697.64. As this sum exceeds £30,000, it will be necessary to "gross up" the figure, to reflect the fact that tax will be payable on it.

219. In her Schedule of Loss, the Claimant suggests the approach of increasing the award by 40%. Mindful of what was said in PA Finlay and Co Ltd -v- Finlay EAT 0260/14, we think that may be a simplistic approach, and that the correct approach is to not to gross-up the first £12,570 of the award, as that sum represents the Claimant's personal allowance; to gross up the next £37,700 at 20%, and the remaining sum at 40%.

220. Applying that approach to the sum of £77,697.64 produces the following:

(a) £12,570 not grossed up;
(b) £37,700 grossed up 20% = £45,240; (£7720)
(c) £27,427.64 grossed up 40% = £38,398.70 (rounded up).

221. That produces a total of £96,208.70. As stated above, no statutory cap is relevant in this case, and we will award the Claimant that sum.

Employment Judge Hughes

Date: 08 June 2022

Reserved Judgment & Reasons sent to the Parties: 21 June 2022

FOR EMPLOYMENT TRIBUNALS