EMPLOYMENT TRIBUNALS

Claimant: **Ms M Lucy-Dundas**

Respondent: **ODT Professional Services Limited**

Heard at: **London South Employment Tribunal**

Hybrid hearing: everyone in person save for Ms Omer who joined by video-link

On: **3 – 6, 9 May 2022, in chambers 10 – 12 May 2022**

Before: Employment Judge Dyal, Ms Omer, Ms Christofi

Representation:

Claimant: Mr Capek, Consultant

Respondent: Mr Paulin, Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed:
    a. A *Polkey* reduction of 70% applies;
    b. The Claimant did do some blameworthy conduct. The basic award is reduced by 25%. The compensatory award is reduced by 50%.
2. The Claimant was wrongfully dismissed.
3. The complaints of sex discrimination are not well founded and are dismissed.
4. The complaint of unpaid holiday pay succeeds in part, namely, 1.49 days.
5. The complaint in respect of unauthorised deduction from wages fails.

CASE MANAGEMENT ORDERS

1. The parties must liaise to seek to agree remedy.
2. If the parties agree remedy the tribunal should be informed forthwith.
3. If the parties are unable to agree remedy by 30 July 2022, they must jointly write to the tribunal informing it of the same and proposing case management directions dealing with remedy or seeking an extension of time to agree remedy.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing. The issues for resolution were agreed by the parties. The final list of issues is appended to these reasons.

Documents before the tribunal:

2. We had a large number of documents before us:

    2.1. There was a primary agreed bundle which ran to around 1000 pages.
    2.2. A significant number of additions were made to the bundle in the course of the hearing, all by consent.
    2.3. Witness statements for each of the witnesses we heard from as identified below.
    2.4. List of issues including a final, agreed list.
    2.5. Skeleton arguments (two from the Respondent, one from the Claimant) and a number of authorities.

Witnesses the tribunal heard from:

3. We heard from:

    3.1. The Claimant;
    3.2. Mr Harvey Osler, Equity Partner of the Respondent;
    3.3. Ms Perryman-Best, Equity Partner of the Respondent;
    3.4. Mr Barnes, Equity Partner of the Respondent.

Without prejudice privilege and s.111A Employment Rights Act 1996

4. Without prejudice privilege was specifically waived by the parties in relation to a significant number of pre-termination settlement communications. Those communications were therefore openly referred to in both documents and witness statements before us.

5. However, the parties had not, in advance of the hearing, given thought to s.111A Employment Rights Act 1996 (ERA). The judge raised this with parties on the first morning of the hearing. It is worth flagging here that the parties both (for very different reasons) submitted that s.111(A)(1) ERA did not apply. For the reasons below, the tribunal disagrees: s.111(A)(1) applies in full.

6. As a result, there is a significant amount of evidence before us that is admissible for some purposes (namely the complaints other than that of unfair dismissal) but inadmissible for other purposes (the unfair dismissal claim). In our findings of fact below we highlight this evidence by underlying it.

7. Another point it may be helpful to explain here is why we have set out so much of the correspondence between the parties in our findings of fact (much more than we ordinarily would). This was necessary to deal with the arguments the Respondent made in support of its position that s.111A(1) does not apply (these are summarised below) which related in part to the nature and content of the correspondence.

Submissions

8. Mr Capek produced detailed closing written submissions. He was content that they set out the Claimant's closing submissions fully and did not wish to elaborate with oral submission. The Respondent relied upon a short opening skeleton argument and a short closing skeleton argument. Mr Paulin also made oral submissions. We considered all of the submissions carefully.

Findings of fact

9. The tribunal made the following finds of fact on the balance of probabilities.

Background

10. The Respondent is a small regional solicitors' practice. Its head office is in Brighton and it has branches in Haywards Heath and Hurstpierpoint. At the relevant times it had:

    10.1. Five equity partners growing to six in July 2018 upon Ms Perryman-Best's promotion. There were five male equity partners and one female partner;
    10.2. Nine salaried partners of whom two were male and the remainder female;
    10.3. There were around 22 other fee earners of whom three were male and the remainder female.
    10.4. There was Practice Manager, Ms Hazel Harper.

11. The Claimant was employed by the Respondent as a legal executive (CILEX) specialising in residential conveyancing from around 1 April 2015. She is a woman and at the relevant times had childcaring responsibilities for her school-age son.

12. They were express terms of the Claimant's contract of employment that:

10. OUTSIDE INTERESTS

10.1 Subject to clause 10.2, during the Employment the Employee shall not, except as a representative of the Company or any applicable Group Company or with the prior written approval of the Company, whether paid or unpaid, be directly or indirectly engaged, concerned or have any financial interest in any Capacity in any other business, trade, profession or occupation (or the setting up of any business, trade, profession or occupation).

10.2 Notwithstanding clause 10.1, the Employee may hold an investment by way of shares or other securities of not more than 5% of the total issued share capital of any company (whether or not it is listed or dealt in on a recognised stock exchange) where such company does not carry on a business similar to or competitive with any business for the time being carried on by the Company.

10.3 The Employee agrees to disclose to the Company any matters relating to themselves, their spouse or civil partner (or anyone living as such), children or parents which may, in the reasonable opinion of the Company, be considered to interfere, conflict or compete with the proper performance of the obligations of the Employee under this agreement.

13. The Claimant was based at the Hurstpierpoint office. This was a small office. At the outset Mr Harvey Osler, Equity Partner, was based there, along with two legal secretaries, Ms Michelle Williams and Ms Linda Christmas.

14. The events that are material to this claim commenced in early 2018. Up until this point in time the Claimant's employment was both satisfactory and uneventful.

Tensions between the Claimant and Mr Buckland

15. On 26 January 2018, the Claimant had a review meeting with Mr Osler and Mr Tim Morgan, Equity Partner. Her annual billing target was increased by about 30%. She was reasonably content with this provided she was given adequate administrative support. On 2 February 2018, Mr Morgan wrote to the Claimant recording the increase in her billing target and stating that her pay would be increased on the basis of the new billing target and on the basis that she would take on managerial responsibilities at Hurstpierpoint including *"being involved in marketing and managing the team (i.e. Michelle and Linda)"*. She was told this was a vote of confidence in her.

16. On 5 February 2018, there was a branch meeting at Hurstpierpoint. The Claimant, Ms Williams and Ms Christmas were told by Mr Osler that Mr Richard Buckland was likely to join the team at Hurstpierpoint. Mr Buckland was a salaried partner who specialised in Leasehold Enfranchisement. Mr Osler said that it would not affect the way the team worked. There was immediate concern that having a new fee earner would create a problem in the absence of additional administrative support.

17. On 9 February 2018, Mr Barnes announced to the firm by email that Mr Buckland would be joining the Hurstpierpoint office. The email stated that he would *"supervise the day to day running of the conveyancing department there. It*

should lend weight to firm's presence there and help push the office forward". The Claimant was upset by this and thought it implied she was not doing her job well.

18. One aspect of Mr Buckland's arrival at Hurstpierpoint that was not well managed was the impact it had on the office's administrative resources. There was a new fee earner that required administrative support but no additional administrative support. Inevitably this meant that Ms Williams and Ms Christmas who hitherto had primarily supported the Claimant (Mr Osler did most of his own administration) now had additional work. No guidance or mechanism was put in place to transition to this new state of affairs nor to ensure that the administrative staff split their time between the fee earners in a fair way. No doubt in many cases matters of this sort simply work themselves out, but here they did not:

    18.1. The administrative staff felt overloaded and certainly they were more loaded than they had been prior to Mr Buckland's arrival. In addition to the increase in the volume of work there was added difficulty that the work came from two different sources who were competing for the legal secretaries' time: the Claimant and Mr Buckland.
    18.2. There was a constant tension between the Claimant and Mr Buckland. Each was stressed by their own workload, stressed by their work being slowed down as a result of not having their own dedicated administrative resource and stressed by having to compete with the other for the legal secretaries' time.

19. There was also a degree of resentment on the Claimant's part about two further matters. Firstly, the very fact that Mr Buckland was a partner and had been brought into the Hurstpierpoint office. The Claimant had aspirations to be a partner herself and if there was to be a new partner in that office she felt it ought to be her, if not immediately then in short order. Secondly, upon Mr Buckland's arrival matters had not panned out in the way that it had been suggested they would by Mr Osler and Mr Morgan in January (i.e., there would be no change). On the contrary, Mr Buckland's arrival had altered the working dynamics of the office.

20. The Claimant alleges, and we accept, that Mr Buckland did comment to her and to the administrative staff from time to time on the fact that the Claimant did not arrive at work by 09.30. She tended to arrive later than others as she did the school run for her son. The Claimant made up the hours by working over lunch.

21. In March 2018, Mr Buckland became irate with the Claimant about the planner she had on her office wall. It had the dates of staff holidays on it and the dates of completion for her clients. The Claimant reported this matter to Ms Perryman-Best.

22. On 18 May 2018, the Claimant and Ms Williams put files on Ms Christmas' desk with notes of what needed to be done in relation to them. This was in preparation for Ms Christmas' return from annual leave and was in accordance with past practice. Mr Buckland came into the office and was furious – he ordered the

Claimant and Ms Williams to take the files off of the desk because he did not want Ms Christmas to come back to a desk piled with files.

23. At the Hurstpierpoint office there was a practice of having an office meeting on Monday mornings. Mr Buckland was not a big fan of this; he preferred to get on with his own work and did not always attend. 21 May 2018 was one such occasion that he did not attend. Also on that day the Claimant complained to Mr Osler that the lack of administrative support was affecting her work. Ms Williams had only been able to devote 45 minutes to the Claimant's work that day. The Claimant repeated this complaint in an email to Mr Osler and Ms Harper.

24. The Claimant's case is that Mr Buckland, who presumably was told about the email by someone, made undermining comments to her and Ms Williams about it. It is surprising that no real detail of what the undermining comments were is given in the Claimant's very lengthy witness statement. The Claimant was asked by the tribunal what the undermining comments were during her oral evidence. Much of her answer comprised an account of her beliefs about what Mr Buckland thought of her. It was harder to discern from her answer what he had actually said. Doing our best, we find that Mr Buckland was critical of the Claimant's arrival time and was critical of her volume in the office. The Claimant herself accepts that she has a loud voice that "can carry" and that she could laugh loudly in the office.

25. On 22 May 2018, Ms Williams told the Claimant that Mr Buckland had been complaining to her and Ms Christmas that the Claimant was not in the office when she was supposed to be. The Claimant went to Mr Buckland's office and confronted him about this. She explained why she worked the hours that she did and that she worked through lunch to make up for time lost in the morning.

26. On 23 May 2018, Mr Buckland wrote to Ms Harper giving an account of the conversation. Mr Buckland's position was that the Claimant had suggested that he did not want her at Hurstpierpoint and he had reassured her that he did. However, the email also records that the Claimant mentioned to Mr Buckland that she had heard him taking calls about some serious personal issues. He said that this showed the Claimant listening to his calls rather than getting on with her own work. We find that Claimant did make clear to Mr Buckland on that occasion that she was unhappy that he had been introduced to the Hurstpierpoint office in a senior role.

27. On 25 May 2018, Ms Williams told Mr Buckland that she had visited a client at the client's home. In her witness statement, the Claimant states that Ms Williams informed her that Mr Buckland had then been very derogatory and critical about the Claimant in relation to this matter. During her oral evidence the Claimant was asked by the tribunal what Mr Buckland said as reported to her by Ms Williams. She was unable to recall. There is no sufficient evidential basis for us to find that Mr Buckland made derogatory or critical comments about the Claimant on this occasion and we find on balance that he did not.

28. On 2 July 2018, Mr Buckland emailed Ms Harper and reported that the Claimant had referred to two of her clients as "*those gay boys*". He went on "*despite my saying I found this vaguely offensive she didn't seem phased ! – may be some*

diversity training is needed 😊". The Claimant's evidence, which we accept, is that these were not precisely her words. What she actually said was "*those lovely gay boys*" in relation to a particular couple who were gay men and were clients.

29. On 16 July 2018, the Claimant told Mr Buckland that she needed to make an emergency dental appointment for her son and that the appointment was on 18 July 2018 so she would be out of the office. The Claimant diarised the appointment. On the same day, the Claimant left a file at home and had to go home to get it. Mr Buckland reported this to Ms Harper.

30. On 17 July 2018, the Claimant offered Mr Buckland a coffee. He was confrontational and angrily demanded the Claimant tell him what her fee figures would be for the month. She was unable to tell him then and there.

31. On 18 July 2018, Mr Buckland emailed Ms Harper telling her about the dental appointment, saying that the Claimant had mentioned it the previous week but had not formally asked for permission and indicating that he hoped the Claimant had cleared it with Ms Harper. Ms Williams had access, in the course of her work, to Mr Buckland's emails. She saw this particular email and reported it's contents to the Claimant. This prompted the Claimant to telephone Ms Perryman-Best. She was upset by what she saw as Mr Buckland implying that she was not working her contractual hours.

32. On 19 July 2018, the Claimant emailed Ms Harper, Ms Perryman-Best and Mr Osler. In the email she explained how she had come to take her son to the dentist, complained that Mr Buckland had raised an issue about this and alleged that he was trying to undermine her and remove her from the business. She went on: *"bearing in mind the fact that I generally work through all my lunch hours and also outside of my office hours I think today's situation shows that Mr Buckland is doing everything possible to make my life difficult whether it is taking my support staff assistance away from me or trying to trip me up over any minor thing he can think… the situation is beyond being funny and his presence in Hurstpierpoint is rubbing off on the team and stretching everyone to their limits of sustainability"*.

33. On 19 July 2018, Mr Buckland offered her a doughnut. When she refused he left on her desk and said "*throw it in the bin then*".

34. On 20 July 2018, Ms Harper sent the Claimant a lengthy email. Among other things it sought to address the broad issue of there being problems at Hurstpierpoint. In summary it said:

    34.1.1. Not to contact Ms Harper or Ms Perryman-Best about matters they were are already aware of unless there was new information that needed to be communicated urgently.
    34.1.2. Asked for a bullet point list of the issues that were causing problems at the office;
    34.1.3. Asked for examples of what Mr Buckland was doing that the Claimant said were making her and that of the team difficult

34.1.4. Asked for the Claimant to keep a record of the work passed to Ms Williams and Ms Christmas and whether it was completed or not.

35. The email also said this about working from home: "*Finally, you mention working from home, which is commended. However, I understand that a file was left at home last week which needed retrieval. Files cannot leave the office unless it is for a court case or similar. The risks under Data Protection rule, and latterly the additional requirements under GDPTT mean that the opportunity for data breaches to occur must be limited as much as is possible… my other concern is from a welfare perspective; everyone needs to rest to able to work efficiently and I am concerned that if you are working late at night you are not getting the rest that is so important. It may also lead to mistakes being made [further comments about sending emails out of hours]".*

36. Ms Harper sent a like email to Mr Buckland. The Claimant was not contemporaneously aware that Mr Buckland had received an email in similar terms. She was very upset by the email she received and misinterpreted it as saying that she was no longer to report any concerns she had about Mr Buckland. Of course it did not say anything so sweeping.

37. Shortly thereafter, the Claimant spoke to Mr Osler about the recent emails and events leading to them. We find that, in the course of the conversation, Mr Osler he said words to the effect that it '*looked like you had fun with the emails'*. The Claimant gave clear evidence of this; Mr Osler had no recollection. We prefer the Claimant's evidence.

38. On around 31 July 2018, the Claimant sent Ms Harper a list of the matters she thought were causing problems at Hurstpierpoint as she had been asked to do.

39. The Claimant had an appraisal meeting with Ms Harper on 3 August. The Claimant was sent the notes of this appraisal on 8 August 2018.

40. On 6 August 2018, the Claimant and Mr Buckland had a conversation about Ms Williams' work and work prioritisation. The conversation took an angry turn when the Claimant repeated something that Ms Williams had told her, namely that Mr Buckland had 34 files to open. This was not in fact correct. Both parties were extremely stressed because of their workloads and because they had to vie with each other for Ms Williams' time. There are competing contemporaneous accounts of this incident from the Claimant and Mr Buckland. Having considered those accounts as well as the Claimant's evidence we find that both the Claimant and Mr Buckland were shouting at each other on that occasion. The altercation came to an end when Mr Buckland stormed out of the building slamming the door on his way out.

41. They each wrote to Ms Harper with an account of the meeting and each essentially characterised the other as the principal aggressor in the argument. Mr Buckland also suggested in his account that *"It would appear that Ms Williams has told [the Claimant] (presumably to wind her up) that I have all this work for her, which stops her from working for [the Claimant] – this is simply not true."*

The Birch Hotel Agreement

42. As a result of the incident on 6 August 2018, the Respondent convened a 'clear the air' meeting at the Birch Hotel on 9 August 2018. In attendance were the Claimant, Mr Osler, Ms Perryman-Best, Ms Harper and Mr Buckland. The meeting was constructive. Mr Buckland's position was that the main problem was that the Claimant and he had to share Ms Williams and Ms Christmas. The Claimant's position was similar. She added that she previously had the use of the legal secretaries, a resource that was now shared.

43. There are written notes of the meeting which both sides agree are materially accurate. An agreement was reached as to how to proceed and it was as follows:

    43.1. Mr Buckland would report to Mr Osler;
    43.2. The Claimant would report to Mr Buckland;
    43.3. Ms Christmas and Ms Williams would report to the Claimant;
    43.4. Ms Williams's work would be channelled through the Claimant;
    43.5. Mr Buckland would monitor holidays and act in a professional support role;
    43.6. The Claimant would deal with day to day running of the office and general office management;
    43.7. Mr Osler and Mr Buckland would open the post together to get a feel of the work coming through;
    43.8. Mr Buckland and the Claimant would meet every 2 to 3 weeks with an agenda and Mr Osler could attend every third meeting.

Problems following the Birch hotel agreement

44. On 16 August 2018, Mr Buckland sent Ms Harper an email complaining about the Claimant. In essence, he alleged that the Claimant had been badmouthing him to client MM. It is the Respondent's position in this litigation that the Claimant had badmouthed Mr Buckland to both client MM and client R. In the course of the hearing we were quite unclear as to what it is that the Claimant was alleged to have said to those clients about Mr Buckland. The judge asked Mr Paulin what specifically the allegation was and he was only able to say, in essence, that the Respondent only had the Claimant's account of those conversations. However, we note that the Claimant's account is that she did not bad mouth Mr Buckland to either client. Rather they came to her with some concerns about Mr Buckland which on her account she managed sensitively. Mr Paulin criticised the Claimant for not referring the complaints to the equity partners. However, the Claimant's evidence is that she had done so. We accept the Claimant's evidence on the matters set out in this paragraph. No cogent challenge to it has been made. Further it is plain from the email at p341 that the Claimant was in dialogue with Mr Osler about the issues between Mr Buckland and those clients.

45. On 29 August 2018, Ms Williams reported to the Claimant that she had overheard Mr Buckland on the telephone. She reported that he had said some "terrible things" and that he had said that the Claimant's work was "mediocre at best". The Claimant was on holiday at the time so has no direct knowledge of the conversation. In the course of the disciplinary proceedings, the Claimant asked Ms Williams some questions about this event, and the nub of Ms Williams'

answer was that she could not be sure who Mr Buckland had been referring to when she heard him says “mediocre at best”. She could only say that at the time she assumed it was both herself and the Claimant. On balance, we can accept that Ms Williams overheard Mr Buckland saying that someone’s work was mediocre at best, but we are not satisfied that he was referring to the Claimant. He could have been referring to anyone and though Ms Williams assumed at the time he was talking about her and the Claimant, there is no evidence that that was a reasonable assumption. Indeed it seems unlikely that Mr Buckland was talking about the Claimant’s work since based on all we have heard there does not appear to have been any basis for characterising it in the manner alleged.

46. On 30 August 2018, the Claimant emailed Ms Harper having been through the notes of her appraisal. In the email the Claimant complained about the demands Mr Buckland was making of Ms Williams’s time. She also complained that if he was to take leave (and he had some scheduled) he needed to work extra hours in advance. She further complained about the profitability of some conveyancing work that he was paying a referral fee for. She enclosed annotations on the notes of her appraisal.

47. Ms Harper forwarded the message to Mr Osler and Ms Perryman-Best with a concerned email of her own about the complaints the Claimant was raising.

48. On 30 August 2018, the Claimant emailed Mr Osler. She forwarded the email she had sent to Ms Harvey on the same date. She said in the email “*I also understand Mr Buckland is slagging me off still to Hazel even though I am not even in the office…”* - a reference to the ‘mediocre at best’ comment. She said that she felt Mr Buckland was undermining her and wanted her out of the office.

49. In September 2018, the Claimant put a post-note on the wall asking that people did not leave unwashed plates and mugs in the sink. Mr Buckland did take some umbrage at this and regarded it as an instance of the Claimant getting at him. Mr Buckland did indeed later mention this to Ms Cutler (see below).

Whether the Claimant obtained permission to carry out work for another firm

50. In September 2018, the Claimant had an opportunity to take on some weekend work for another firm of solicitors. It involved going to clients’ homes and witnessing clients signing equity release documents. It did not involve the provision of legal or financial advice as such, but it did require the client to confirm that they had received legal and financial advice already. The work attracted modest pay of £50 per client including travel time and expenses.

51. There is a dispute in case about whether or not the Claimant had permission to do this work. We have considered all of the evidence carefully and find as follows.

52. The Claimant spoke to Mr Osler about this matter. She told him that the work involved acting as an agent for another firm to witness the signature of equity release documents. This finding is in part supported by Mr Osler’s own email at p627. He told her that work of this kind was not financially worthwhile for the

Respondent but that it was *"…up to the fee earner concerned as to whether she wished to take on this work."*

53. Beyond that, there was no express discussion about whether if the Claimant did do this work it would be for her own private benefit or whether it would be for the Respondent's benefit (the Respondent sometimes did 'agency work' where it acted as agent for another firm of solicitors). The Claimant took Mr Osler to mean that, since the work was not of interest to the Respondent, but since she was free to do it if she wanted to, she had his permission to do the work privately for her own benefit. For his part, that is not what Mr Osler intended. He meant that the Claimant could undertake the work for the Respondent if she wanted to, even though the work was not specifically of interest to the Respondent because of the low fees.

54. In our view, Mr Osler did not express himself very clearly and we can well understand why the Claimant interpreted what he said as permission for her to carry out this work. The work was of no interest to the Respondent, the fees it attracted were minimal and the message was that the Claimant could do the work if she wanted to.

The Cutler report

55. In an email to the Claimant dated 25 September 2018, among other things, Ms Harper said:

> …"*you seem to want to discredit Mr Buckland whenever possible which is not conducive to a cohesive working relationship.*
>
> *I have discussed this situation with the partners, and we feel the actions taken to date do not seem to have resolved the issues at Hurstpierpoint, but more importantly your concerns.*
>
> *We have therefore instructed an external HR company to meet with you and Mr Buckland (individually) to carry out a fact-find and to report back some possible solutions. We believe this is the fairest way for all concerned and gives a completely impartial appraisal of the situation.*
>
> *This meeting has been booked in for Monday 01.10.18.*
>
> *I hope this gives you some reassurance that your concerns are not going unnoticed and that ODT does want to invest in both you and Hurstpierpoint branch".*

56. The Respondent did not have any in-house employment lawyers. It did, however, have a friendly firm that it referred employment matters to (and which in turn referred other matters to the Respondent.) The equity partners took some basic advice on how to take forward the ongoing tension between the Claimant and Mr Buckland and were advised to get an external HR consultant to investigate and report. Ms Cutler of Cutler & Co was recommended.

57. On behalf of the Respondent, Ms Perryman-Best asked Cutler and Co, Ms Cutler in particular, to assist, in an email of 19 September 2018. The substance of the request is this:

> *The issue we have is with the staff members in one of our branch offices. They are not getting on (which is a very mild version) and are continuously 'reporting' each other to our practice manager / partners without any form of solution (except we imagine they each feel the other should be disciplined). The staff members are both senior and the junior members within the office are now getting drawn into taking sides. We have already had an informal meeting between the two of them to try and decide a way forward but this seems not to have made a great deal of difference and the matter is escalating.*

58. There followed a conversation between Ms Perryman-Best and Ms Cutler. We accept Ms Perryman-Best's evidence that this was quite a general conversation. She did not ask for any particular form of inquiry to be made or for any particular outcome. We also accept the Respondent's evidence more generally that when instructing Ms Cutler, they did not have a disciplinary investigation in particular in mind. They were essentially just handing over to someone else, that they understood to be an expert, to look into their problem and make some recommendations.

59. In so far as it could be said that Ms Cutler was given terms of reference, they were very general and vague. Neither the Claimant nor Mr Buckland were consulted upon the terms of reference. Ms Cutler was sent a selection of documents (those that now appear at p247 – 313). Neither the Claimant nor Mr Buckland were told what documents she had been sent.

60. The Claimant asked whether she needed to prepare anything for the meeting with Ms Cutler. On 28 September 2018, Ms Harper checked with Ms Cutler what the answer to that query was. Ms Cutler advised that no preparation was necessary as the meeting was just an "*informal chat*". This message was passed on to the Claimant.

61. On 1 October 2018, Mr Buckland and the Claimant met individually with Ms Cutler. No notetaker was present at either meeting. If Ms Cutler took notes of those meetings she did not retain them. The Claimant made some notes of her own after the meeting.

62. At the end of the meeting, Ms Cutler told the Claimant she was going to the Haywards Heath office to speak with Ms Harper and Ms Perryman-Best. The meeting with the Claimant lasted from around 2pm to around 3.20pm.

63. Ms Cutler emailed Ms Harper with, what proved to be version 1 of, her report the following day at 15.37. It was three pages long (p362).

64. The analysis of the issues between the Claimant and Mr Buckland were dealt with on a single page. It is worth setting out all that was said:

Thank you for inviting me to meet with Richard Buckland and Margaret Dundas on 1 October 2018 to provide an impartial and objective report giving recommendations on next steps regarding their working relationship and the most effective way to move forward.

In my opinion the issues have arisen due to miscommunication from the Partners as to why Richard was moved to Hurstpierpoint. Richard believes he was told he was moving to sort out issues with Margaret and Michelle. Margaret believes that Richard was providing conveyancing support and Margaret clearly resents the implications of Richards move to Hurstpierpoint and this shows no sign of abating.

Richard was clearly upset by the current working environment and gave examples of how he has been ostracised by Margaret and how he feels that Margaret and Michelle are 'ganging' up on him. It was evident that this is taking a toll on Richard's health and impacting on his work. I asked Richard what he would like to happen moving forward. Richard explained that he would like the situation resolved, Margaret to work with him in a happy and nice environment and respect him as a Manager. Richard also explained that Harvey will need to support him with his Managing of Margaret and Michelle and back him up.

In my opinion Margaret is unmanageable. Margaret constantly referred to Richard as 'him' and when I asked what she would like to happen going forward she explained that she did not know. I asked Margaret if she accepted that Richard would need to manage her in the future and she was adamant that she would not be line managed by Richard. Margaret explained that she has contacted recruitment agencies and they have advised that it is a difficult job market at the moment and that her salary could not be met elsewhere. Margaret explained that she could not afford to move to another job on less money. Margaret has sought legal advice about the current working situation. Margaret also advised that her GP had offered to sign her off from work, but she had declined this.

It is my opinion that Richard should not be disciplined or have any penalty issued as a result of the current situation between himself and Margaret. I believe Margaret's conduct is unprofessional and as a small business you cannot sustain the detrimental impact that this is having on the business and risk of further damage to the company reputation.

65. On the second page of the report were three options. It said this:

In my opinion you have the following options:

1. Settlement Agreement

Offer Margaret six months salary to leave under the terms of a Settlement Agreement.

2. Manage conduct through a Performance Improvement Plan

This can be time consuming and may not result in an improvement in Margaret's conduct in the longer term.

3. Dismissal

If you were to dismiss without following a disciplinary process, this would automatically be classed as unfair dismissal.

66. The remainder of the report gave generic information about employment tribunal claims. There was no explanation at all as to why the settlement payment would be six month pay rather than any other figure.

67. The report was considered by the Equity Partners. Mr Barnes who is a litigator took the lead. There was some shock all round about two matters. Firstly, the incredibly stark/serious conclusions that the report reached – essentially that the Claimant alone was to blame and her employment needed to be terminated or she needed to be performance managed. Secondly, given its conclusions, how incredibly thin the report was in all its aspects including its fact finding and reasoning.

68. We note (because there is a specific allegations about this) that the Claimant complains that the report refers to the impact of the workplace problems on Mr Buckland's health but does not refer to the impact of the workplace issues on her health. This not really fair since the report does refer to the Claimant's GP being willing to sign her off but her declining, with the context making clear that it was the Claimant's case that this was work-related.

69. On 2 October, Ms Harper sent Mr Barnes an email with a proposed message to Ms Cutler. It said:

"I've spoken with the partners and we feel that to evidence that we have followed a process, that the report would benefit from being more structure along the following lines:

- Explain how we got to this point – for example, what steps ODT have carried out themselves to attempt to resolve the situation, including the nature of the complaints from each party, and why we decided to bring in an external consultant.
- We want to show that this is the final piece of the process, and that we engaged yourself as a completely impartial consultant to interview both parties and to investigate their complaints.
- From your discussions, the reasons why each of the options open to us may or may not work, and why. This is based on non-binding findings from language used, evidence of correspondence that you have seen together with your experience.
- After considering all of the above, the recommendations that you would make to the business, together with the likely consequences of the same.

I know you are very busy, and that is completed appreciated, but we want to bring this matter to a swift conclusion, and as such, if you are able to provide this to us by close of business on Wednesday, that would be greatly appreciated, however, if that is not feasible, please advise how soon this could realistically be achieved.

70. Mr Barnes was not certain whether he approved this email or not nor whether it was sent to Ms Cutler or not. On balance thinks he did and it was and we so find.

71. Also on 3 October 2018, Mr Barnes annotated version 1 of the report with tracked change following consultation with the other equity partners. He added numerous headings to the report and under each heading identified matters for the report to deal with. He also asked for further information and clarity in relation to a number of issues as well as for the report to explain why it had reached the views it had, such as why it said that Claimant was a risk to the Respondent's reputation. Mr Barnes also removed the word "unmanageable" in relation to the Claimant because thought it was unnecessarily harsh. He also deleted the reference to six months salary and replaced it with *"an amount of money on a WOP basis"*.

72. The Claimant indicated that she was happy to meet with Ms Cutler again. Ms Cutler did try to call the Claimant on 3 October 2018, but missed her. No further meeting was set up.

73. On 4 October 2018, Ms Harper sent the marked up version of the report to Ms Cutler. Her email stated

> *"Following my message yesterday, I've had the details back from Paul, he is our partner who is head of litigation. He has requested a bit more information in the report and has made some tracked changes to show you what he is looking for.*
>
> *Would you mind adding in these extra bits please, and then forwarding it back to me.*
>
> *As discussed before, we are hoping to conclude this matter as soon as possible, which is the fairest approach for everyone, so if it possible to complete this at your earliest opportunity, that would be appreciated*." P388.

74. Also on 4 October 2018, Ms Harper wrote to the Claimant and stated:

> *"TC will now review her note and write a report, this will include suggestions for a way forward. The partners will then review these suggestions and then decide on what the next steps are. Obviously, this may take a little while and it is important to allocate this time to ensure careful consideration is given to Tammy's suggestions."*

75. On 5 October 2018, Ms Cutler sent the Respondent a second version of the report (p382). The report was amended in some of the ways Mr Barnes had requested.

76. There was then a meeting of partners in which it was agreed that further clarification and explanation was needed for the views expressed in the revised report. Mr Barnes' oral evidence is that a telephone conversation took place between Ms Harper and Ms Cutler in which Ms Harper elicited further detail about Ms Cutler's views. There are no notes of this conversation. After that, in an un-noted meeting the equity partners made tracked changes to the second draft of

the report and these were sent back to Ms Cutler for consideration on 16 October 2018, (p391). There are a lot of additions some of which are substantive rather than simply requests for further information.

77. Mr Barnes' evidence was that some of the changes to the second version of the report reflected the conversation between Ms Harper and Ms Cutler and some were additions the partners made themselves. He considered these to be justified because Ms Cutler was ultimately happy to put her name to them. He was unable to remember which changes were which.

78. On 22 October 2018, Ms Cutler sent the Respondent a third version of the report. It incorporated the changes that Mr Barnes had made and answered some of the further queries.

79. A fourth and final draft was then produced by Ms Cutler, which was in like terms as the third draft, save that the employer's options (settlement, performance management, dismissal) were removed.

Claimant's conduct towards Mr Buckland

80. It is necessary to break from the chronology to make some findings of fact of our own about the Claimant's attitude towards and conduct towards Mr Buckland.

81. As noted above, we do find that the Claimant was resentful of Mr Buckland coming to the Hurstpierpoint office. Although she could see the case for a further partner at the office she wanted to be that partner. Mr Buckland's arrival made this less likely to happen, at least in the short to medium term.

82. We find that in the meeting with Ms Cutler the Claimant did say that she would not be managed by Buckland. Although the Claimant's case is that she did not say this, and although there is conflicting evidence, on balance we think she did. In Ms Cutler's response to questions put to her by the Claimant, Ms Cutler is clear that this is what the Claimant said. Moreover, when the Claimant first responded to this allegation in the letter of 7 January 2019, notably absent from her response is an averment that she had not said this to Ms Cutler this. On the contrary what she does say is consistent with her not wanting to be managed by Mr Buckland and in turn consistent with that being the position she adopted at the meeting with Ms Cutler.

83. One of the criticisms of the Claimant is that she 'ganged up' on Mr Buckland with Ms Williams. The expression 'ganging up' is a difficult one to assess because it has no fixed meaning. We accept that until at least December 2018, the Claimant and Ms Williams had quite a close working relationship and that they did discuss and share concerns about Mr Buckland. Ms Williams did bring concerns about Mr Buckland to the Claimant and the Claimant in turn would raise them with Ms Harper and/or Ms Perryman-Best and/or Mr Osler. The Claimant also would share her concerns about Mr Buckland with Ms Williams. Altogether she did

cross the line of what was appropriate workplace dialogue. For example, the Claimant referred to Mr Buckland as a '*shit'* in a text message to Ms Williams. Likewise Ms Williams in a text message to the Claimant referred to Mr Buckland "*giving me the usual bullshit*".

84. However, this was far from being a one-way street. We accept the Claimant's evidence that she was told by Ms Williams that Mr Buckland complained about her (the Claimant) and this is likely to be because he did.

85. The Claimant is also criticised for saying negative things about Mr Buckland to clients. As set out above, we reject that criticism on the facts: the Claimant did not speak negatively about Mr Buckland to clients.

86. The Claimant is criticised for referring to Mr Buckland's sexual orientation as "them". The evidence suggesting that she did this is very thin – it is limited to what is said in the Cutler report. However, we have not heard from Ms Cutler, there are no notes of her interview with Mr Buckland and we have not heard from Mr Buckland. It is also clear that this allegation was never put to the Claimant by Ms Cutler (see e.g. question 20 and 21 that the Claimant put to Ms Cutler and the answers). It is also clear that the Claimant denies the sting of this allegation (that she was in some way homophobic), not least in her response to the Cutler report (p715). We take into account the fact that the Claimant did refer to some gay clients as "those lovely gay boys" but we do not think that means or infers that she referred to Mr Buckland's sexuality as "them". On balance we do not accept that the Claimant did refer to Mr Buckland's sexual orientation as "them".

87. The Claimant was criticised for making pointed comments in the office about washing up, making drinks, paying for cakes and biscuits in relation to Mr Buckland. Likewise for saying he had bought house in the village so was staying put. We find that the Claimant did make these comments.

88. The Claimant was criticised for trying to instigate a state of affairs in which either Mr Buckland would leave the firm or she would be in a position to pursue a claim for constructive dismissal. In a similar vein she was criticised for deliberately instigating situations so that Mr Buckland lost his temper or showed that he was exasperated. We reject those criticisms:

    88.1. There were difficult and unhappy interactions between the Claimant and Mr Buckland, but they were not manufactured by the Claimant to make Mr Buckland lose his temper or at all. Further, Mr Buckland, like everyone else was responsible for holding his own temper in the workplace.
    88.2. The Claimant's position from an early stage was that *she* would leave if she found another satisfactory job. Essentially that was the route out of the problem that she saw. She was not trying to push Mr Buckland out or to manufacture a constructive dismissal claim.

89. The Claimant is criticised, more generally, for "bullying" Mr Buckland. We do not accept this characterisation:

    89.1. The was no imbalance of power between the Claimant and Mr Buckland – certainly she was not more powerful than him;
    89.2. There was a difficult relationship between the pair and the did both regularly raise concerns about the other. However, in our view it was very much six of one and half a dozen of the other.

Disciplinary charges laid / sickness absence begins

90. We now return to the chronology.

91. On 5 November 2018, the Claimant emailed Mr Buckland and made a number of complaints about him. Her central point was that Mr Buckland did not attend Monday morning meetings. She said he was not promoting teamwork in the branch, not assisting with general day to day management and that he was potentially breaching the agreement from Birch Hotel.

92. On 9 November 2018, Ms Harper sent the Claimant the final version of the Cutler report. The cover email said the report raised serious concerns and that the Claimant should have a chance to respond. It invited her response by 14 November 2018. The Claimant was shocked and distressed by the content of the report.

93. On 9 and 12 November 2018, the Claimant went to Mr Buckland's office and asked for a quiet words about Ms Cutler's report. She shut the door and, we infer, was comfortable being alone in his presence. The Claimant asked Mr Buckland if he would meet with her and Ms Harper in relation to the Cutler report and he agreed to.

94. On 6 December 2018, the Claimant went to Mr Buckland's office and initiated a private conversation with him. He was stressed and feeling overworked. He said to the Claimant that he could not carry on for another 8 months working under the same conditions. The Claimant said 'nor could I'.

95. On 11 December 2018, Ms Williams reported to the Claimant that Mr Buckland had told her that his work had to take priority that day over the Claimant's and that she therefore could not work on an urgent report for the Claimant. The Claimant was concerned by this considered it a breach of the Birch Hotel Agreement.

96. On 11 December 2018 the Claimant sent Ms Williams a text message in the following terms (554):

> *Well he is a partner so he needs to sort out his own stress not take it out on everyone else and expect us all to have to have a horrific working environment and let alone having to suffer personally health wise and otherwise-why should Andy Finley and Lou have to put up with us at home*

and the fact certainly I am not doing all I should be for Andy and Finley because I am so stressed out about work etc-he is a shit and he needs to start to work as a team and be reasonable and realistic in the treatment of us all. He just wants to look big but if he is making so much money why have they not got an assistant in for him does not make sense unless they really do want me out-so they should be suggesting an exit agreement for me to let us all get on with our lives with some sort of certainty but they are not going to have me over whatever .... Their treatment of you and Ms Christmas is despicable and if they are not careful they will get a bad name I have already had a couple of agents tell me they get very mixed reviews from candidates as to OPT and their treatment of staff, x"

97. The Claimant went into the office and telephoned Ms Perryman-Best. Ms Perryman-Best explained that she was extremely busy and was covering her own work and Ms Harper's while she was away. The Claimant responded that she did not care whether Ms Perryman-Best was stressed as it had been her choice to become an equity partner. The Claimant admits raising her voice in the call. Ms Perryman-Best puts it higher and says that the Claimant shouted at her. On balance, on we accept Ms Perryman-Best's evidence on this matter. It is supported by a contemporaneous file note and we found her oral evidence on this point credible.

98. On 17 December 2018, the Claimant saw her GP. The GP wanted to sign the Claimant off but she declined.

99. On 18 December 2018, the Claimant arrived early and found a courier at the office waiting to collect a faulty telephone. The Claimant spent some time investigating which telephone was for collection but was unable to find out which. This wasted a fair amount of her time. When Mr Buckland arrived at work she went to his office to confront him. She was angry and we think the confrontation is likely to therefore to have been an angry one. She said that he should tell her if something needed to be collected. Mr Buckland, having just arrived at work himself, was no doubt put out by this angry confrontation. The Claimant says that Mr Buckland sat behind his desk laughing and sneering at her and that he said that the Claimant was not usually in the office much before 09.45. We find that it that Mr Buckland dealt with this angry confrontational way in which the Claimant presented by laughing and making that comment about her not usually getting into the office before 09.45. That was a kind of a sneer.

100. The Claimant then reported this matter to Mr Osler. She said she could not go on working "like that". She said the working conditions for Ms Williams and Ms Christmas had gone beyond being "funny". The Claimant then spoke to her GP, asked him to sign her off and then left the office.

101. Later on 18 December 2018, the Respondent wrote to the Claimant was invited her to a disciplinary hearing scheduled to take place on 20 December 2018. The charges were as follows:

101.1. Your conduct towards Richard Buckland amounts to bullying and victimisation.

101.2. You refuse to be managed by Richard Buckland.
101.3. You have not adhered to the agreement made on 9 August 2018 which was believed to be a reasonable compromise, expressly agreed by you, and necessary to normalise your working relationships particularly with Richard Buckland.
101.4. Your actions towards Richard Buckland have caused irreparable damage to your relationship with your manager and colleague and as such have seriously undermined the relationship of trust and confidence between you and the firm.
101.5. On Tuesday 11 December 2018, you shouted at Kirsty Perryman-Best, an equity partner in the firm, and were aggressive in your manner. Further, you once again complained about Richard Buckland in a manner that breached the August agreement.

102. The letter also said

The basis for these allegations arise from telephone calls and correspondence from yourself and from Richard Buckland resulting in our informal meeting on 9 August 2018 and further investigation by Cutler & Co following their meetings with yourself and Richard Buckland on 1 October 2018.

You have already been provided with a summary of the findings of Cutler and Co which sets out further detail in respect of many of these points. We have not received any response from you to the specific points within the report but merely a request for a further meeting between yourself, Hazel Harper and Richard Buckland which is not felt appropriate in the circumstances particularly considering the history leading up to this point. Further, we are concerned that your conversation with Kirsty on Tuesday 11 December 2018 makes us concerned that you have no intention of modifying your conduct going forward. You would invite you to address this issue in the disciplinary hearing.

We do not intend to call any witnesses to the hearing. If you wish to call any relevant witnesses to the hearing please let us have their names as soon as possible. If there are any further documents you wish to be considered at the hearing, please provide copies as soon as possible. If you do not have those documents, please provide details so that they can be obtained.

103. The Claimant's GP certified her as unfit for work on 18 December 2018 with depression and anxiety due to stress at work for two weeks ending on 31 December 2018.

The disciplinary process

104. On 19 December 2018, the Claimant responded to the invitation to the disciplinary hearing stating that she was not fit to attend the hearing. She objected to Mr Buckland chairing the hearing and complained that the allegations were not adequately particularised. She asked for further information, 428. *Under a sub-heading 'Without Prejudice' she proposed a settlement and said "whatever*

the outcome of any disciplinary hearing, it is impossible for me to remain as a member of staff at this firm". She proposed a settlement agreement that included severance.

105. On 21 December 2018, Mr Barnes wrote to the Claimant and said that he expected her to attend the disciplinary hearing on 3 January 2018 unless a further fit note was provided. He said that the documents the charges were drawn from would be provided in advance of the meeting. *Mr Barnes said that the Respondent was not in a position to offer any form of settlement.*

106. On 21 December 2018, the Claimant responded to Mr Barnes. She stated that even if she was medically fit for a disciplinary hearing in the new year, she would require time to prepare and her advisor would not be able to commence work until 2 January 2019. *Under the heading 'Without Prejudice' the Claimant returned to the issue of settlement. She said that he had received a provisional job offer and that it was dependent on references. She proposed the outline of an offer of settlement that included severance.*

107. The Respondent adduced in evidence a screenshot of what appears to be the Claimant's Facebook page. The screenshot is said to have been taken by Ms Harper shortly before this trial. The screenshot shows an entry dated 1 January 2019 that states "*Left Job at ODT Solicitors*". The Claimant denies ever posting that on her Facebook page. On balance we think it is likely that she did, since this document exists. It seems most unlikely (and has not been alleged) that the document is an outright fabrication. The most likely thing is that the Claimant posted this and over time forgot she had done so. For the avoidance of doubt the Respondent was not aware of this post contemporaneously.

108. On 2 January 2019, Mr Barnes wrote to the Claimant. He noted that she could not attend the disciplinary hearing and indicated that he did not think it was appropriate to delay it unduly. *In the remainder of the letter he responded to the offer of settlement. Essentially he indicated that the Respondent would provide the Claimant a standard factual reference and pay for her to have independent legal advice so as to facilitate a settlement agreement. He enclosed a draft reference and draft settlement agreement. He did not agree to the Claimant being placed on garden leave in the meantime.*

109. On 2 January 2019, Mr Capek wrote to Mr Barnes on the Claimant's behalf. He said that the disciplinary charges needed to be particularised before a hearing could take place and that agreement needed to be reached as to who should be the chair. He contended that Mr Barnes himself was insufficiently independent. He asked that Ms Williams, Mr Buckland, Ms Perryman-Best and Ms Harper attend any hearing or that questions be put to them in advance. In the meantime he stated that the Claimant did not wish to be signed off further by her GP but that she would not return to work at Hurstpierpoint while Mr Buckland was there. He proposed:

109.1. Working from home, provided that any materials were brought to her by someone other than Mr Buckland;
109.2. Using leave entitlement for 2019 to cover her absence;

109.3. Suspension on full pay.
109.4. *A settlement proposal was also made.*

110. Mr Barnes responded on 4 January 2019. He stated that as the Claimant was now fit for work her absence would be treated as unauthorised. He stated that the Claimant could not chose her line manager so would be managed by Mr Buckland. He said that no agreement on the chairperson of the disciplinary hearing was needed – he would be chair. He said that he was not prepared to suspend the Claimant on full pay and that she could use her annual leave but if she did so and if she were later dismissed any leave taken in excess of entitlement would be recovered. He said the Claimant could not work from home because the work would be unsupervised, there would be no vetting of her IT arrangements and it would not comply with obligations under GDPR. *He stated that settlement was a good idea and that the offer the Respondent had previously made remained open until the end of the day. He rejected the Claimant's offer to settle.* He stated that the disciplinary hearing would take place on 14 January 2019 and enclosed a zip file of documents as follows:

221. PB also provided a "zip file" of 34 pages which consisted of the following documents:

Email from myself to HH dated 19.07.18
Email from HH to me dated 20.07.18
Email from me to HH dated 31.07.18
Undated document written by me entitled *"HPP Points causing issues in HPP"*
Pre-appraisal form dated 31.07.18
My completed appraisal dated 03.08.18 (this was included twice - I do not know if the two versions were different)
Notes of the meeting on 09.08.18 (this was the first time I had seen this document)
Email from me to HH dated 30.08.18
Email from HH to me dated 25.09.18

111. On 4 January 2019, Mr Capek responded to Mr Barnes. He said it was not appropriate for Mr Barnes to chair the disciplinary hearing because he was a close friend of Mr Buckland's and had arranged for him to transfer to the Hurstpierpoint office. He pointed out that the Claimant had worked at home on a number of occasions in the past. *The email also argued that a sensible settlement remained the best course and that it would be difficult, including for the Respondent if the dispute protracted.*

112. On 7 January 2019, the Claimant was assessed by her GP. The sick-note records that the Claimant had depression and anxiety due to stress at work. It indicated that she may be fit to work from home but was incapable of returning to the office environment in light of ongoing workplace issues, unless they were resolved. The sick-note covers the period 7 January to 6 February 2019.

113. On 7 January 2019, Mr Capek wrote again. He referred to the Claimant's recent fit-note and said it strengthened the argument for pay in her absence. He said the Claimant had worked from home whenever necessary. Mr Capek said that the documents provided (on the zip file) were inadequate and did not evidence charges 1, 2 and 4. He asserted that the Claimant could not, nor could she be expected to, defend herself against unparticularised charges. He said that Ms Cutler's report was inadequate in various ways. In response to allegation 2,

that the Claimant refused to be managed by Mr Buckland, Mr Capek set out the Claimant's response:

". . . ODT have failed to deal with the issues in Hurstpierpoint and this is culminated in my current situation. I cannot be expected to walk back into an environment whereby there was no changes to ensure my safety and security within the workplace. Since the incident in August which instigated the meeting in Haywards Heath, I am petrified to be in the office particularly alone with RB and this is not conducive to a happy working environment. Further it is not conducive for both RB and I to have to monitor each other the way we have both been told to do this. This cannot enable a happy working or safe environment for either of us.

In actual fact, I feel completely intimidated by the whole situation and I cannot be expected to have to work under these conditions. They have failed in their duty of care to me as an employee to provide that safe working environment and have by their actions made the situation worse, and frankly as a result I do not believe even RB would wish to carry on under these circumstances. He told me on 13.12.18 that he could not carry on working the way we were for another 10 months as he agreed that his health was being affected also. I have a more detailed note of my conversation with him that morning but needless to say was at the lowest I have been in many years and felt suicidal and this is not how I should be when in the workplace."

114. Mr Capek said that the parties were not ready for the disciplinary hearing scheduled for 14 January 2019.

115. Mr Capek wrote again on 11 January 2019, 463, stating that the Claimant would not attend and disciplinary hearing until she received a properly detailed statement of case supported by evidence. He stated that following the Cutler report there ought to have been an investigation in accordance with s.3 of the Respondent's disciplinary policy. He asserted that the Claimant should be allowed to work at home and as she was not at fault but unable to work at Hurstpierpoint.

116. *The remainder of the letter was under the heading without prejudice. This was initially redacted from the copy in the bundle but the parties handed up the unredacted version in the course of the hearing. The offer was for the Claimant to be paid three months salary (i.e. up to the end of March) for her to leave employment as soon as possible. Under that heading Mr Capek said that the job the Claimant had referred to on 21 December 2018 had not materialise. It also stated that she was exploring working with a firm on a self-employed basis under a franchising arrangement. This would not generate income for about three months and she was unable to seek locum work whilst an employee of ODT.*

117. 14 January 2019, the date scheduled for the disciplinary hearing, came and went without any response to Mr Capek's correspondence or further communication with the Claimant.

118. On 17 January 2019, Mr Capek wrote again. *For the most part the letter dealt with pre-termination negotiations. Mr Capek indicated that the Claimant's preference was for a settlement agreement or alternatively to be given notice and placed on garden leave.* He asserted the Claimant's right to pay in the meantime and asserted that the disciplinary allegations needed to be fully particularised.

119. On 24 January 2019, Mr Barnes wrote to Mr Capek. He said that he was the appropriate person to chair the disciplinary hearing and implied he was not a close personal friend of Mr Buckland's. In relation to homeworking he agreed that the Claimant had worked from home on occasion but said that GDPR had had an impact on home working and that it would not be appropriate for the Claimant in particular to work at home, with the Respondent's files, unsupervised. Mr Barnes commented that the Claimant's fit note showed that she was not unwell. He also stated "*leaving to one side the question of how her GP would have been able to make these comments based on a brief consultation*" the current situation might amount to frustration of the contract. He suggested that the resolution to the Claimant's inability to work with Mr Barnes or at Hurstpierpoint was through the disciplinary process. Mr Barnes pointed out the Claimant had not responded to the Cutler report when she had been given the opportunity to. He asserted that the Claimant had been provided with sufficient material to prepare for the hearing. He said that the Respondent would not be "*providing witness statement, a statement of case or live witnesses at the hearing*." He invited the Claimant to provide written questions to the firm or to Ms Cutler. He stated that as the Respondent had not responded to Mr Capek's previous correspondence by 14 January 2019, the disciplinary hearing that had been postponed. Mr Barnes said that the Claimant was entitled to one week of sick pay in additional to SSP (as this was the Respondent's practice) and that this would be applied to her absence of 7 – 11 January 2019. He said that the absence over the course of 2 – 4 January was treated as unauthorised. He asserted that she had no greater entitlement to pay than that whilst off sick.

120. Mr Barnes raised a further disciplinary allegation (which became known as the 'moonlighting allegation'). He said that clause 10 of the Claimant's contract of employment prevented her from having any outside interests and required her to disclose an outside interests that might conflict with the firm's interests. He said that he had interviewed Mr Osler and Mr Osler *"had no recollection of any such conversation with the Margaret or that he consented to her doing this kind of work 'on the side' or at all."* There is no record of this interview.

121. Mr Barnes said that the disciplinary hearing would proceed on 7 February 2019 in the Brighton office. He said that if this was not a satisfactory venue the Claimant should suggest an alternative.

122. *In this letter Mr Barnes also addressed settlement. In short, he implied that the Claimant was avoiding the disciplinary hearing as a way of trying to leverage the Respondent. He rejected any offer of settlement.*

123. Enclosed with that letter was a document titled '*Notes re. MLD'* dated 8 January 2019. The Respondent's case is that it was written by Ms Williams. In summary:

123.1. It portrayed the Claimant as the primary problem in the relationship between her and Mr Buckland;
123.2. It stated "*Her opinion of Mr Buckland has been discussed with at least one long established client, MM, and also at least 2 or 3 estate agents that I am aware of. MLD confirmed that she had received an email of complaint*

from SA at R (she did let me read it on screen) regarding Mr Buckland, although unfortunately, I cannot recall exactly what was said in the email. I have consistently told MLD that she should not discuss these issues outside the office.

123.3. It described a discussion between the Claimant and Ms Williams in which the Claimant had told Ms Williams that she had been approached and offered work certifying ID in relation to equity release documents. She recounted that she told the Claimant that she needed permission from the Respondent to do this and in essence, that the Claimant went and spoke to Mr Osler and returned stating she had permission.

123.4. It said: "*Unfortunately, upon reflection and without MLD being here, I feel that the majority of issues which MLD has raised were unfounded and indeed, were a figment of her imagination. Mr Buckland has occasionally snapped at MLD but I have not always been present when they interacted so cannot say whether it was justified or not*."

124. In her oral evidence the Claimant said that in a telephone conversation with Ms Williams in early January 2019, Ms Williams told her that Mr Osler had edited and written parts of the above account. In his evidence Mr Osler denied that he had done so. On balance we do not accept the Claimant's evidence on this point and we do accept Mr Osler's:

124.1. On the one hand we can see that the content of this statement is somewhat surprising because hitherto Ms Williams had, broadly speaking, been more on the Claimant's side of the dispute than Mr Buckland's.

124.2. On the other hand, however, the first time the Claimant alleged that she had been told by Ms Williams that Mr Osler had edited and written parts of the statement was in her oral evidence to the tribunal. If indeed Ms Williams had told her this in early January 2019, it seems extremely surprising that the Claimant did not mention this in the course of the internal disciplinary process that had a long way to run at that point or in her tribunal claim form and/or her tribunal witness statement. Notably in the internal process the Claimant put hundreds of questions to Ms Williams and Mr Osler and she did not ask them about this matter in those questions. The Claimant's witness statement in this claim is also very lengthy and notably does not include this allegation.

124.3. On balance we think it is more likely that Ms Williams did not tell the Claimant that Mr Osler had edited/written the statement and we accept Mr Osler's evidence that he did not do so.

124.4. Mr Osler's evidence which we accept, is that Ms Williams came to him and told him that she had some important things to say about the Claimant. He told her, if so, she should put those points in writing and that is how Ms Williams written account came about. It seems likely that Ms Williams may have reported this to the Claimant and the Claimant over time misconstrued that as Mr Osler having some input or influence over what was actually written.

125. On 25 January 2019, the Claimant telephoned Mr Osler. In the course of the call she asked Mr Osler to try and persuade Mr Barnes to agree a settlement. There was a discussion of the Claimant's current work situation. There is some dispute about what was said. We find that the Claimant said she was ready and wiling to work but not at the Hurstpierpoint office because she would not work with Mr Buckland. This is consistent with her evidence and Mr Osler's contemporaneous note of the conversation. The real dispute is over whether Mr Osler, as he says in his witness statement, "*informed her that she would be able to work in another office of the Respondent as she was able to work and remained an employee*" or whether he simply said she could ask to work in another office. We find it was the latter which is consistent with the Claimant's evidence and Mr Osler's contemporaneous attendance note. The Claimant's response was that she could work in another office due to her other commitments, by which she meant and Mr Osler understood her to mean, her childcare commitments.

126. As to whether the Claimant was prepared to work at another office, we find that she was not. Her evidence to us was no higher than that she would have had to seriously consider the same had it been directly offered to her. However, we think it is clear from her answer to Mr Osler's suggestion that she ask to work from another office and from the fact that she did not do so despite the *impasse,* that she was not prepared to work from another office.

127. On 25 January 2019, Mr Capek wrote to the Claimant again. *He set out some benign reasons as to why logically settlement was the best course. These reasons were essentially typical economic ones coupled with, he said, a strong case in the employment tribunal if the Claimant were summarily dismissed.* Mr Capek also responded to the moonlighting allegation. He said that the Claimant had permission from Mr Osler to undertake freelance work in her own time at weekends witnessing the signing of equity release agreements. He said that her fee was £50 per assignment and that she was insured by the firm for whom she undertook the work.

128. On 30 January 2019, Mr Capek wrote to Mr Barnes again. In summary he:

128.1. Said more time was required to set out questions for witnesses, that Ms Cutler needed to attend the hearing, that a different venue was needed and he suggested the Birch Hotel.
128.2. He asked for the hearing to be tape recorded and transcribed. for permission to attend (he is not a trade union representative nor work colleague), for the hearing to be postponed to 14 or 15 February.

129. On 31 January 2019, the Claimant submitted 150 questions for Ms Williams and 72 for Ms Cutler.

130. Mr Barnes, wrote to Mr Capek twice on 5 February 2019. *In the first letter He rejected the Claimant's efforts to settle and gave reasons why he did not think Mr Capek's arguments had been good ones.* In the second letter:

130.1. He attached Ms Williams's answers, such as they were, to the Claimant's questions. She answered some questions and declined to answer many others;
130.2. He told the Claimant that if Ms Cutler were to attend she would have to pay for Ms Cutler's attendance at the rate of £95 plus VAT plus travel time plus travel expenses, and likewise that the Claimant would have to pay Ms Cutler's hour rate for her to answer questions;
130.3. He said the hearing would go ahead on 7 February 2019 in the Claimant's absence if needs be but if the Claimant attended he might adjourn the hearing to a later date to allow questions to be answered.

131. The letter did not deal with the request to alter the venue for the hearing, the request for Mr Capek to attend, nor the request for the hearing to be recorded and transcribed.

132. Mr Capek responded on 6 February 2019. He:

132.1. *Argued that Mr Barnes' attempt to rebut his arguments in favour of settlement were not well founded. The tone and content of the points made are entirely typical and do not have the slightest shade of impropriety of any description;*
132.2. Expressed great surprise at the suggestion that the Claimant should pay for Ms Cutler's attendance.
132.3. Stated the Claimant would not attend the disciplinary hearing because she and he were nowhere near ready and because the three matters noted above had not been responded to.
132.4. Stated it was essential for he and the Claimant to be given time to prepare a bundle of documents, a statement for the Claimant and written submissions.

133. The disciplinary hearing went ahead in the Claimant absence on 7 February 2019. It was heard by Mr Barnes and Mr Gibbons.

134. The Claimant obtained a further fit-note covering the period 31 December 2018 – 6 January 2019 signing her off with stress at work. This fit-note was obtained retrospectively following a consultation with the GP on 13 February 2019.

135. Following the disciplinary hearing, the outcome letter was sent on 18 February 2019:

135.1. It contended that it had been procedurally fair to proceed with the meeting;
135.2. In relation to *Charge 1: Your conduct towards Richard Buckland amounted to bullying and victimisation.* It gave a very strong indication that the charge was found proven but said a final decision would be made once a response was received to the questions posed to Ms Cutler. The letter indicated that the Claimant would not after all be charged for Ms Cutler's time.

135.3. In relation to *Charge 2: You refused to be managed by Richard Buckland.* The allegation was found proven.

135.4. In relation to *Charge 3: You failed to adhere to the agreement made on 9 August 2018 which was believed to be a reasonable compromise, expressly agreed by you, and necessary to normalise your working relationships, particularly with Richard Buckland*. The letter gave a very strong indication that the charge was thought to be proven but said that a final decision would be deferred for the same reasons as charge 1.

135.5. In relation to *Charge 4: Your actions towards Richard Buckland caused irreparable damage to your relationship with your manager and colleagues and, as such, seriously undermined the relationship of trust and confidence between you and the firm.* This allegation was said to have been made out on the basis that the Claimant had made homophobic remarks towards Mr Buckland and flatly refused to be supervised by him. The determination of a further factual allegation in support of the charge, that the Claimant had made comments about Mr Buckland behind his back to clients, was deferred pending the Claimant commenting on Ms Williams's answers to her questions. However, the stated: "*Of more importance however is that we would not feel able to continue in a relationship of mutual trust and confidence with somebody who was not prepared to respect Richard's sexuality and our policies on equality and diversity which we consider to represent core values of our approach as a firm.*" Later in the letter, it purports that a final decision on whether the charge was made out was postponed. That is not consistent with the passage quoted above which makes clear that the charge was said to be proven and what was postponed was simply whether there was an additional basis supporting the charge.

135.6. In relation to *Charge 5: On Tuesday 11 December 2018, you shouted at Kirsty Perryman-Best, an equity partner in the firm, and were aggressive in your manner. Further, you once again complained about Richard Buckland in a manner that breached the August agreement.* The letter said that on a "preliminary basis" the charge was likely to be made out but that as the Claimant may not have seen Ms Perryman-Best's attendance note of the conversation the decision was deferred.

135.7. In relation to the *moonlighting allegation*: It came down to whether the Claimant had permission to do the work. The letter said this: "*We spoke to Mr Osler during the meeting at which you did not attend to take his evidence on this point. He vaguely recalled having had a conversation with you regarding the possibility of you doing this work through the firm and recalls confirming that he would have no issue at all with ODT Solicitors acting as agent for another firm in certifying ID / witnessing documents etc, but he was clear that he had no idea that you intended to do this work on your own account or to divert the fees away from the firm."* It adjourned a decision pending the Claimant having the opportunity to put questions to Mr Osler.

136. The letter ended with a timetable for the next steps which essentially involved further questions, answers and comments on them. The Claimant was given a

deadline for providing a witness statement herself. The disciplinary hearing would resume on 18 March 2019 at the Brighton office. The Claimant was told she could be accompanied in accordance with statutory rights which did not include being accompanied by Mr Capek.

137. Mr Capek responded on 25 February 2019. He alleged that the procedure followed to date was unfair in various respects. There was a particular focus on the allegations being unparticularised. He indicated that further questions to witnesses would shortly follow. He asked again for the disciplinary hearing to take place a neutral venue.

138. Between 7 and 13 March 2019 the Claimant provided a number of versions of her witness statement for the purpose of the disciplinary process.

139. *On 13 March 2019 Mr Capek wrote to Mr Barnes and indicated that the Claimant continued to want to settle the matter "rather than continue with a messy disciplinary process that will become extremely protracted and which is likely to end in the Employment Tribunal".*

140. By a further letter misdated 18 February 2019 and actually dating from around mid-March, Mr Barnes wrote to Mr Capek and enclosed:

140.1. Answers to the Claimant's questions from Ms Cutler;
140.2. Answers to the Claimant's questions from himself;
140.3. Answers to the Claimant's questions from Mr Osler (who answered only a couple of the many questions posed);
140.4. An email from Mr Buckland in which he declined to answer any of the questions the Claimant had posed him;
140.5. Answers to the Claimant's questions from Ms Perryman-Best.

He also stated the hearing would be at the Brighton office.

141. On 14 March 2019 the Claimant in response to Mr Buckland's refusal to answer her questions wrote: *Considering everything that has happened would he seriously want me to go back to work alongside him? There is absolutely no way that I would agree to this - therefore his reason for refusing to answer my questions is invalid.*

142. By the time the disciplinary hearing resumed, among other things:

142.1. The Claimant posed 60 questions to Ms Perryman-Best, they were answered by Ms Perryman-Best and the answers commented upon by the Claimant;
142.2. The Claimant posed 272 questions to Mr Buckland, which Mr Buckland refused to answer any of;
142.3. The Claimant posed 72 questions of Ms Cutler, Ms Cutler answered the questions and the Claimant commented on the answers;
142.4. The Claimant produced a written response to Ms Cutler's report;
142.5. The Claimant posed 179 questions of Ms Harper which Ms Harper refused to answer any of;

142.6. The Claimant posed 115 questions of Mr Osler, which he provided answer to two of and the Claimant commented on his response;
142.7. The Claimant posed questions for Mr Barnes which he answered and she commented upon;
142.8. A statement from Ms Perryman-Best relating to the incident on 11 December 2018 was obtained;
142.9. The Claimant posed 150 questions for Ms Williams which Ms Williams selectively answered some of and the Claimant commented on her answers. The Claimant posed further questions to her which were not answered;
142.10. The Claimant produced a lengthy principal witness statement and a 'Summary and Response to Allegations';
142.11. The Claimant produced a separate response to the moonlighting allegation;
142.12. The Claimant produced a supplementary witness, followed by a revised statement;
142.13. Mr Capek provided written submissions.

143. The disciplinary hearing resumed on 19 March 2019. The Claimant did not attend and the hearing proceeded in her absence.

144. On 9 April 2018, the Claimant started and finished Early Conciliation. On 12 April 2019, the first of the Claimant's two tribunal claims was presented.

145. The Claimant was notified of summary dismissal by letter dated 18 April 2019. All charges were found proven. The letter is very detailed and we will not attempt a summary here.

146. The Claimant indicated on 18 April 2019 that she would appeal and that grounds of appeal would follow. In very general terms, Mr Capek invited a settlement as the appropriate route forwards.

147. On 25 April 2019, the Claimant was notified that the appeal would take place on 16 May 2019 at the Brighton office chaired by Mr Morgan.

148. Mr Capek responded, and asked for the appeal to take place at a neutral venue, for the Claimant to be accompanied and for the hearing to be recorded (p564-6). No agreement could be reached in relation to the venue or recording the hearing, so the Claimant did not attend. Mr Capek made a number of other points relating to the existing tribunal claim and alluded to the possibility of a second one in relation to dismissal which he indicated may incorporate a variety of claims.

149. On 7 and 13 May 2019, Mr Capek chased a response to his requests in relation to the appeal hearing arrangements.

150. Mr Barnes responded to the request in relation to the appeal hearing. He indicated that the hearing would take place at 1 Crown Office Row, Brighton (which is barristers' chambers), that the Claimant could record the hearing and that she could be accompanied by a friend in a support role.

151. On 15 May 2019, Mr Capek said that the Claimant would not attend the appeal hearing. He said that the arrangements had been proposed too late in the day and the Claimant had a job interview. Further, that the venue proposed was not neutral because it was a barristers' chambers and the Claimant knew some of the tenants.

152. On 16 May 2019, the Claimant submitted an 18 page letter stating grounds of appeal . Mr Capek sent the grounds to Mr Gibbons and Mr Barnes in error rather than to Mr Morgan. Mr Barnes was on holiday at the time and it did not come to his attention there and then. However, on the balance of probabilities in our view it is likely that the grounds of appeal came to someone's attention contemporaneously at the Respondent, whether Mr Gibbons and/or others. It was sent by email and this was a solicitors' firm where no doubt attention was paid to emails to equity partners.

153. On 30 May 2019, the Claimant notified the Respondent that regardless of the outcome of the appeal she would not be returning to work.

154. The Claimant commenced fresh employment on 16 Jun 2019. On her behalf Mr Capek made clear in writing to the Respondent that an appeal outcome was still required.

155. The Clamant never received any outcome of her appeal contemporaneously.

156. In disclosure for the purposes of these proceedings, the Respondent produced the document at p573. This is an undated letter with the word draft written in manuscript on it. It bears Mr Morgan's name in typeface though the letter is unsigned. It sets out a chronology of events and concludes by stating that the appeal was rejected because no grounds of appeal had been provided.

157. Mr Barnes' evidence was that he had investigated the matter internally and there was no evidence that the letter had been sent to the Claimant contemporaneously and we have found it was not. The Respondent has failed to explain in any remotely cogent way why this letter written in the terms it was, why having been written it was not sent out, and why the Claimant's grounds of appeal were not determined.

Holiday pay

158. The leave year was 1 January to 31 December.

159. In the year 2018, from 1 January to 18 December the Claimant took 19 days of leave plus public holidays (totalling 25 days). She was due to take 19 December 2018 as holiday but was signed off sick by her GP on 18 December 2018. The Claimant remained on sick leave for the rest of 2018 during which time:

159.1. There were two public holidays (25 and 26 December 2018);
159.2. The office was closed on 27, 28 and 31 December 2018. These would also have been holidays had she not been on sick leave.

160. Nothing contemporaneously was said as to whether or not 19, 25, 26 – 28, 31 December 2018 should be classified as annual leave or sick-leave. The Claimant was paid in full for December 2018.

161. The Claimant remained on sick leave until the termination of her employment.

162. The Claimant's contract said this in relation to annual leave:

> The Employee shall be entitled to 20 days' paid holiday in each holiday year plus public holidays. In addition you will be entitled to paid holiday leave during any period between Christmas Day and New Year's Day when the Company's offices are closed. If the Employment commences or terminates part way through a holiday year, the entitlement of
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> the Employee during that holiday year shall be calculated on a pro-rata basis. The holiday year is 1st January – 31st December.
>
> 8.3 The Employee shall have no entitlement to any payment in lieu of accrued but untaken holiday except on termination of the Employment. Subject to clause 8.4 the amount of such payment in lieu shall be 1/260th of the Employee's full time equivalent salary of the Employee for each untaken day of the entitlement under clause 8.1 for the holiday year in which termination takes place and any untaken days carried forward from the preceding holiday year.
>
> 8.4 If the Company has terminated or would be entitled to terminate the Employment under clause 14 or if the Employee has terminated the Employment in breach of this agreement any payment due under clause 8.3 shall be limited to the statutory entitlement of the Employee under the Working Time Regulations 1998 and any paid holidays (including paid public holidays) taken shall be deemed first to have been taken in satisfaction of that statutory entitlement.
>
> 8.5 If on termination of the Employment the Employee has taken in excess of any accrued holiday entitlement, the Company shall be entitled to recover from the Employee by way of deduction from any payments due to the Employee or otherwise one day's pay calculated at 1/260th of the Employee's full time equivalent salary for each excess day.

8.6 If either party has served notice to terminate the Employment, the Company may require the Employee to take any accrued but unused holiday entitlement during the notice period. Any accrued but unused holiday entitlement shall be deemed to be taken during any period of Garden Leave.

8.7 During any continuous period of absence due to Incapacity of one month or more the Employee shall not accrue holiday under this contract and the entitlement of the Employee under clause 8.1 for the holiday year in which such absence takes place shall be reduced pro rata save that it shall not fall below the Employee's entitlement under the Working Time Regulations 1998.

Feasibility of working from home

163. It is necessary for us to make some findings in relation to the feasibility of working from home since this is of some relevance to the wages claim.

164. During the course of the Claimant's employment all of the fee earners and partners were office based workers. However, the culture was that, as required, people would take work home with them, including paper files, and complete work at home if that was necessary or convenient. For instance, if the workload was too high to complete in the course of the working day or if there were some childcare reasons.

165. At the relevant times, the Respondent's case files were paper-based. However, some of the documents were available electronically. There is a dispute about quite how much was available electronically. The Claimant's evidence is that almost all of the documents were available electronically because the practice was for them to be scanned onto Proclaim a case management system which was accessible remotely. The Respondent's written evidence gave the impression not only that there was very limited if any access to electronic copies of important documents. However, under cross examination, Mr Osler agreed that "*most key documents were scanned in and accessible over terminal servers from anywhere. So it is broadly correct that key documents were accessible by Proclaim*".

166. The Claimant's evidence was also that the volume of documentation and nature of documentation involved in conveyancing was such that it was not easy to work entirely electronically, and that is why she was in the habit of taking files home when she was doing some work from home. Certain documents, such as plans, were much easier to read in hard copy. We also note that on one occasion the Claimant had to return home in the course of the working day to pick up a hard copy case file she had left at home.

167. In January 2018, the Claimant did complete a Homeworking Checklist. On analysis this document is a sort of health and safety risk assessment in relation to working at home and matters such as fire exits, work stations and the like. It does not shed any real light on the question of how feasible it was to work *entirely* remotely from home.

168. Applying our common sense to all of the evidence, we think it is clear that although the systems and technology were in place for hybrid working, i.e.., working mostly on paper in the office but partly from electronic documents from home, the set up was not sufficiently developed to lend itself easily to full-time remote working:

168.1. Not all documents were available electronically;
168.2. Some documents were not easy to use even if available electronically and it was preferable to work from hard copies;
168.3. Some files were sufficiently large that electronic working at that time was difficult;
168.4. It would have been necessary, realistically, for paper files to be brought to the Claimant, and this would have resulted in a lot of paper files being routinely at the Claimant's house which undesirable, both from a data protection perspective and because someone else may have needed the file;
168.5. Part of the Claimant's job was managing the administrative staff and running the office and there were no mechanisms in place for this to be done remotely.

Law

Unfair dismissal

169. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

170. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420). The net could be cast wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason (***Royal Mail Ltd v Jhuti*** [2020] All ER 257.)

171. There is a limited range of fair reasons for dismissal (s.98 ERA). Conduct is a potentially fair reason. There is also a residual category: 'some other substantial reason'. Provided the reason is not whimsical or capricious (***Harper v National Coal Board*** [1980] IRLR 260), it is capable of being substantial and, if, on the face of it, the reason *could* justify the dismissal then it will pass as a substantial reason (***Kent County Council v Gilham*** [1985] IRLR 18*).*

172. If there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA (the wording of which we have reminded ourselves of). The burden of proof is neutral.

173. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the

employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

174. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider considerations of procedural fairness and of course the severity of the sanction in light of factors such as the offence, the employee's record and mitigation.

175. In ***Strouthos v London Underground Ltd*** [2004] IRLR 636, Pill LJ said *"It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.*"

176. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

177. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

178. The fairness of a disciplinary process should be judged at its conclusion. It is possible for unfairness an early part of the process to be corrected at a later stage of the process, for instance, at the appeal stage. In any event not every aspect of unfairness will make a dismissal unfair overall. An assessment in the round is required in the manner stated in ***Taylor v OCS Group Ltd*** [2006] IRLR 613.

179. There are some circumstances in which a dismissal can be fair even in the absence of any disciplinary procedure. This might happen where to follow such a procedure would be future or would serve no purpose, see e.g. ***Gallacher v Abellio Scotrail*** Ltd UKEATS/0027/19/SS.

180. By s.207 TULR(C)A the tribunal is required to have regard to *Acas Code of Practice on disciplinary and grievance procedures* in a case of this kind since many of its provisions are relevant. It sets out some well known basic principles of fairness in disciplinary and grievance processes. Giving an employee a right of appeal and determining the appeal are features of this code.

Polkey

181. In ***Polkey v A E Dayton Services Ltd*** [1987] IRLR 503, Lord Bridge said this:

> *'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will*

often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in Earl v Slater & Wheeler (Airlyne) Ltd *[1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called* British Labour Pump *principle [*British Labour Pump Co Ltd v Byrne *[1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in* Sillifant's *case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the* British Labour Pump *principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in* Sillifant's *case, at 96:*

> *"There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."*

An example is provided by the case of Hough and APEX v Leyland DAF Ltd *[1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.*

182. The ***Polkey*** principle is not confined to cases of procedural unfairness but has a broader application. The tribunal's task is to apply ERA 1996 s 123(1) and award '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'). See e.g. ***Lancaster & Duke Ltd v Wileman*** [2019] IRLR 112*.*

183. In ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274, the EAT said this:

> *A '*Polkey *deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two*

extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…

184. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

"*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ...*"

Contribution

185. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) ERA.

186. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse. See further ***Nelson -v- British Broadcasting Corporation (No. 2)*** [1980] ICR 110. In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal.

Direct discrimination

187. Section 13 Equality Act 2010 is headed "Direct discrimination". So far as relevant it provides:

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

188. Section 23 (1) provides*:*

> *"On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each*

case."

189. The phrase 'because of' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.*

190. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

> *69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:*
>
> *(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said: "It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not." I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36: "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in*

the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"
(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:
"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

191. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues

and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

192. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 Equality Act 2010. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

The burden of proof and inferences

193. The burden of proof provisions are contained in s.136(1)-(3) EqA:

(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.

194. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

195. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

196. The position was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

197. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

198. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

199. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and

documentary evidence available and what inferences may be drawn from all the primary facts.

200. In ***Wisniewski (a minor) v Central Manchester Health Authority*** [1998] EWCA 596 Brooke LJ said this:

> *(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.*

201. In ***Efobi v Royal Mail Group Ltd*** [2021] UKSC 33, Lord Leggatt said:

> *The question of whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in [Wisniewski] is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules." (paragraph 41)*

Wages

202. In ***Miles v Wakefield Metropolitan District Council*** *[1987] ICR 368, HL*, Lord Templeman said:

> *In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work…. different considerations apply to a failure to work by sickness or other circumstances which may be governed by express or implied terms or by custom.'*

203. In ***North West Anglia NHS Foundation Trust v Gregg*** [2019] IRLR 570, Coulson LJ said this following a review of the authorities:

> *52. It is, not always easy to discern a clear set of principles from these authorities. However, the following seem to me to be uncontroversial:*
>
> > *(a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (*Petrie*).*
> > *(b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.*
> > *(c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (*Wallwork v Fielding*).*
> > *(d) By contrast, an inability to work due to an 'unavoidable impediment' (Lord Brightman in* Miles v Wakefield*) or which was 'involuntary' (Lord Oliver in* Miles v Wakefield*) may render the deduction of pay unlawful.*
> > *(e) Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee's ultimate guilt or innocence (*Harris*,* Burns*), nor simply by reference to whether he or she was granted bail or not (see the comments in* Knowles *about the decision in* Burns*, with which I agree).*
>
> *53. More difficult is the correctness of the repeated assertion, most recently seen in* Paterson*, that 'unavoidability' (and therefore the unavoidable or involuntary nature of the third-party decision or external event) is 'to be construed narrowly' and should be taken to mean an Act of God, or some other form of 'accident'. The basis for this is unclear. In some of the cases it seems to have led to the conclusion that, if the employee's actions have led to a suspension from work or the bringing of criminal charges, then the suspension or the consequences of the criminal charges are automatically 'avoidable' or 'voluntary'. This is uncomfortably close to an assumption of guilt and seems to me to be wrong in principle. This case is perhaps a good example of the problem. Can it really be said that Dr Gregg's suspension was*

'avoidable' without, of necessity, assuming that he was guilty of the allegations made?

*54. I consider that the starting point for any analysis of the Trust's attempt to deduct Dr Gregg's pay must be the contract itself (*Walker, Knowles, Paterson*). Was a decision to deduct pay for the period of suspension in accordance with the express or the implied terms of the contract? If the contract did not permit deduction, then, as envisaged by Lord Templeman in* Miles v Wakefield*, the related question is whether the decision to deduct pay for the period of suspension was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the 'ready, willing and able' analysis summarised at paragraphs 52 – 53 above – falls to be considered. But, in my judgment, a considerable degree of caution is necessary before concluding that someone like Dr Gregg, who was and remains the subject of an interim suspension imposed in the public interest, is not 'ready, willing and able' to work, or is to be characterised as avoidably or voluntarily unable to work.*

204. In ***Beveridge v KLM UK Ltd*** [2000] IRLR 765 the employee produced a medical certificate indicating that she was fit to return to work. The employer refused to allow her to return to work for some six weeks pending its own medical evidence. The EAT held that in the absence of a contractual term to the contrary, wages were payable for the six week period.

205. In ***Cresswell v Board of Inland Revenue*** [1984] IRLR 190 the claimants refused to work using the new computerised system the employer wanted them to. The employer was entitled to direct them to work in that way and they were not entitled to pay whilst refusing to do so.

Holiday pay

206. There is a statutory right to paid holiday in regs 13 – 16 Working Time Regulations 1998. Of particular importance:

206.1. By regulation 13 there is a right to four weeks leave per annum. This gives effect to the Working Time Directive and the right must be construed in light of the case law of the CJEU;
206.2. By regulation 13A there is a right to a further 1.8 weeks annual leave. This is a purely domestic right to which the law of the EU does not apply.
206.3. Regulation 14 makes provision in relation to entitlement to annual leave upon termination.

207. A long line of CJEU authorities (such as ***Pereda v Madrid Movilidad SA***: C-277/08, *[2009] IRLR 959*, ***Asociacion Nacional de Grandes Empresas de Distribucion (ANGED) v Federacion de Asociaciones Sindicales (FASGA)***: C-78/11, *[2012] IRLR* 779) and domestic authorities such as ***NHS Leeds v Larner*** *[2011] IRLR 894, EAT,* ***Sood Enterprises Ltd v Healy*** *[2013] IRLR 865*, have established important principles in relation to regulation 13 leave. The effect of these authorities on how the Working Time Regulations 1998 must

be construed, and the wording that needs to be read into them in order to give effect to EU Law, was recently considered by the Court of Appeal in ***Pimlico Plumbers Ltd v Smith*** *(No.2)* [2022] IRLR 347**.** Regulation 13 needs to be construed as if it said as follows (the provisions relating to coronavirus are irrelevant here and therefore omitted):

> *13. Entitlement to annual leave*
> *…*
>
> *(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—*
>
> > *(a) subject to the exceptions in paragraphs (10) and (11), (14) and (15)***,** and (16)*, it may only be taken in the leave year in respect of which it is due, and*
> > *(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.*
>
> *[…]*
>
> *(14) Where in any leave year a worker was unable or unwilling to take some or all of the leave to which the worker was entitled under this regulation because he was on sick leave, the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (15).*
>
> *(15) Leave to which paragraph (14) applies may be carried forward and taken in the period of 18 months immediately following the leave year in respect of which it was due.*
>
> *(16)* Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.

208. This line of jurisprudence has no application to Regulation 13A leave nor to leave which has no basis in statutory law (e.g. contractual leave).

209. Regulation 13A says *"that a relevant agreement may provide for any leave to which a work is entitled under this regulation to be carried forward in the leave year immediately following the leave year in respect of which it is due."* Thus the law allows the parties to agree for leave to be carried over pursuant to a relevant agreement ('relevant agreement' is defined at reg. 2) but it does not require such an agreement.

210. Given that different law applies to different type of annual leave, a further issue of importance is how to identify what law to applies to any given period of leave. So far as we are aware there are only two authorities on this point. Both deal with the matter quite briefly and neither is binding on us.

211. Firstly, in ***Bear Scotland v Fulton*** *[2015] IRLR 15* Langstaff J said, *obiter*, this:

> *82 It is unnecessary therefore for me to consider whether Employment Judge Camp was in error at paragraph 86.3, in thinking that the type of leave being taken was a matter for the employee to choose. However, in case this issue goes further, I shall deal with it. I think his reasoning (that the choice was theirs because it was 'their leave') is unsustainable. First, it might equally be said that it is the employer's obligation to pay for it, so the choice should be its: this is equally unsatisfactory as a basis for deciding who should determine the character of leave, but demonstrates that there are two sides to the same coin. Second, in the absence of detailed contractual provisions the power of an employer to exercise control, which is inherent in every contract of employment, means it is entitled (within reasonable bounds, and following the procedure laid down by reg. 15(3) of the Working Time Regulations) to direct when holiday should be taken. It therefore has the power to direct when, within a leave year, reg. 13 holiday should be taken (albeit subject to reg. 15). Third, reg. 13A is described in the Regulations as 'additional leave'. That suggests that the dates of it should be the last to be agreed upon during the course of a leave year.*

212. By contrast, in ***Chief Constable of The Police Service of Northern Ireland & Anor v Agnew*** [2019] NICA 32 (17 June 2019), the Northern Ireland Court of Appeal took a different view. It rejected the proposition that the employee's overall leave entitlement could split into different categories and held that a composite approach should be taken. Approving the decision of the tribunal in that case it said this:

> *116. The Tribunal set out part of its reasoning at paragraphs [279] – [280] as follows:-*
>
> *"[279] It is clear that the 20 days annual leave provided by the Directive is the minimum period mandated by EU law. However, as a matter of law, it is no less an entitlement of the individual worker and no less an obligation on the individual employer, than the eight days provided under the Working Time Regulations or the two days (or in certain cases more) provided under the conditions of service afforded to the individual worker.*
>
> *[280] To the tribunal, it would make no sense to treat any part of the annual leave entitlement, which comprises those three categories, differently from any other part of the annual leave entitlement or to require a strict succession of types of leave. As far as the individual employer and the individual worker is concerned, the split between these three categories has no real importance at all. Both the individual employer and the individual worker look at annual leave entitlement as a composite whole. No police officer claimant, or any civilian employee, has ever said "I have two more Working Time Directive days left before I move on to Working Time Regulations days." Neither has the Chief Constable. In the present claims, the composite leave entitlement comprises 20 days provided by the Directive, eight days provided by the Regulations and two (or more) days provided under the conditions of service. If any strict succession had been*

intended or even contemplated, that would have had to be laid down in legislation and would have had to deal with issues such as the carryover of annual leave."

117. The Tribunal with respect differed from the approach of Langstaff J for the following reasons:

"The description of the eight days or 1.6 weeks provided by the Regulations as "additional" says nothing about a strict succession of types of annual leave. If it were to do so, it would have said that in terms and it would have dealt also with the issues of succession in relation to leave provided under the conditions of service or leave provided as a carryover of other types of annual leave. It did not do so. It seems to the present tribunal that reading into the words "additional leave", the proposition that there must be a strict succession of annual leave, is a step too far."

118. The Tribunal concluded that:

"The (Appellants') argument is inherently illogical. The only sustainable interpretation is that days of annual leave awarded on whatever basis form part of a composite whole. Any individual leave days taken from that pot are not possible of being allocated between one category or another. Each day's annual leave therefore must be treated as a fraction of the composite whole."

119. We also respectfully disagree with the approach adopted by Langstaff J in Bear Scotland. A worker has an entitlement to all leave from whatever source and there is no requirement that leave from different sources is taken in a particular order. We agree with the reasoning of the Tribunal

213. Neither authority is binding on us. The passage in ***Bear Scotland*** is *obiter* and ***Agnew*** is a decision of an appellate court in a different jurisdiction. We prefer the reasoning in ***Agnew***. Respectfully, it is more principled and the basis on which the court in ***Agnew*** departed from ***Bear Scotland*** appears to us to be cogent.

Discussion and conclusions

Unfair dismissal: admissibility issues

214. Both parties contend that the pre-termination negotiations are admissible in the unfair dismissal claim despite s.111A(1). They give different reasons. In our view they are both wrong.

215. In his closing submissions, Mr Capek submits they are admissible as follows:

"My understanding of Section 111A, which may not be correct, is that it confirms that details of pre-termination settlement negotiations are not be disclosed in unfair dismissal cases, except where a party has expressly reserved the right

*to refer to them when dealing with applications in respect of costs or expenses. HHJ stated in **Bailey** that "Section 111A confidentiality cannot be waived.""*

216. Respectfully, this is wrong. There is a carve out at s.111A(5) ERA but this only applies at the stage of considering questions of costs/expenses. That is not what we are doing. Save in relation to costs/expenses the parties cannot waive confidentiality (see ***Bailey***).

217. The Respondent submits that the Claimant's conduct of the settlement negotiations was improper and therefore that the pre-termination settlement communications are admissible. Mr Paulin said this in his skeleton argument:

The ACAS Code of Practice 4 on settlement agreements is a relevant consideration as to whether the conduct was improper: one example provided at paragraph 18(e) of the Code includes putting undue pressure on a party. An example is given of an employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed (see paragraph 18(e)(ii)). It is submitted that the converse of this must also hold true: an employee refusing to return to work and refusing to attend any of the meetings in question, while also disavowing the appeal process in its entirety and announcing to the world she had left the Respondent's employment, must also qualify as improper conduct. The Claimant sought to unduly pressurize the employer into settling the matter. This was improper conduct.

218. In his oral submissions, Mr Paulin was critical of the terms in which the Claimant and her representative expressed the pre-termination negotiations. He also placed great emphasis on the Claimant "moonlighting" during the period of time that the settlement negotiations were ongoing.

219. We do not accept that there was any impropriety:

219.1. The terms in which the Claimant/Mr Capek expressed the Claimant's settlement position was, at all times that are in evidence before us, entirely proper. The correspondence was temperate, measured and reasoned. There were periodically references to the Claimant bringing tribunal claims in the event of there being no agreement but there is nothing wrong with that. That is where the employee's leverage in a negotiation generally is and there is no need to pretend otherwise. It is of course possible to go too far in the way this is done but the correspondence does not come even close to that. It is in typical form and if anything is more polite and temperate than the norm. Another piece of context is that the Claimant's actual settlement demands were very modest indeed. Mr Capek politely made the point contemporaneously that if the parties did not reach an agreement then there was a likelihood of a protracted employment tribunal dispute. How right he

was. There have been three preliminary hearings (one of which went part-heard) and an eight day trial in this matter.

219.2. It is not entirely fair to say that the Claimant refused to return to work. The position is more nuanced than that. Come January 2019, she refused to work at the Hurstpierpoint office with Mr Buckland. She was prepared to work from home. No offer was made to her to work from another office (albeit she would not have done so had it been offered). Her position was supported by medical evidence (that of her GP). It was not improper conduct.

219.3. The Claimant had commenced working as an agent for another law firm, witnessing the signature of equity release deeds in her own time. The commencement of this predated the settlement negotiations and we can assume for current purposes (though it is actually not entirely clear) continued during the settlement negotiations. This was one of the disciplinary allegations. We make detailed findings elsewhere about the Claimant's degree of blameworthiness in this matter. There is some but it is modest. In so far as there was any impropriety here it was not in the pre-termination negotiations but in working for another firm without written permission. Even if that is wrong, and there is some connection between the impropriety and the pre-termination negotiations of a sort that bring s.111A(4) ERA into play, it is just for s.111A(1) ERA to apply in full. The allegation of moonlighting arose very early in the course of the pre-termination negotiations. Ms Williams' statement in which she makes the allegation dates from 8 January 2019. Thus almost all of the pre-termination negotiations happened at time at which the Respondent was aware of the allegation and at the least suspected that the Claimant was guilty of it. In the circumstances, the fact that there was some underlying misconduct on the Claimant's part in no way makes it just to admit any of the pre-termination negotiations. It is simply routine for there to be some underlying misconduct, or a suspicion of the same, when pre-termination negotiations happen and indeed that is very often why the negotiations happen.

219.4. The Claimant did delay in her preparation for the disciplinary hearing in January 2019 in order to explore settlement. That was not improper – it was a good idea given the mountain of work that dealing with the disciplinary allegations inevitably required.

219.5. The Claimant did not attend either disciplinary hearing nor the appeal hearing. There is no obligation on an employee to attend such meetings and declining to do so is not improper conduct for these purposes.

219.6. The submission that the *Claimant* disavowed the appeal process has a *Through the Looking Glass* quality about it. The facts are that the Claimant did appeal and did submit detailed grounds of appeal. Then, the Respondent, without explanation, whether then or now, failed to deal with the appeal. In so far as the submission may be a reference to the Claimant indicating openly by the appeal stage that she would not return to work even if the appeal succeeded, that is not disavowing the appeal process. It continued to have an important purpose – namely to consider whether the very serious disciplinary findings and outcome should be sustained. Those matters were

important regardless of whether the Claimant was interested in returning to work or not. In any event, we fail to see how it was improper for the Claimant to decline to return to the Respondent's employment in the event of the appeal succeeding. It was her basic freedom to chose not to.

219.7. The Claimant did at one stage put on Facebook that she had left the Respondent's employment though she had not. At the time it looked as though she had another job to go to and that a settlement was in touching distance. This was premature and proved inaccurate. It was not improper in any meaningful sense. It also does not in any way make it just to disapply s.111A(1) to any extent.

220. In our judgment s.111A(1) ERA applies and applies in full. In considering the *unfair dismissal* claim we therefore exclude from our consideration all pre-termination negotiations.

Reason for the dismissal

221. We find that the principal reason for the dismissal was conduct. In particular, the Respondent genuinely believed that the Claimant was guilty of the six disciplinary charges and that the appropriate response to them was dismissal.

222. There is an overwhelming case that this was the reason for dismissal. It is supported by the contemporaneous documentation and by live evidence we have heard in this case. The Claimant's contention that the true reason for her dismissal was the Claimant's sex was not pursued with Mr Barnes in cross-examination and it was in any event implausible. Sex was no part of the reason. See further the discussion below.

223. It is plain from the admissible evidence that the disciplinary proceedings themselves generated a good deal of unhappiness with, and frustration with, the Claimant. The Respondent resented for instance the delays occasioned to the disciplinary hearing, the volume of material that the Claimant produced and also the fact she would not return to work at Hurstpierpoint from January 2019. However, though these factors probably did contribute something to the decision to dismiss, they were not the principal reason for dismissal. The principal reason was as stated above.

Fairness of the dismissal

224. Mr Capek made very many detailed submissions on fairness. There is no doubt that among them he makes some very good points. However, with no disrespect intended we will not deal with every single argument raised as it would not be proportionate to do so. We deal instead with what we consider to be the important matters and take careful account, of course, of Mr Paulin's submissions. The matters we do not deal with would not in any way alter the outcome in respect of liability or remedy.

The Cutler report

225. The starting point when considering fairness has to be the Cutler report. From the first draft onwards it expressed exceptionally trenchant, wholly one-sided views on a complex employment situation. It portrayed the Claimant as the sole wrong-doer. Such views could not fairly be formed on such a small body of evidence and such an exceptionally thin investigation. The report was based upon:

225.1. An interview with Mr Buckland;
225.2. A short (and incomplete) interview with the Claimant of around 1 hour and 20 mins that was billed in advance as a mere informal chat;
225.3. A selection of documents that neither the Claimant nor Mr Buckland knew had been sent, nor had any role in selecting nor opportunity to contextualise or comment upon;
225.4. Some general background information from Ms Perryman-Best and Ms Harper.

226. As noted, the Claimant was told that her interview with Ms Cutler was an informal chat that she did not have to prepare for and told she did not need to provide any documents. That would have been fine if the report had been limited to some initial exploratory issues. But it was not, it stood as a disciplinary investigation report. As such the Claimant simply did not have a fair shot at the meeting with Ms Cutler.

227. The Claimant was never shown all of the documents that had been sent to Ms Cutler and upon which her report was based. One of the features of that material is that it is all susceptible to interpretation and it was essential (in the sense that it is what any reasonable employer would have done) that the Claimant should know what the report was based on and have a chance to comment upon it. Much later in the process, she was given a zip file of documents - however that contained only a fraction of the documents that Ms Cutler had been sent.

228. A further problem is that Ms Cutler did not provide the Respondent with notes of her interviews with either the Claimant or Mr Buckland and therefore no such notes were available to the Claimant. The Claimant could not therefore test the accuracy of the allegations in the Cutler report against a note of the interview with Mr Buckland. In the context of the conclusions of the report that was a serious and surprising shortcoming.

229. It is also fair to acknowledge that the Cutler report put the partners in a very difficult position. It’s content was so stark it could scarcely be ignored, yet the quality of the report and lack of particularity and reasoning meant that it was impossible to rely on in its initial form.

230. This in turn prompted a remarkable back and forth between the partners and Ms Cutler in which an attempt was made to render the report more fit for purpose. However, this also had the unfortunate consequence of dragging the partners

into the actual drafting of the report. The process became so convoluted that Mr Barnes now cannot say which additions to the text of the report, some of which are very important, came from the partners, and which came from an un-noted telephone conversation between Ms Harper and Ms Cutler. That is deeply unsatisfactory.

231. The Cutler report had an enduring impact on what was to be the disciplinary process. It profoundly influenced and tainted the remainder of the process.

Wider inadequacy of the investigation

232. Whatever the Cutler report said it was the employer's duty to conduct a fair investigation. No doubt the report meant that there was a difficult starting point but the situation was not in principle irredeemable. In practice there was no redemption.

233. It is of course fair to say that the inquiry into the disciplinary allegations did not start and finish with Ms Cutler's report and it is important to take account of what happened subsequently particularly as it is possible for unfairness at one stage of a process to be corrected by what happens later. However, in this case what happened later did not come close to correcting the unfairness.

234. Given that the Cutler report was wholly inadequate to stand as the investigation/report into the disciplinary allegations, what was needed was a reasonable investigation into the subject matter of the disciplinary allegations. This did not happen.

235. It is true that the Claimant did not help herself by failing, initially, to produce a response to the Cutler report. It is also true that she was given the opportunity to ask questions of witnesses and that she took this opportunity. However, this was no substitute for interviewing relevant witnesses as the answers or, more accurately, non-answers of the witnesses show:

235.1. The Claimant asked Ms Williams lot of questions. However, no doubt because the questions came from the Claimant rather than the employer, Ms Williams felt free to answer and decline to answer questions as she herself saw fit. She took a view on what was relevant and what was not and for that and other reasons declined to answer very many of the questions. Some of the questions she refused to answer undoubtedly were relevant and important to disciplinary charges.

235.2. Ms Harper declined to answer *any* of the questions despite being the Practice Manager. The reasons she gave do not stand scrutiny. In essence she said that she needed to remain neutral and that she had access to confidential information about other employees. Those were peculiar reasons at best for not answering questions in an extant disciplinary process in which she had relevant evidence to give. However, they simply do not explain why she refused to answer some of the questions that neither involved

confidential information about other employees nor the taking of sides – of which there were many. In any event, her role in the business was not a bar to her conveying information as a witness of fact to a disciplinary investigation.

235.3. Mr Osler declined to answer any questions save for those in relation to the moonlighting allegation. That was in accordance with Mr Barnes' decision about what questions could be put to Mr Osler - but it was unfair. Mr Osler after all was the senior person in the small office in which the events took place and was a relevant witness with relevant evidence to give about the dynamics between the staff in his office and in particular the Claimant and Mr Buckland.

235.4. Remarkably, Mr Buckland declined to answer *any* questions from the Claimant apparently on the stated basis that the issues were between the Claimant and the Respondent (rather than he) and that it would not assist any future working relationship. Seemingly the Respondent simply allowed this. That also made the investigation deeply unfair.

236. Overall, there was a deep and fundamental failure on the part of the employer to make reasonable efforts to gather evidence in relation to disciplinary charges. The most obvious way of doing this was to properly interview relevant witnesses. It inconceivable that the key witnesses listed above would have been anything like so uncooperative if the employer had interviewed them as they were with the Claimant when she sought to ask them written questions.

237. There were ultimately huge gaps in the evidence:

237.1. Although the Claimant was interviewed by Ms Cutler, it is clear that she was not asked anything about Mr Buckland's sexuality and the allegation of referring to it as 'them.' In fact she was not asked anything about homophobia at all (see the Q&As passing between the Claimant and Ms Cutler). Yet the Cutler report effectively alleged that the Clamant had been homophobic towards Mr Buckland, as did the disciplinary findings expressed in the letter of 18 February 2019. Further, as set out below, the evidence which the Claimant ultimately produced denying she was homophobic and giving her side of events appears to have simply been ignored since it does not feature in the reasoning in the outcome letters where it would be expected to.

237.2. It was absolutely vital to interview Ms Williams as she was said by both parties to be deeply entangled in the allegations and counter-allegations. Yet she was not interviewed by Ms Cutler nor ultimately by anyone. It is true that Ms Williams produced a sort of statement on 8 January 2019. However, this was no substitute for an interview of her because the statement did not deal with all of the issues that were the subject of Ms Cutler's report that Ms Williams may have been able to give evidence about. Further, the statement itself shows that Ms Williams was substantially revising the views that she had previously held about the rights and wrongs of the dispute between Mr

Buckland and the Claimant. That is something that demanded further investigation.

237.3. This was a small office and all of the events took place within it within a fairy short space of time. The only reasonable course would also have been to interview Ms Christmas and Mr Osler as they would so obviously have relevant evidence to give about the relationship between the Claimant and Mr Buckland as well as, in probability, some specific incidents.

237.4. It was vital for a proper, detailed account from Mr Buckland to be taken in his own words so that the Claimant could see it and respond to it.

Specificity of the charges

238. A further point of unfairness is that some of the disciplinary charges, namely, 1, 3 and 4 were inadequately particularised and instead were very general. If the intention was for the charges to be particularised by a different document, namely the Cutler report, that was acceptable in principle but not in practice. The problem was that even putting charges 1, 3 and 4 together with the Cutler report it remained insufficiently clear what the specifics of the charges were and the way in which the allegations were being put. One of the reasons for that, of course, was that the report itself raised a lot of issues in a very generalised way.

239. The position is different in relation to the remaining charges. They were specified with reasonable clarity.

Investigation of charges 5 and 6

240. It is important to give charges 5 and 6 some separate consideration because they do not emanate from the Cutler report and the factors relating to them are generally rather different to charges 1 – 4.

241. Charge 5 is *'On Tuesday 11 December 2018, you shouted at Kirsty Perryman-Best, an equity partner in the firm, and were aggressive in your manner. Further, you once again complained about Richard Buckland in a manner that breached the August agreement.'*

242. The second of the part of the charge alleges that the Claimant was in breach of the Birch hotel agreement by complaining about Mr Buckland. That part of the charge is without merit because the Birch hotel agreement simply did not say anything about complaints about Mr Buckland, not to raise them or not to raise them in a given manner.

243. However, the first part of the charge is wholly unrelated to that and it sensibly stands on its own. The allegation made is adequately particularised. Unlike some of the other allegations it is very straightforward.

244. The essence of dealing with the allegation fairly was to take Ms Perryman-Best's account, show it to the Claimant, allow the Claimant to respond and consider the response. This happened:

244.1. The Claimant was ultimately given a copy of Ms Perryman-Best's attendance note of the conversation;
244.2. The Claimant put questions to Ms Perryman-Best which Ms Perryman-Best answered;
244.3. The Claimant was given a chance to respond to the allegation.

245. There was a reasonable investigation into this matter and a reasonable belief the allegation was well founded.

246. Similar points can be made in relation to charge 6:

246.1. The allegation was adequately specified in Mr Barnes' letter of 24 January 2019.
246.2. In that letter, Mr Osler's initial account was provided;
246.3. A further account was provided by Mr Osler at the disciplinary hearing on 7 February 2019. This was relayed in the letter of 18 February 2019.
246.4. The Claimant was given the opportunity to put questions to Mr Osler. She did, and on this topic, he answered them.
246.5. The Claimant was also given the opportunity to state her own case on the matter, which she did.

247. All in all, the Respondent took the view that the Claimant undertook the work for another law firm without permission in circumstances in which she knew she did not have permission. Although that is materially different from our own assessment of the facts based on the evidence we have heard, it was a reasonable belief for the Respondent to hold and was based on a reasonable investigation.

Mr Barnes chairing the disciplinary hearing

248. The Claimant's case is that it was unfair for Mr Barnes to chair the disciplinary hearing because he was so heavily involved in the actual drafting of the Cutler report. We thought hard on this issue.

249. It is certainly uncomfortable that Mr Barnes had a role in drafting the report and then decided the disciplinary hearing. However, this must be set in the context of the case.

250. With the benefit of hindsight one can say that upon receipt of the Cutler report it would have been useful for at least two equity partners to recuse themselves from the steps taken to improve and refine the report. That would have increased their independence for any disciplinary/appeal hearing.

251. However, it is not fair to apply a hindsight based standard. At the time the report was received the equity partners all considered and all discussed the obvious need for changes to it. It was not initially clear that it would take so much

effort to get the report into some kind of shape, nor clear what the final report would look like, nor clear where matters would end up. So it is understandable that there were no recusals and that all of the equity partners were involved in the process.

252. Once a decision was made, then, for the matter to go to a disciplinary hearing, the only way of someone chairing that hearing who had not been involved in the production of the Cutler report, was for the chair to be someone who was not an equity partner. That would mean in practice a salaried partner or an independent third party.

253. Since the issue was so important and involved the Claimant, an experienced fee earner and dispute with a salaried partner (Mr Buckland) and a dispute involving two equity partners (charge 5 related to a call with Ms Perryman-Best, charge 6 turned on what had been said by Mr Osler), a salaried partner would not have been senior enough to deal with matter.

254. That left instructing a third party. The Respondent did not want to do this. It wanted to keep the decision as to whether or not it disciplined or dismissed one of its' employees in-house. It was a very important, sensitive matter. We think it was within the band of reasonable responses to decide it should be dealt with in-house.

255. Ultimately, although it was far from ideal, it was within the range of reasonable responses for Mr Barnes to chair the disciplinary hearing. This is a fact sensitive decision that takes account of the peculiar way in which matters unfolded in this case.

Failure to hear the Claimant's appeal

256. The dismissal letter was deeply critical of the Claimant and it amounted to a serious stain on the record of a practising lawyer. The Claimant appealed against her dismissal and ultimately gave detailed reasons for the appeal.

257. The Respondent failed to determine her dismissal. There is a draft letter that was never sent out that suggests she did not lodge grounds of appeal. That is inaccurate. Why the Claimant's appeal was not determined has not been explained. Mr Barnes says he investigated the matter internally and was unable to get to the bottom of it.

258. However, the Respondent's position in the litigation is that this was not unfair because an appeal would have been futile. That is based upon the fact that the Claimant had, openly by the appeal stage, indicated that she would not return to the Respondent's employment even if her appeal succeeded.

259. The Respondent's submission is based upon an assumption that an appeal only has a purpose if the employee will return to work in the event of it

succeeding. We do not agree. There are instances in which an appeal against dismissal has a real and important purpose notwithstanding that the employee will not on any view return to work. This case is one such instance.

260. The basic point in the Claimant's appeal was that she should not have been dismissed and that she was not guilty of all or some of the very serious matters she was said to be guilty of. The appeal would have determined the merits of those points. If it had been decided in the Claimant's favour in whole or in part, some or all of the stain on her record would have been expunged. That was an important matter of itself that meant an appeal was not futile. Further, she might have been reinstated or at least offered reinstatement. If she had been reinstated but had not wanted the job, then her employment would have had to come to an end by some other means. For example, her resignation, termination by mutual agreement or ultimately if neither of those things came to pass, a further dismissal (but a much more honourable one). It no doubt would have been incredibly valuable for her, as professional person likely to be in the job market again in her career, to have the gross misconduct dismissal overturned.

261. It was unfair for the Respondent to fail to consider and determine the Claimant's appeal.

Conclusion on unfair dismissal

262. The overall fairness of a dismissal must be considered broadly and not every item of unfairness will render a dismissal unfair overall. However, in our judgment there was fundamental unfairness in the investigation of charges 1 – 4, the specification of charges 1, 3, 4 and in the failure to consider and determine the Claimant's appeal. We have no hesitation in deciding that the dismissal was, overall, and applying the range of reasonable responses approach to s.98(4), thereby rendered unfair.

Polkey

263. We must ask ourselves what the chances are that, absent the unfairness, the Respondent could and would have fairly dismissed the Claimant and if so when.

264. In our view if the Respondent had not acted unfairly it would, by April 2019, have perceived that the investigation into charges 1 – 4 was so deeply unsatisfactory that if those matters were to be pursued further a proper investigation was required. It therefore would not have dismissed the Claimant in respect of those charges at any time proximate her actual dismissal, if at all.

265. There is a possibility that the Claimant would have been dismissed at some point for matters arising out of the events that led to charges 1 – 4 following a proper investigation. But there are many other possibilities too. For instance, it is possible that the Respondent would have ultimately taken the view that Mr Buckland was or was substantially to blame. It possible that it would have taken the view that blame was shared between the Claimant and Mr Buckland in some

fairly even measure. It is possible that some sanction short of dismissal would have been visited on Mr Buckland and/or the Claimant. It is possible that the Respondent would have tried further mediation between the pair, after all, there had only been one attempt at that to date. It is so hard to predict what would have happened and when that it would involve a sea of speculation to do so and we do not think any sensible prediction can be made.

266. However, the position is different in relation to charges 5 and 6. In our view, even if the Respondent had not acted unfairly, there is a high chance that it would have pursued these charges. In our view the Respondent regarded charge 6 as a very serious matter indeed and charge 5 as a moderately serious matter.

267. We think there is a strong probability (not a certainty) that the Respondent would have dismissed the Claimant and maintained the dismissal on appeal on the basis of charges 6 (with charge 5 relied upon as a supporting factor) even if it had not acted unfairly in the way that it did. In our view such a dismissal would have been fair based on the view that the Respondent permissibly took of the facts.

268. The Respondent's view was (and would still have been even absent charges 1 – 4) that the Claimant did not have permission to carry out work for another firm and did not believe herself to have permission. On that assessment of the facts, which was a reasonable one, it would have been within the band of reasonable responses to dismiss the Claimant for charge 6 (and the case for dismissal being in the band is made stronger by the addition of charge 5).

269. If acting fairly the Respondent could and would have heard an appeal against dismissal. It is unlikely that the appeal would have succeeded and far more likely that the same view would have been taken as at the dismissal stage.

270. All in all, and this does involve some speculation, we think there is approximately a 70% that the Respondent could and would have fairly dismissed the Claimant had it not acted unfairly, and that it would have done so at around the same point in time as she was actually dismissed.

Contribution

271. The Respondent proposed to deal very generally with contribution. The tribunal was not content with that and during Mr Paulin's closing submissions asked for the detail of the matters said to merit some form of deduction on account of blameworthy conduct. We now deal with the matters relied upon by Mr Paulin in turn.

Moonlighting

272. We took a different view of the facts to the Respondent. In our view, the Claimant genuinely believed she had oral permission from Mr Osler to carry out the work. Mr Osler was less than clear in what he said to the Claimant and we

can well see how the misunderstanding, and it was a misunderstanding, arose. There was, however, a degree of blameworthy conduct. Firstly, the Claimant's contract required the permission to be in writing and it was not. Secondly, it was obvious that such a loose and informal conversation with Mr Osler was not a sensible way of going about obtaining permission.

Refusing to return to work. An offer was provided to work in a different office.

273. There was no blameworthy conduct. The Claimant refused to work at Hurstpierpoint and refused to be managed by Mr Buckland in January 2019. That refusal to work from Hurstpierpoint was supported by medical evidence which has not been contradicted by any other medical evidence in these proceedings. Further given the outstanding disciplinary allegations against the Claimant and given that they principally related to her conduct towards Mr Buckland her position was, for that reason also, not blameworthy in the relevant sense.

274. Further, the Claimant offered to work from home. Yet further, we do not accept that the Respondent offered the Claimant to work from a different office and therefore do not accept the premise of that part of this allegation of blameworthy conduct. It is true that the Claimant was told she could ask to work from another office and she did not do so. However, we think that falls short of blameworthy conduct.

Improper conduct in the settlement negotiations.

275. This submission is untenable. We repeat what we said about the settlement negotiations. There was no blameworthy conduct.

The following extract from Ms Williams's statement:

> Unfortunately, upon reflection and without MLD being here, I feel that the majority of issues which MLD has raised were unfounded and indeed, were a figment of her imagination. RB has occasionally snapped at MLD but I have not always been present when they interacted so cannot say whether it was justified or not.

276. This particular extract of Ms William's statement was relied upon. Of itself what is said here is extremely vague – too vague to form the basis of a finding of blameworthy conduct. In any event, to the extent that it is suggested that the issues in the office were "imaginary" we do not agree nor is that the evidence we have heard. See our findings of fact.

The reference to the sexuality of clients as 'gay boys'; referring to Mr Buckland's sexuality as them 'them'

277. The Claimant referred to some clients as those "lovely gay boys". She did this in conversation with Ms Williams, who as the Q&As between her and the Claimant show, did not consider the Claimant to be homophobic. The comment was overheard by Mr Buckland who took mild offence. It is plain that the Claimant was in the habit of describing both men and women as respectively boys and girls so we do not think the use of the term 'boys' here, in reference to what were

men, was intended to be pejorative. (Intention being just one factor relevant in the assessment of blameworthiness). We do not think this was a homophobic remark, i.e., one demonstrating prejudice towards gay people. However, we think there was a degree of blameworthiness attached in that it was an unnecessary reference to the clients' sexual orientation where that was irrelevant to anything under discussion. Certainly this was an unfortunate choice of phrase. The level of blameworthiness however is mild. It also had no bearing on the decision to dismiss – there being no evidence that it was taken into account at the disciplinary stage (though it did feature heavily before us at trial). It cannot therefore be taken into account in relation to the compensatory award.

278. As to referring to Mr Buckland's sexual orientation as 'them', we find that the Claimant did not say that or if she did the context is so completely unknown that we cannot say it was blameworthy.

Bringing the organisation into disrepute

279. This is an allegation that the Claimant 'badmouthed' Mr Buckland to clients. We reject that allegation. Even now we do not know what it is the Claimant is alleged to have actually said about Mr Buckland. She denies the allegation and we accept her explanation that all that happened was that two clients came to her with complaints about Mr Buckland which she sensitively managed and told Mr Osler about.

Accepting bribes or secret payments/ refusal to disclose information required to be disclosed

280. This is a repetition of the moonlighting allegation using language taken from the staff handbook. We repeat our analysis. Beyond that we say in terms it is not fair/accurate to characterise the issue as one of taking bribes, secret payments or refusing to disclose information.

Claimant's conduct towards Mr Buckland

281. By and large our broad assessment is that the dispute between the Claimant and Mr Buckland was very much six of one and half a dozen of the other. We do not accept, based on the evidence that we have heard, that the Claimant was "bullying" Mr Buckland. The Claimant did not have an imbalance of power over Mr Buckland and the analysis is that they were upsetting each other.

282. We do not accept that the complaints the Claimant made about Mr Buckland were blameworthy conduct. So far as we have seen there was always at least something in the complaints even if some of them were at the trivial end (not all were by any means).

283. We reject the allegations of homophobia towards Mr Buckland for the reasons already given.

284. We note that the Claimant did refuse to be managed by Mr Buckland. However, this was not until January 2019 at the height of the dispute about the disciplinary issues. By that time there was medical evidence essentially supporting the Claimant's position (technically the medical evidence referred to working in an office environment rather than to Mr Buckland in particular but he was part and parcel of that office environment and was the principal issue the Claimant had with it). At this stage it was not blameworthy to refuse to be managed by him. It is true that at an earlier stage the Claimant said she would not be managed by him (to Ms Cutler) but she did not actually refuse to be managed by him until January 2019.

285. In the first disciplinary outcome letter, in relation to the Birch Hotel Agreement and Mr Buckland, the Respondent said this: "*We do not believe that you accepted at any point that Richard was a more senior fee earner than you and in fact our opinion is that you felt it was your role to organise and run the office (as can be seen from your reference to setting up weekly team meeting and complaining about Richard's attendance and contribution).*" This complaint about the Claimant's conduct was not well founded because managing the running of the office was precisely one of the things the Claimant was required to do by the Birch Hotel Agreement. As the notes of that agreement record: "*we then looked at the roles and responsibilities of each, and these were agreed as follows…: Margaret to deal with the day to day running of the office, and the general office management, i.e. compliance, advertising etc…. It was agreed that RB and MD would meet every 2-3 weeks (they need to decide), and that they should have a fixed agenda for that to discuss where everything is at and open the lines of communication generally*."

286. It is true that after the Birch hotel agreement the Claimant continued to make complaints about Mr Buckland. However, that was not a breach of the agreement because that agreement did not contain any provision in relation to the making of complaints. Further, there was always at least something in the complaints. The making of complaints was neither blameworthy conduct nor a breach of the agreement.

287. However, we note that in a text message to Ms Williams the Claimant referred to Mr Buckland as a "shit". That was unprofessional and was blameworthy conduct even though Mr Buckland sometimes spoke ill of her and Ms Williams. This text message featured in the letter of dismissal and we find contributed to the dismissal.

Shouting and being aggressive to Ms Perryman best on the telephone

288. This did happen and it was blameworthy conduct. There was some mitigation for it in that the Claimant was extremely stressed at the time. However, she was out of order and unpleasant to Ms Perryman-Best in that telephone call. That was blameworthy.

Conclusions

289. In light of the blameworthy conduct we must consider whether it is just and equitable to reduce the basic and/or compensatory awards (in the latter case only conduct that contributed to the dismissal can be taken into account – all of the above blameworthy did save where indicated otherwise).

290. In relation to the basic award we consider a reduction of 25% is just and equitable. This strikes a fair balance between the significant unfairness in the Claimant's dismissal and her blameworthy conduct. It is important, in our view, that the basic award is not reduced to a trivial sum because there was significant unfairness in this case. A reduction greater than 25% would go too far in that direction.

291. In relation to the compensatory award, we think a higher figure of 50% is just and equitable. It marks the appropriate amount in light of the nature, extent and seriousness of such blameworthy conduct as there was that made a contribution to the dismissal.

Wrongful dismissal

292. The Claimant was dismissed without notice and seeks her notice pay. Beyond identifying that there was a complaint of wrongful dismissal at paragraph 1.3 of its closing skeleton argument, the Respondent did not make any written or oral closing submissions on the matter. There is a brief reference to wrongful dismissal in the Respondent's opening skeleton argument under the heading of 'unfair dismissal'. We understand the Respondent to rely upon the six disciplinary charges and upon the Claimant's refusal to return to work from January 2019 onwards.

293. The matter which the Respondent put the most emphasis on its presentation of the case was the moonlighting issue and its relation to clause 10 of the contract of employment.

294. In our assessment the Claimant was in breach of clause 10.1. By acting for another law firm she was plainly doing something in breach of that clause. She could only do it if she had permission in writing. She did not. We do not accept she was in breach of clause 10.3 since she disclosed to Mr Osler her plan to carry out this work and made tolerably clear that it was to be done on her own account as an agent for another law firm.

295. Clause 10 is an innominate term and therefore determining whether a breach of it is repudiatory requires an assessment of the breach. In that regard the circumstances of the breach are important. The sting of the breach arose as a result of a misunderstanding between the Claimant and Mr Osler. He did not actually give her even oral permission to carry out the work on her own account. However, the words that he used were not very clear. Because the reference to it being a matter for the fee earner was prefaced by a reference to the work not being of interest to the firm, she misconstrued what she was told as oral

permission to do the work. She was in error and she was in further error by not getting permission in a more formal way, namely, in writing.

296. It is also relevant to note that the work the Claimant undertook was not work the Respondent actually wanted and was for a tiny sum of money. Thus only a tiny sum in billings was diverted from the Respondent. Further, the Claimant undertook this work in her own time (the weekend).

297. In light of the view of the facts we take (which differs to the view the Respondent took in the disciplinary proceedings) and evaluating the factors set out above, this was not a fundamental breach and did not entitle the Respondent to dismiss without notice.

298. The Claimant was rude to Ms Perryman-Best on 11 December 2018. However, her conduct that day came nowhere being serious enough to objectively seriously undermine or destroy trust and confidence. The conduct was simply not of that order.

299. We do not accept that the Claimant bullied or victimised Mr Buckland for reasons already given. We do not accept that the Claimant refused to adhere to the Birch Hotel Agreement save that by January 2019 she refused to be managed by Mr Buckland (that point is dealt with below). We do not accept that her conduct towards Mr Buckland caused irreparable damage to her relationship with him or the relationship of trust and confidence with the Respondent (we have found that she did not bully him, did not victimise him, was not homophobic towards him and did not bad-mouth him to clients which appear to be the serious allegations). She did refer to him as a ‘shit’ in a private message with a then trusted colleague. That was wrong but not the stuff of repudiation.

300. The Claimant was not in repudiatory breach by refusing to return to work in January 2019. The refusal was more limited than the headline suggests and was supported by medical evidence. For similar reasons the refusal to be managed by Mr Buckland was not a repudiatory breach. The Claimant only actually refused this in January 2019. She had reasonable and proper cause to do that (the medical position; the nature of the allegations against her; the fact they primarily involved Mr Buckland; the fact they were unresolved and the fact that the attempt to resolve them had been become acrimonious).

301. Looking at the matters understood to be relied upon individually and cumulatively the Claimant was not in repudiatory breach.

Sex discrimination

302. The factual allegations at paragraph 9(a)(i) – (xxii) are all made out but with the following exceptions:

302.1. the factual allegation at paragraph 9(v) is not made out;
302.2. the factual allegation at paragraph 9(x) is made out but it should be noted that: although it is fair to say that Mr Buckland was aggressive towards the Claimant because he was shouting at her in an argument, this was mutual aggression - the Claimant was also shouting at him in the same argument;
302.3. the factual allegation at 9(xi) is not made out;
302.4. the factual allegation at 9(xiv) is broadly made out but overstates matters. The Cutler report said more about Mr Buckland's health than the Claimant's but it did record the Claimant's account that her GP had offered to sign her off though she had declined. The context made clear that the ill-health in question was said by the Claimant to be work-related.
302.5. The factual allegation at 9(xxi) is unclear in its meaning. If it means that the Respondent sided with Mr Buckland throughout the dismissal letter it is made out. If its meaning is that the dismissal letter shows that the Respondent had sided with Mr Buckland throughout the dispute between the Claimant and Mr Buckland, it is not made out. The Respondent began to side with Mr Buckland after the Cutler report. Prior to that, for the most part at least, it had sympathy with both the Claimant's and Mr Buckland's positions.

303. The critical question is whether the Claimant has proved facts from which the tribunal could conclude, absent an explanation, that on the balance of probabilities the Claimant's sex was the reason, or part of the reason for any or all of the impugned treatment.

304. We remind ourselves that it is rare for there to be direct evidence of discrimination, that it is often hidden and often sub-conscious.

305. In this case it is fair to say that there is no direct evidence of discrimination. It is also fair to say that the Claimant's complaint of sex discrimination was not developed a great deal.

306. The Claimant said a handful of times that Mr Buckland would not have treated a man in the way that he treated her. However, this was, save in one respect, nothing more than unreasoned assertion. The Claimant pointed out that Mr Buckland did not treat Mr Osler in the way that he treated her. That is so, but that does not on the facts infer that the treatment of the Claimant was in any part because she was a woman. Mr Buckland and Mr Osler were not in dispute. Mr Osler was senior to Mr Buckland (effectively his boss) not his junior. Mr Osler and Mr Buckland were not competing for administrative resources because even prior to Mr Buckland's arrival Mr Osler was in the habit of doing his own administration. Overall, there is no remotely cogent reason to think that any difference of treatment between the way Mr Buckland treated Mr Osler and the way he treated the Claimant was sex.

307. We note that Mr Buckland did not give evidence. The Respondent said that this was because he was too unwell to even give a witness statement never mind to attend. Mr Capek, fairly, accepted this explanation. We did not draw any adverse inference from Mr Buckland's non-attendance.

308. We also note that some of the allegations of sex discrimination would appear to impugn, Ms Harper, Ms Cutler and Mr Morgan. They have not attended to give evidence. The allegations of sex discrimination against each of them are quite minor in the scheme of this dispute. Analysing what they each did, our findings about it, the particulars allegations against them and the allegations as a whole we just see no logical reason to infer from their non-attendance that the conduct they did was in any part because of the Claimant's sex.

309. We note that we have been critical of aspects of the Respondent's investigation and disciplinary procedure. However, we do not think it would be right to infer sex discrimination from those shortcomings. The base problem was that the Respondent had no expertise or experience in dealing with disputes of this kind. It is clear that with one exception (the appeal) it was trying hard (though not always succeeding) to deal with the issues properly. It took advice on how to proceed at an early stage and that was to bring in an outside consultant. The report that followed created a fundamental difference between the Claimant's circumstances and Mr Buckland's. The Respondent then put considerable effort into the disciplinary process. The Respondent got a number of things wrong but this was not for lack of trying.

310. All that said, it is clear that the efforts to deal with the matter internally broke down at the appeal stage. However, by this point the Claimant had been dismissed and did not want to come back. While it was not fair to leave the appeal outstanding, but we do not see any cogent reason to infer that the Claimant's sex had anything at all to do with it.

311. Finally, we note that although Mr Capek is a skilled representative, he has not developed a case as to why inferences of discrimination should be drawn.

312. Standing back from the evidence as a whole we do not think it would be right to infer discrimination in relation to any matter.

313. The Claimant has failed to prove facts from which the tribunal could conclude that sex was any part of the reason for the impugned treatment nor that a male comparator in materially like circumstances would have been treated more favourably. The sex discrimination claims therefore fail on the application of the burden of proof.

314. In so far as the Claimant's dismissal is impugned as an allegation of discrimination, we are also in a position to positively find that the reason for the dismissal was that the disciplinary allegations were thought proven and that

dismissal was considered to be the appropriate sanction in light of those matters. Sex was not any part of the reason why the Claimant was dismissed.

Wages

315. The Claimant's contract of employment provided that:

315.1. Clause 3.1 (duties): *The Employee shall serve the Company as a Conveyancing fee earner with ILEX qualifications, or such other role as the Company considers appropriate.*
315.2. Clause 4.1 (place of work): *The normal place of work of the Employee is the Company's office at Wheel House, 133 High Street, Hurstpierpoint BNS 9PU or such other place which the Company may reasonably require for the proper performance and exercise of the Employee's duties.*
315.3. Clause 9*: Incapacity means any sickness or injury which prevents the Employee from carrying out their duties.*
315.4. Clause 9.1 (sickness): *If the Employee is absent by reason of Incapacity, the Company shall pay them Statutory Sick Pay (SSP) provided they satisfy the relevant requirements.*
315.5. The Respondent accepts that the entitlement to sick pay was a little more generous in that it paid one week of normal pay before moving to SSP.

316. As can be seen, the Claimant's contractual place of work was the Hurstpierpoint office or such other place as the respondent could reasonably require for the performance of her duties.

317. In our judgment, the simple answer to the Claimant's claim for wages in the relevant period from January 2019 to dismissal, is that the sick pay provisions of the contract applied and she was properly paid in accordance with them.

317.1. The Claimant was not able, because of incapacity, to fulfil her contractual role. That role was working as a conveyancer from the Hurstpierpoint office or any other place the Respondent decided in accordance with clause 4.
317.2. The contract made specific provision about what would happen in the event of the Claimant being incapacitated. She would be paid in accordance with the sick pay provisions. That is exactly what happened.

318. The fact that it would have been harmful to her mental health to work at Hurstpierpoint simply indicates that she was indeed incapacitated within the meaning of clause 9.

319. There was no obligation, certainly under the contract, to allow the Claimant to work from home as she offered to and there were some real difficulties in her doing so (it was quite different to the kind of occasional home working she and others had previously done which was ancillary to their office based practices).

The refusal to allow this was based upon genuine and substantial business concerns and was not arbitrary, capricious or gratuitously obstructive.

320. We do not think that working from another office really comes into it. But if does, our finding is that while this was not offered in terms to the Claimant, it is something she was not willing to do in any event. Her true position was that she would work entirely from home or not work at all.

321. In reality the Claimant's argument that she ought to be paid her wages in full seeks to import a novel kind of duty to make adjustments into the law of contract and the law of wages under the Employment Rights Act 1996. Such a duty would be incredibly wide reaching and profound.

322. There is an almost infinite range of circumstances in which an employee is able to work, if but only if the employer adjusts their contractual work or contractual place of work in some respect. The range from adjustments spans tiny things to enormously costly things.

323. On the Claimant's argument the employee is entitled to be paid full wages if the employer declines to make the adjustment needed for the employee to work. But there are no apparent limits to the kinds of adjustment that the employer is obliged to make here, in default of which it must pay the employee in full. Or if there are limits it is not clear where they come from. That can usefully be contrasted with the position under the Equality Act 2010 where there is a statutory duty to make reasonable adjustments. It is a limited duty: the limits come among other things from the right being extended only to disabled people, the right being limited by reasonableness and the various knowledge requirements that apply before the duty is triggered. These are all set out in statute. These limiting factors strike the balance between employer and employee and make the law workable. We cannot accept that a duty of the sort described in the first part of this paragraph exists in law and that is a further basis for rejecting the Claimant's claim.

324. Finally, we note that the Respondent's skeleton argument suggests that the Claimant is arguing that there was an implied term that she could work from home. However, that is not actually what the Claimant has argued and therefore we do not think the matter arises. However, if it does we reject any suggestion that there was an implied term that she could work entirely from home (as distinct from working occasionally from home in a manner ancillary to an office based practice). We do so for the reason given by Mr Paulin in his skeleton argument.

Holiday pay

325. The claimant had an overall annual leave entitlement of 31 days per annum. When she fell ill on 18 December 2018 she had taken 25/31 days in the 2018 leave year.

326. Taking the composite approach described in *Agnew* this means that she had 3.87 days of regulation 13 leave outstanding. The calculation is 20 - (20 x (25/31)) = 3.87.

327. As a matter of law, the Claimant could not be compelled to take regulation 13 leave between 18 – 31 December 2018, given that she was sick. It appears nothing was expressly said either way as to whether the planned dates for leave would be taken as annual leave. In the absence of any indication from the Claimant that she wanted to take annual leave despite going onto certified sick leave, she should be entitled to take any regulation 13 leave falling in that period on another occasion. Since she remained off sick to the end of the leave year she could not take the remaining leave during that leave year. She was entitled to carry 3.87 of her regulation 13 leave into 2019.

328. As for the other types of leave, regulation 13A leave and contractual leave, the Claimant was not entitled to carry any outstanding leave over from 2018 to 2019. That is because:

328.1. The principles of EU law do not apply to these types of leave and therefore it is simply a matter of what was agreed between the parties;

328.2. The agreement was that leave could not be carried over in these circumstances. Clause 8.2 of the Claimant's contract read: *The Employee shall not without prior written consent carry forward any accrued but untaken holiday entitlement to a subsequent holiday year unless a period of statutory maternity, paternity or adoption leave has prevented you from taking it in the relevant year.* The Claimant did not have such consent nor was she prevented from taking leave in the relevant year by any such matter.

329. It is the Claimant's case, which we accept, that that she accrued 6.92 days of annual leave prior to termination during 2019. To this accrued leave 3.87 days must be added giving 10.79 days of accrued leave upon termination. The Claimant's case, which we accept, is that she was paid 9.3 days of accrued annual leave upon termination. There is thus an outstanding balance of pay in lieu of 1.49 days of accrued annual leave.

330. It was disappointing that the Respondent failed to engage with the Claimant's case on holiday pay in any meaningful way, particularly as it was set out with such clarity in the Claimant's witness statement. The Respondent made no submission other than to simply assert that the Claimant had been paid what she was entitled to.

331. Having researched the matter ourselves we would have invited further submissions had it been proportionate to do so; but since we are awarding about a day and a half's pay it is not proportionate. The parties can of course apply for reconsideration if they think we have erred and that it is sufficiently important to make that necessary.

Conclusion

332. The claim succeeds in part and fails in part. If the parties are unable to agree remedy, a remedy hearing will be required.

_____

Employment Judge Dyal
Date: 14/06/2022

Annex to Judgment and Reasons: Agreed Final List of Issues

Unlawful deduction of wages (s13 Employment Rights Act 1996)

1. During the period 02.01.19 and 18.04.19, what if any wages (salary and other benefits) was "properly payable" to C?
    a. C avers that she was willing and able to work during this period, but not at R's Hurstpierpoint office or alongside RB in any form, and as such her full wages were payable.
    b. C further avers that she was otherwise constrained from so working (despite being willing) by a third-party decision or external constraint.
    c. R avers that C could not work from home, because it was not practicable, permissible or appropriate, in the context of regulated activity, for C to work from home. C was fit for work, R had work for her to do, but this work could only be done at the office.
2. Could C have worked from one of R's other offices during this period? R's case is that C was unwilling to do so, C's case is that there was no such offer made by R.

Unpaid holiday pay

3. Is C entitled to holiday pay for accrued but untaken holiday pay at the date of dismissal?

Unfair dismissal

4. What was the principle reason for the Claimant's dismissal? Was it a potentially fair reason?
    a. C contends that it was her sex and/or that there was no fair reason;
    b. R avers that it was her misconduct and/or some other substantial reason, as a result of bullying and other inappropriate professional conduct towards other employees leading to the breakdown of the term of mutual trust and confidence leading to a frustration of the employment contract in circumstances where C refused to work from her principle place of work and for or with RB, the partner of R who managed her work function and was therefore fair.

5. Was C's dismissal procedurally fair?
    a. R contends that it was.
    b. C contends that it was not and asks the tribunal to consider whether R acted unfairly by:
        i. engaging an independent HR consultant (ie Ms Cutler) to report on the conflict between C and Mr Buckland without first obtaining the approval of both the individuals concerned, and without first agreeing with them the terms of reference for Ms Cutler?

ii. failing to seek agreement with C (and with Mr. Buckland) as to what information/documentation was to be disclosed to Ms Cutler to enable her to conduct her investigation?

iii. failing to disclose to C (and Mr Buckland) prior to their respective meetings what information it had actually been passed on to Ms Cutler.

iv. failing to disclose all of this information to C prior to her disciplinary hearing?

v. Failing to undertake a fair independent and thorough investigation through Ms Cutler, (in that she failed to investigate each specific incident and further did not invite specific comment from C and RB on each incident or their accounts to her)?

vi. Following receipt of the original version of Ms Cutler's report (dated 02.10.18), (by means of a heavily tracked and amended version sent to Ms Cutler at 17.29 hours that same day, and also by means of an email from Ms Harper to her timed at 09.16 hours on 04.10.18), by Mr Barnes asking/ordering her to significantly alter her original version, and by him also providing her with guidance as to what her forthcoming amended version should include?

vii. Following receipt of the second version of Ms Cutler's report (dated 05.10.18) (by means of a further tracked and amended version dated 16.10.18, sent by email at 16.04 hours that day) by Mr Barnes again asking her to make further significant alterations, resulting in a third version, still dated 16.10.18, which was finally sent to Ms Harper on 22.10.18)?

viii. On 09.11.18, by Ms Harper and Ms Perryman-Best providing C with a fourth version of the report, (ie the third version minus the three-page concluding section referring to "options") which it will be contended bore virtually no resemblance to the original version?

ix. using the supposedly "independent" report of Ms Cutler (version 4) as the basis for embarking on a disciplinary process against C without first conducting any investigation of its own?

x. engaging in a fair procedure prior to, and at, C's disciplinary hearing?

xi. Failing to properly particularise the allegations against C, by relying on Ms Cutler's report?

xii. Failing to give C sufficient time to prepare her case?

xiii. Conducting the disciplinary hearing on 14.02.19 in C's absence?

xiv. By Mr Barnes failing to recuse himself from chairing C's disciplinary hearing when (unbeknown to C at the time), by virtue of all the alternations he had

made, he himself was by now effectively the author of the fourth/final version of the "Cutler Report" that was used as the basis of the case against C?

xv. Failing to agree with C the organizational details of her appeal hearing, such that she felt unable to attend in person?

c. R contends that Mr Morgan considered C's appeal on 16.05.19 in C's absence. C contends that he did not, or that if he had done so fairly R would no longer have held the belief that dismissal was appropriate.

(C avers that although in the bundle there is a undated letter to her from Mr Morgan which purports to dismiss her appeal, she never received this, and indeed it appears never to have been sent as it is full of typing and grammatical errors etc which presumably would have been corrected had it been sent out.)

6. Did R have a genuine and reasonably held belief, based on as much investigation as was reasonable in the circumstances of the case that C had committed misconduct?

7. Did dismissal fall within the range of reasonable responses?

Wrongful dismissal

8. Did any of the unparticularized allegations against C, allegedly found to be proven in the dismissal letter dated 18.04.19, objectively amount to "gross misconduct" such that R was justified in summarily dismissing C?

Direct Sex Discrimination (s13 Equality Act 2010)

9. Did the Respondent treat the Claimant less favourably by reason of her sex?
    a. The Claimant contends that she was treated differently to her male colleagues and/or a hypothetical male comparator in that she avers that the following incidents (if they occurred) would not have occurred but for the reason of her sex, and that the same amount to detriments:
        i. From March 2018 onwards did RB make frequent verbal complaints/comments either directly to C, or to third parties such as Michelle Williams (MW) and Linda Christmas (LC) that C was frequently arriving late at the office?

ii. On an uncertain Date, c March 2018, did RB complain to C about the fact that C had a wall planner which noted staff holiday dates and completions?

iii. On 18.05.18 did RB lose his temper with C (and with Michelle Williams) after they had placed files on Linda Christmas's desk in readiness for her return to work after a period of leave?

iv. In late May 2018 did RB make *"undermining comments"* to C, Ms Williams and others about the fact that C had sent emails to Mr Osler and Ms Harper regarding insufficient administrative support?

v. On about 25.05.18 did RB criticize C to Ms Williams after Ms Williams had visited a client in her home, Ms Williams having said to RB that this was how C would have handled the situation had she been at work at the time?

vi. On 16.07.18 did RB report to Ms Harper that C had left a file at home?

vii. On 17.07.18 did RB angrily demand to know what C's fee figures for the month of July were to be?

viii. On 18.07.18 did RB report to Ms Harper that C had left the office to take her son to the dentist, querying whether she had been given permission to do so?

ix. On about 23.07.18, was Mr Osler flippantly dismissive of C's concerns regarding RB by saying to her *" it looks like you had fun with regard to emails last week"* or words to that effect?

x. On 06.08.18 did RB became aggressive towards C during the course of a discussion about work prioritization?

xi. On an uncertain date in late August 2018, did RB say on the phone, apparently to Ms Harper, that C's work was *"mediocre at best"?*

xii. On a date in September 2018, did RB take offence at a notice that C had placed in the kitchen about washing-up, and did he in due course cite this to Ms Cutler as an example of C's alleged victimization or bullying?

xiii. On 25.09.18 did C receive a lengthy email from Ms Harper which stated, inter alia, that *"you seem to want to discredit RB wherever possible which is not conducive to a cohesive working relationship."?*

xiv. In the original 02.10.18 version of her report, did Ms Cutler mention that the conflict between RB and C was having a negative impact on RB's health, but fail to mention the fact that C had made similar comments to her about the conflict having a negative impact on her own health?

xv. Was this alleged imbalance in reporting the health impacts of the conflict in relation to RB and C perpetuated in the subsequent versions of the report, in particular in the fourth and final version?

xvi On 18.12.18 did RB laugh and sneer at C?

xvii. On 18.12.18, did C receive a letter from Mr Barnes inviting her to a disciplinary hearing on 20.12.18, the allegations contained therein making it clear that she alone was being held responsible for the conflict between RB and herself?

xviii On 04.01.19 did Mr Barnes send a letter to Mr Capek in which he refused to allow C to work at home and in which he made it clear that he expected C to return to work at the office under the supervision of RB?

xix At a disciplinary hearing on 07.02.19, which went ahead in C's absence, did Mr Barnes and Mr. Gibbons make a finding that "*the allegation that C refused to be managed by RB was clearly made out."?*

xx At the resumed disciplinary hearing on 19.03.19 which C again did not attend, did Mr Barnes and Mr Gibbons decide to dismiss her for "*gross misconduct?*

xxi. If so did the subsequent letter of dismissal dated 18.04.19 indicate that they had throughout sided with RB?

xxii Did Mr Morgan ever consider C's appeal against dismissal, notwithstanding the fact that C had refused to attend the scheduled hearing on 16.05.19?

The Respondent denies that the Claimant has been treated differently or discriminated against, and in any event that none of the alleged detriments or less favourable treatments outlined above occurred (if they occurred at all), for reason of C's sex.

10. Was the main cause of any treatment which was less favourable than a hypothetical male comparator in circumstances with no material differences, C's sex or alternatively was it an important reason for C's treatment?

11. Has C brought her claim for sex discrimination in time, and if she has not would it now be just and equitable to extend time?
    a. C avers that the above particularised acts form a continuing course of conduct such that her complaint is brought in time;
    b. R denies that the matters complained of form a course of conduct, and it would not be just and equitable for the tribunal to extend time for those complaints for which complaint was not raised in time, such that the tribunal has no jurisdiction over those matters.

Remedies

12. If C succeeds in whole or in part then the tribunal will consider the issue of remedy, including:
    a. Any unlawfully deducted wages, which were properly payable during C's employment;
    b. any outstanding holiday pay;
    c. damages for unfair dismissal, compromising basic and compensatory awards (capped or uncapped, dependant on the reason for dismissal);
    d. Compensation for injury to feeling: what *Vento* band is appropriate in this case?
    e. is all/ any of the compensation claimed just and equitable?

13. If C's dismissal is found to be unfair, then C puts in issue R alleged failure to comply with the ACAS code in respect of failing to provide an opportunity to meaningfully appeal; C contends that any award of compensation should be increased for R's failure to follow the code. R contends that they did follow the ACAS code and C's appeal was properly considered.