



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Miles

Respondent: Wybone Limited

Heard at: Leeds, by CVP

On: 7, 8, 9, 10, & 11 March 2022 (Hearing)
24 March 2022, 20 May 2022 & 15 July 2022 (Deliberations)

Before: EJ Anderson
Ms G Fleming
Mr P Kent

Representation

Claimant: Mr M Rudd (Counsel)
Respondent: Mr A Weiss (Counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of direct sex discrimination is not well founded and is dismissed.
3. The complaint of failure to pay sick pay is not well founded and is dismissed.
4. The complaint of wrongful dismissal succeeds. The Respondent shall pay the Claimant nine weeks' notice pay; a total of £14,365.35 (gross).
5. At the time of the Claimant's dismissal, the Respondent was in breach of s1(1) Employment Rights Act. There are no exceptional circumstances which would

make an award under s38 Employment Act 2002 unjust or inequitable, and no circumstances that indicate the higher award. The Respondent shall pay the Claimant two weeks' pay (at the statutory cap), in the sum of £1,076.00 (gross).

REASONS

Technology

1. The hearing was conducted by CVP (video). The parties did not object. A face-to-face hearing was not held because it was not practicable, and all the issues could be dealt with by CVP.

Introduction

2. This was a claim brought by the Claimant, Mrs Miles, against her former employer, Wybone Limited. The Claimant was represented by Mr Rudd of counsel and the Respondent was represented by Mr Weiss of counsel.
3. The Respondent is a company that designs, manufactures and sells street furniture including litter bins, recycling bins, grit bins and clinical waste bins, and employs approximately 80 staff. It is a family operated business and was founded by the Claimant's late father, Mr Wyatt, who was statutory director and sole shareholder. Since his death in September 2017, the shares have been held in a Trust created by his will, the "Wybone Trust", of which the Claimant and her brother, Mr Cooper, are both trustees and beneficiaries.
4. In addition, Mr Cooper is the managing director of the Respondent. At the time of her dismissal in September 2020, the Claimant's job title was 'Director: Supply Chain and Business Standards'.
5. The claim comprised a number of complaints, namely: unfair dismissal, wrongful dismissal, direct sex discrimination, failure to pay sick pay, and failure to provide a statement of particulars. These complaints arise following the Claimant's dismissal, which had been preceded by an 'incident' involving her, Mr Cooper and Mrs Wright (the Respondent's then HR manager) on 7 May 2019 and subsequent events. The matter was investigated and the decision to dismiss the Claimant was taken by an external HR company, HR180. Ms Mee (HR Partner) was the investigating officer and Mrs Hayden (HR Partner) chaired the Claimant's disciplinary hearing and made the decision to dismiss. The Claimant's appeal against the decision was considered by a further, external, HR professional (not from HR180), Mrs Tolley (Director/HR Consultant).
6. There has been a regrettable delay in providing this reserved judgment to the parties. This has been due to a combination of factors, including the complexity of the case, and in no small part to the size and organisation of the bundle

(which was extremely difficult to navigate and not always logically ordered (in the view of the Panel)), as well as the need to reconvene the Panel for deliberations.

7. It has been neither possible nor appropriate to deal with every single example of complaint raised by the Claimant. We have identified and addressed the matters that are critical to our decision. This includes all those matters raised by the Claimant in her claim, as well as additional points referred to in her witness statement.

Evidence

8. There was an agreed bundle of documents initially running to 4438 pages, comprising 943 separate documents, as well as separate witness statements from the Claimant (47 pages), Ms R Mee (4 pages), Mrs L Hayden (28 pages), Mrs V Tolley (13 pages) and Mr R Cooper (4 pages).
9. A number of additional documents were submitted throughout the hearing, including diary entries Mr Cooper said he had made at the time of the issues under consideration by the Tribunal. These were only located by him during the course of the hearing and provided to the Tribunal and the Claimant on the third day of the hearing. The timing of this was extremely unfortunate, though ultimately the content had no real bearing on our decision. Other additional evidence submitted after the start of the hearing included Mr Wyatt's 'Letter of Wishes' dated 14 July 2017, sickness documents relating to a former employee of the Respondent, and an email relating to CCTV within the Respondent's premises, as well as some other emails and documents.
10. We heard evidence over four days. We heard evidence from the Claimant. For the Respondent, we heard from Ms Mee, Mrs Hayden, Mrs Tolley and Mr Cooper. We received written submissions from Mr Weiss for the Respondent and heard oral submissions from both parties.

The Claims and Issues

11. In accordance with a case management order of 8 March 2021, the parties agreed a list of issues; the issues were not identified at a hearing. The agreed issues document was contained within the bundle and identified the issues as follows (with corrected numbering):

Dismissal

- 1 What was the reason or principal reason for dismissal?
 - 1.1 The Respondent asserts conduct or some other substantial reason.
 - 1.2 The Claimant asserts her claims for unfairness at 10, 11, 14, 15,

16 and 20.

- 2 If so, in all the circumstances (including the Respondent's size and administrative resources) did the Respondent act reasonably in treating that reason as a sufficient reason for dismissal?

- 3 In particular, if the reason or principal reason was misconduct:
 - 3.1 Did the Respondent genuinely believe that the Claimant had committed the misconduct alleged?
 - 3.2 Was the Respondent's belief formed on reasonable grounds?
 - 3.3 At the time the Respondent formed the belief, had the Respondent carried out a reasonable investigation?
 - 3.4 Was dismissal within the range of reasonable responses open to the Respondent for the alleged misconduct?

- 4 If the Claimant was dismissed for a potentially fair reason, was the dismissal fair and in accordance with equity and the substantial merits of the case?

- 5 Was the Claimant wrongfully dismissed, i.e. did she commit an act of gross misconduct justifying summary dismissal?

Direct Sex Discrimination

- 6 Did the Respondent treat the Claimant less favourably because of her sex than a real or hypothetical male comparator?
 - 6.1 The Claimant asserts her claims at 23, 24, 25.1 and 26 of her grounds of complaint
 - 6.2 The Respondent provides its response at 21, 22, 23 and 24 of its grounds of resistance.

Other Claims

- 7 Did the Respondent provide the Claimant with a s.1 Statement of Employment Particulars?
 - 7.1 The Claimant asserts her claims at 37.7 of her grounds of complaint.
 - 7.2 The Respondent provides its response at 10.2 and 34 of its grounds of resistance.

- 8 Did the Claimant have a contractual term (implied through custom and practice) that she was entitled to full pay during periods of sick leave? If so, did the Respondent breach that contractual term?
- 8.1 The Claimant asserts her claims at 22 of her grounds of complaint.
- 8.2 The Respondent provides its response at 20 of its grounds of resistance.

Remedy

- 9 The primary remedy sought by the Claimant is reinstatement/reengagement. Should this be granted? In this regard:
- 9.1 What are the wishes of the employee?
- 9.2 Is it practicable for the Respondent to comply with the order?
- 9.3 Did the Claimant cause or contribute to the dismissal, and therefore is it just to make an order?
- 10 If unfair dismissal is found, how much should the basic award amount to?
- 11 If there is a compensatory award, how much should it be?
- 11.1 What financial loss has Claimant endured?
- 11.2 Has the Claimant taken reasonable steps to mitigate her loss?
- 11.3 Should the compensatory award be reduced to reflect matters including:
- 11.3.1 contributory fault; and/or
- 11.3.2 just and equitable grounds; and/or
- 11.3.3 Polkey; and/or
- 11.3.4 To reflect the fact that the Claimant would have been dismissed in any event.
- 12 If the Claimant was wrongfully dismissed, what compensation is she entitled to?
- 13 If the Claimant's breach of contract claim in relation to sick pay succeeds, what compensation is she entitled to?
- 14 If the Respondent failed to provide the Claimant with a section 1 statement, what compensation is she entitled to?

- 15 If discrimination is founded, what is the appropriate value of the injury to feelings award?
- 16 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 16.1 If so, has there been any unreasonable failure on the part of the Respondent to comply with the ACAS Code of Practice?
- 16.2 Is it just and equitable to increase any award payable to the Claimant? By what percentage?

The Facts

12. The Tribunal made the following findings of fact:

Context

13. As set out above, the Respondent is a company that designs, manufactures and sells street furniture including litter bins, recycling bins, grit bins and clinical waste bins, and employs approximately 80 staff. It is a family operated business and was founded by the Claimant's late father, Mr Wyatt, who was a statutory director and sole shareholder. The Claimant and Mr Cooper are siblings.

14. Mr Cooper began employment with the Respondent around 1985. He was appointed as Managing Director in 1995. It is understood he became a statutory director in 1996. He signed a contract of employment in October 2004.

15. The terms of Mr Cooper's contract include:

9. *Your sick entitlement is full pay for 6 months followed by 1/2 pay for 6 months. This is upon completion of the 6-month probationary period, during which time you will receive SSP only when absent due to sickness.*

13.1 *Your contract is for an indefinite period but subject to notice. After one week you must give one month's notice to terminate your employment.*

13.2 *After one month you are entitled to one week's notice for the first two years in your job, and after that you get an extra week for each year up to a maximum of 12 weeks after 12 years. For example:*

<i>Length of Service</i>	<i>Notice</i>
<i>More than one month but less than 2 years</i>	<i>1 week</i>
<i>More than 2 years but less than 3 years</i>	<i>2 weeks</i>

More than 3 years but less than 4 years and so on with an extra week for each year until 3 weeks

More than 12 years 12 weeks

16. The Claimant began employment with the Respondent in 2010.

17. Mr Wyatt signed a 'Letter of Wishes' on 14 July 2017 to his executors and trustees, in which he expressed, amongst other matters:

- i. His hope that Mr Cooper be employed by the company in the capacity of Managing Director
- ii. That the income of the Wybone shares should be treated upon the basis that the Claimant, Mr Cooper and Mrs Gascoigne (Mr Wyatt's partner) are the primary beneficiaries during their respective lifetimes and to apply the income of Wybone to them in equal shares
- iii. That following Mrs Gascoigne's death, her daughter should be regarded as the primary beneficiary standing in her shoes

18. Within the letter, Mr Wyatt records:

I would also mention the unfortunate fact that (Mr Cooper) and (the Claimant) do not always get on and my thoughts as set out above are based upon the premise that they will in fact bury their differences and allow matters to progress upon the terms set out above. If they cannot then there may be no other option but to sell the shares in Wybone and I do expressly authorise you to put in hand such a sale if it is thought the only way that matters can be satisfactorily resolved (no matter that the income that would be received upon any investments would be substantially less than it might be if the investment in Wybone were to be retained etc) is to sell such.

19. Mr Wyatt died in September 2017. The company shares have since been held in a Trust created by his will, the "Wybone Trust", of which the Claimant and Mr Cooper are both trustees and beneficiaries. There are two further, professional trustees: Ms Payne, who is also the company accountant, and Mr Seldon.

20. The Claimant was appointed as a statutory director of the Respondent on 22 September 2017 (though see below).

21. Mrs Gascoigne (Mr Wyatt's partner) had been a statutory director and sales director. The Claimant says Mrs Gascoigne left the business in 1998 but continued to receive a salary until her death in February 2019.

22. In his oral evidence, Mr Cooper said Mrs Gascoigne had not worked since the 1990s, but continued to be paid a wage. Mr Cooper referred to her 'having responsibilities', but that she didn't come into work. He confirmed this was an arrangement established by Mr Wyatt and that he maintained the position after his father's death. When asked whether Mrs Gascoigne was ill and unable to

work up until she died, Mr Cooper said that he did not know. He said that she continued to fulfil the company secretary role. Mr Rudd put it to Mr Cooper that this was not the case; Mr Cooper responded "*well if that's the information, then no she didn't.*" Mr Cooper agreed the situation may have lasted years. He later said that the Claimant had had meetings with Mrs Gascoigne "*very close to her death*" and so she was still actively involved in the company. We also had sight of an email in which Mr Cooper informed Mr Scobbie of Blacks Solicitors that Mrs Gascoigne *left the business in 199- and never worked again although she remained on the payroll and as a Director.* The accounts for the year ending 2018 name Mrs Gascoigne as both a director and the secretary.

23. The Tribunal was satisfied that Mrs Gascoigne was a director and the secretary in name. We also accept the agreed evidence that she continued to receive a salary until her death.
24. The senior management team (SMT) at the Respondent company was, at all material times, comprised of the Claimant, Mr Cooper, Mrs Wright (HR Manager) and Mr Conway (Facilities Manager).
25. Mrs Wright's and Mr Conway's updated contracts of employment are both dated 8 April 2015 and stipulate that they shall continue to report to Mr Cooper, Managing Director.
26. Their contracts provide that: *Your Company sick pay entitlement will now be 6 months at full pay, followed by 6 months at half pay.*
27. There was a swearing culture within the Respondent company. This was not disputed by any party or witness and was referenced extensively throughout the written and oral evidence.
28. An incident took place on 7 May 2019 involving the Claimant, Mr Cooper and Mrs Wright (see below). This led to disciplinary proceedings against the Claimant.
29. On 17 May 2019, the Claimant raised a grievance against Mr Cooper.
30. Both the disciplinary proceedings and the grievance were investigated and concluded by an external company, HR180.
31. The Claimant issued an application for an injunction against Mr Cooper and the Respondent on 30 September 2019, which was heard on 19 and 20 December 2019. The Tribunal did not have sight of the application, but heard that part of the relief sought by the Claimant was to restrain the disciplinary proceedings. The Tribunal had a copy of an order made by His Honour Judge Eyre QC, sealed on 16 January 2020 in which the application was dismissed, but which included a number of directions in relation to the use of and access to information relating to the Respondent.
32. The Claimant has produced some 'file notes' following her accessing such information. These include notes of emails between Mr Cooper and Mr Scobbie.

When asked if the file notes were an accurate reflection of the emails, Mr Cooper replied that he couldn't confirm this because he hadn't read them fully. When it was suggested that if he did dispute them, he should have done so by now, he commented that there were lots of pages. Whilst the bundle was voluminous, the file notes were a few pages. These proceedings have been ongoing for some considerable time. In the absence of any express dispute, the Tribunal accepted that the file notes were a true reflection of the emails.

Relationship between the Claimant and Mr Cooper

33. The relationship between the Claimant and Mr Cooper is both fractured and fractious, and the two have not been able to work together effectively for some time (if at all). In addition to the description in Mr Wyatt's letter of wishes, there is evidence on ongoing disagreements and friction to the extent that both have instructed solicitors to write to the other at various points.

34. As part of the Claimant's disciplinary process, various members of staff were interviewed. The interview notes consistently refer to difficulties between the Claimant and Mr Cooper, as does email correspondence and meeting minutes contained in the Tribunal bundle. Mrs Wright told Ms Mee that the culture had changed, she said in relation to the Claimant and Mr Cooper:

"Basically, since our chairman passed away, what staff term it, is a power struggle. A lot of difference in opinion across all aspects of day to day working, strategy is very different. Causing a lot of arguments, shouting, staff have been witness to and are aware of. That's changing the culture in a negative way."

35. Mr Conway made comments to Ms Mee that:

- It's really abrasive in the office area; if they (the Claimant and Mr Cooper) fall out everyone hears it and its not nice, they all know their business
- They were arguing once, (we) left, not two mins later they were shouting again. We said to them you need to calm it, people don't like hearing you argue, puts them on edge. They took no notice and continued arguing at the top of their voice.

36. At a trustees meeting in March 2019, there are references to 'heated discussions' and it being a shame the two are 'squabbling'.

37. There have been allegations made on both sides:

38. Solicitors instructed by the Claimant sent a letter to Mr Cooper dated 14 September 2018 in which she alleged excessive control of Wybone, refusal to engage with the Claimant, and his management of the company. The letter confirmed the Claimant's view that Mr Cooper's conduct amounted to: *a breach of your directors' duties and is prejudicial to our client's interests as a beneficial shareholder of Wybone*. That letter explicitly set out: **this is an extremely important letter and it may act as a precursor to the issuance of court proceedings against you and/or Wybone** (original emphasis by bold and underline). A 'proposed way forward' was set out, including provisions relating

to board meetings, the adoption of formal job descriptions for each of Wybone's directors, and a review of management arrangements and governance structure (amongst other things).

39. Blacks solicitors responded to that letter on 26 September 2018 in which they confirmed they did not see that any useful purpose would be served in setting out Mr Cooper's full response to the allegations of breach of duty at this stage, particularly *in circumstances where the parties trading allegations against each other would merely serve to inflame the situation between the parties even further.*
40. The letter confirmed Mr Cooper was prepared to explore the possibility of resolving the issues between the parties and looked forward to receiving any proposal in that regard. The letter also set out that Mr Cooper did not believe the Claimant had ever been validly appointed as a Director.
41. There were further exchanges of correspondence between the solicitors throughout October 2018. By letter dated 4 October 2018, the Claimant made allegations that Mr Cooper had engaged in harassing, aggressive and bullying conduct at the offices the previous day. The letter refers to alleged threats made by Mr Cooper: *to act ultra vires in making unlawful deductions to (the Claimant's) wages.* It goes on to say that the Claimant had no intention of resigning, but sets out that: *on any objective interpretation, there are clear grounds for our client to leave the business and sue for constructive dismissal.* The letter refers to others feeling aggrieved by Mr Cooper's conduct and names the Claimant's partner.
42. The letter of 4 October 2018 sets out that it, together with the letter of 4 September 2018, should be treated as a grievance against the company arising from Mr Cooper's bullying and harassing conduct towards the Claimant. It also states that: *Given the existence of our client's grievance, any attempt by you to instigate disciplinary proceedings and/or whistleblowing disclosure would be ill-judged.*
43. The letter was sent to both Mr Cooper and Blacks solicitors. The Claimant's solicitors confirmed a copy had been sent to the solicitor for the professional trustees *given that it is likely that the professional trustees, having regard to their professional obligations, will be required to take steps to protect the Company (and, by extension, the trust assets) by making an application to Court to seek your urgent removal as a director of the Company.*
44. Blacks responded by letter dated 5 October 2018, in which they raised the preliminary point that their letter of 26 September 2018 had not yet been responded to. It set out that as a trustee, the Claimant was entitled to call a meeting to seek to persuade the Board of Trustees to make an application to the court to remove Mr Cooper as a Director of the company, though commented that such would serve no useful purpose *and would be contrary to the best interests of the Company to do so merely to satisfy the personal vendetta which your client seems to have against Mr Cooper.* The letter set out counter-allegations, that it had been the Claimant who had acted aggressively

during the exchange referred to on 3 October 2018 about working pattern. The letter confirmed that the Claimant's grievance would be dealt with through the grievance procedure.

45. Further correspondence followed.

Directorship

46. As can be seen, a specific element of the dispute between the Claimant and Mr Cooper was the validity of the Claimant's status as a statutory director.

47. As above, the Claimant produced some file notes of emails, which arose from the order of His Honour Judge Eyre QC on 19 and 20 December 2019 that the Claimant be granted access to documents falling within a number of classes, which included: *All correspondence between (the Respondent) and Blacks Solicitors as to the composition of the board of directors of the (the Respondent), save that (the Respondent) may redact such documentation as is necessary to remove advice given by Blacks Solicitors to (Mr Cooper) in his personal capacity and in respect of which (Mr Cooper) asserts legal professional privilege.*

48. The notes detail emails between Mr Scobbie of Blacks solicitors and Mr Cooper, in which Mr Scobbie states on 16 October 2018:

I cannot therefore see that we can maintain the allegation that (the Claimant) was never appointed as a Director. I think therefore that her position is as a Director of the Company. However, her appointment as a Director can only last until the next AGM. If her appointment is not ratified as the next AGM then her appointment lapses. I assume that the Company must be in a position to call an AGM shortly if only to approve the accounts to 30 April 2018 which have to be filed at the end of Jan 2019. On that basis, I think therefore that the correct approach is for us to confirm that (the Claimant) currently remains as a Director of the Company to avoid any threatened application to Court. If (the Claimant) does make the application to Court and succeeds that it is likely that a court order will be made in her favour against you, although you could validly argue in my view that the costs liability ought to be met by the Company given that you are acting solely in the best interests of the Company in seeking to limit her involvement in the Company.

However, at the same time as taking those steps you ought to be garnering the support of the Trustees not to ratify (the Claimant's) appointment at the AGM so that she will effectively only be a Director for a limited period of time. In any event, as I understand from you that the Trustees can only make decisions unanimously, your vote not to ratify (the Claimant's) appointment should ensure her appointment as a Director lapses and I also understand from you that there is already some support for the position that (the Claimant) shouldn't remain as a Director because of the conflict between you.

49. At a meeting on 12 March 2019, it is recorded that:

H (the Claimant) believes that R (Mr Cooper) wants her out. H has raised issues, got solicitors involved etc. R says her action has disrupted his running of the business.

H wants to have some input in the business. R does not want her to have an input.

50. A number of potential options were discussed, in a bid to move matters forward. Two of those options were:

- Mr Cooper's proposal that he would endorse the Claimant's appointment as a director provided that he remained as the managing director of the company and the chair of the board of directors.

The Claimant said no.

- The Claimant leaves the company but continues to be paid.

Mr Cooper still wants this. The Claimant does not want to leave.

51. A further meeting took place on 19 March 2019 between the Claimant, Mr Cooper and Ms Payne (who is a director of an accountants firm and an executor and trustee of Mr Wyatt's estate). The minutes of that meeting record that its main purpose was to discuss the accounts of the Respondent for the year ended 30 April 2018, which should have been submitted to Companies House by 31 January 2019. This had not happened: *because there had been a dispute between the 2 Directors; this broadly comprised (Mr Cooper) refusing to recognise (the Claimant) as a legally appointed Director and the Claimant instructing (Ms Payne) via solicitors' letter not to submit the Company's accounts.* The minutes go on to ultimately record that Mr Cooper *agreed to recognise (the Claimant) as a Director and to have regular, short meetings with her to discuss the Company's finances and (the Claimant) agreed to (Mr Cooper) being the Chairman on the Board in return for an additional 1 weeks' paid holiday.* In her evidence, the Claimant acknowledged that this showed Mr Cooper had agreed to recognise her as a Director, but disputed that she had agreed to recognise him as Chair. She said there had been agreement around him fulfilling the responsibilities of Chair, but there had been no discussion about him having a 'casting vote', which is what she said it had progressed to. She also disputed that there had been a discussion at that time about an additional week holiday.

52. A letter dated 20 October 2020, which post-dates the incident leading to the disciplinary, was sent to the Claimant by solicitors instructed by Mr Cooper 'in his capacity as the managing Director and Chairman of the Board of Directors' setting out that it was Mr Cooper's view that it was in the best interests of the company for the Claimant to be removed as a Director for the following reasons:

- i. The result of the independent disciplinary inquiry by HR180 published on 16 September was that you had been guilty of gross misconduct. This decision included a finding at paragraph 5, that you had behaved in a manner unbecoming of a director. We refer to the decision which provides further details of the findings against you.*
 - ii. The business relationship between you and (Mr Cooper) has broken down irretrievably. You will accept that directors must have sufficient trust and confidence in each other to be able to work together and this is no longer the position.*
 - iii. You have breached the requirement that you must act in a way that, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.*
 - iv. There is a clear conflict of interest between you and the Company. You have appealed against the decision to dismiss you and it seems likely that were this appeal to be dismissed that you will bring a claim against the Company in the Employment Tribunal*
53. The Claimant believes that Mr Cooper wished to remove her from the business as an employee for financial reasons and she points to the fact that after her employment was terminated, Mr Cooper used what she describes as *his alleged 'casting vote' at a Board Meeting on 18th June 2021 to vote himself a £300,000 bonus*. Mr Cooper accepted there was a starting point of him receiving £300,000 and the Claimant receiving £50,000 from the directors' dividends. When it was put to him that he would benefit financially from the Claimant no longer being a director, he said it would depend on the company's performance. We found this response insincere, based on the profits the company has made over recent years and the profits being discussed during this part of the evidence. However, Mr Cooper went on to point out that as a trustee, the Claimant would have a vote on the dividends.
54. Mr Cooper accepted during cross examination that in early November 2020, the then-company solicitors, instructed by him, sent a letter to the Claimant asking her to resign and threatened to remove her as a Director. Mr Cooper sought to point out that this was hypothetical, as the Claimant remains a Director of the business and he was 'not currently' trying to remove her.
55. Mr Cooper's evidence, and the submissions made on the Respondent's behalf, was that a 'line had been drawn' at the meeting on 19 March 2019 and that Mr Cooper essentially accepted the position (that the Claimant was a valid director). The Tribunal found that whilst there may have been a line drawn in the sense that Mr Cooper did not continue, at that time, to instruct solicitors to continue efforts to have the Claimant removed from her role, his views about this had not changed. We consider such findings are supported by the subsequent events as detailed above. We find that Mr Cooper attempted to frustrate the Claimant's role by his actions in refusing to allow her sight of the company accounts and the letter dated November 2020.
56. The Tribunal found that there was a pattern of behaviour that demonstrates Mr Cooper was seeking to remove the Claimant from her role as statutory director and that his actions following her dismissal further support this.

57. The Tribunal had no hesitation in finding that there was a toxic relationship between the Claimant and Mr Cooper, that this included allegations of poor conduct on both sides and a power struggle between the siblings in the context of their roles at the Respondent company. We also had no doubt in finding that neither wanted the other to remain as a director of the company, or have the ability to wield significant influence over the other.

Culture of the Business

58. The Tribunal read and heard a great deal about the culture at the Respondent company. It is accepted between the parties that there was a swearing culture within the company and Mrs Hayden and Mrs Tolley made findings to that effect. The Tribunal had no hesitation in finding that a swearing culture very much existed within the Respondent company.

59. The Claimant's partner, Mr Graham described in a statement that: *Swearing is a part of daily life at Wybone, in both factory and office environments. General conversation includes the use of 'swear words'. I would say that, on the whole, there is no malice intended and people are not usually offended.*

60. There is consistent and extensive evidence throughout the bundle that in addition to the swearing culture, the Claimant and Mr Cooper often engaged in shouting and swearing at each other and that such exchanges were commonplace. Mrs Wright told Mrs Tolley that she had "*witnessed people swearing within meetings and within disagreements, the only time I've seen someone where they've been hurling very direct insults at one another, is between (the Claimant) and (Mr Cooper).*" Mrs Wright also said that she had personally witnessed them tell each other to "*eff off*".

61. There were notes of a discussion with a current or former employee Ms Sidebottom (taken by a Ms Stainthorpe). Ms Sidebottom said "*Lots of people swear at Wybone - it just happens all the time. It doesn't offend or upset me if people swear. Sometimes people swear out of frustration, sometimes just in general conversation. In my personal experience if people swear in front of me they tend to apologise for using bad language.*" She also said that she sometimes heard raised voices between the Claimant and Mr Cooper if walking down the corridor past his office; she described that "*It seems that they are always at loggerheads. A brother and sister bickering, which must be very difficult when they are running a business. It doesn't always feel like Wybone pulling together because of the conflict.*"

62. Mr Cooper was asked about his own use of swear words and his general conduct towards the Claimant. He said that he had never directly sworn at the Claimant, that he had 'maybe' used swearing as part of an argument and that he had never got angry with the Claimant in meetings, only 'frustrated and heated'. He accepted there had been arguments but denied shouting, saying he may have raised his voice, but he has a loud voice so there would be no need to shout. The Tribunal was not persuaded or impressed with Mr Cooper's

evidence, which we found to be self-serving and sought to minimise his own behaviour. We are entirely satisfied from the wealth of evidence within the bundle that Mr Cooper has shouted and sworn directly at the Claimant, and she him.

63. In her oral evidence, the Claimant did not always answer direct questions, choosing to make her own points in response. Like Mr Cooper, her evidence was self-serving. In these circumstances, the Tribunal took consideration of other, supporting and collateral evidence when reaching our findings.

7 May 2019

64. There is no dispute that there was an exchange on 7 May 2019. This was preceded by the Claimant feeling aggrieved as to the handling of a staff night out, her dissatisfaction with Mrs Wright in this regard, and her wish to raise this with Mr Cooper. It culminated in a heated exchange between her and Mrs Wright, to which Mr Cooper was witness/party. The Respondent's case is that the Claimant shouted at and swore at Mrs Wright repeatedly. The Claimant says she used a swear word only once, and it was not directed at Mrs Wright.

65. We set out our findings on this incident below, for the purpose of the wrongful dismissal claim.

Meeting 8 May 2019

66. The Claimant asked to meet with Mrs Wright the following morning (after the incident), in order to apologise. Mrs Wright reported in her interview with Ms Mee that the Claimant wanted to 'formally apologise', that she acknowledged she shouldn't have behaved 'like that', and referred to the situation between her and Mr Cooper and the stress this was causing her.

67. The Claimant said that she asked to apologise and also invited Mrs Wright to bring a witness "*as I didn't want her to feel I was going to take advantage of her.*"

68. In her interview with Ms Mee, Mrs Wright said that "*I do regret shouting; I don't think its professional and I would never advocate people shouting. The next day I apologised for shouting back but told her it was how she was.*"

69. Mr Cooper chose to attend this meeting. There is no dispute that the meeting descended into an argument between the Claimant and Mr Cooper and that Mrs Wright left the meeting.

70. It is clear the Claimant made attempts to speak with Mrs Wright on a more formal footing to offer a further apology for the incident the previous day.

71. However, that the Claimant felt it was necessary or appropriate to arrange a formal meeting, to which she suggested Mrs Wright bring another person with

her, supports that what occurred on 7 May 2019 was out of the ordinary and that there was something serious that required such a formal apology.

Subsequent events

72. The Claimant refers to the ongoing relationship between her and Mrs Wright following the incident and suggests that the incident cannot have been so bad given that the relationship continued without difficulty. It was put to the Claimant that this was evidence of Mrs Wright acting professionally. That the two women were able to continue working together does not undermine the findings made.

Grievance

73. On 17 May 2019, the Claimant raised a grievance against Mr Cooper. This is addressed further below.

Disciplinary Process/HR180

74. Mrs Wright did not at any time raise a grievance against the Claimant. During her interview with Ms Mee she said *"I told (Mr Cooper) at that point I didn't think he needed to raise a grievance. That it wasn't for me to have to do that for him to intervene. If someone was to shout at a manager we would step in, we wouldn't ask the manager to raise a G. I said I thought it was for the company."* (sic)

75. Mrs Wright stated that she was 'too involved', and that she suggested Mr Cooper took statements, stating that it was not acceptable. In her interview with Mrs Tolley, Mrs Wright said *"I thought something needed doing about it. And, you know, even if it was a discussion, some, you know, we needed to be...Erm, you know, for it formally to be recognised that that wasn't acceptable."*

76. In Ms Mee's investigation report, she describes: *On 10th June 2019, HR180 were instructed by (Mr) Cooper, Managing Director of Wybone to undertake any HR process HR180 felt was necessary on the basis of the allegation, but starting with a full investigation of the facts and circumstances.*

77. On 31 May 2019, the Claimant was informed that the Respondent intended to investigate 'your recent behaviour within the workplace' and that: *Given the nature of this situation, the Company considers that it would be inappropriate and impractical for the investigation to be conducted internally. Accordingly, the Company is in the process of arranging for an external HR consultancy to deal with this matter. This is to ensure that a robust, objective and fair investigation is conducted by a third party.*

78. On 4 June 2019, Mrs Wright sent an email to the Claimant and Mr Cooper in which she set out that she had spoken to 'several HR Companies'. This was in the context of both the grievance and the disciplinary. Mrs Wright advised that

the best way to approach the selection was to *compare them, based on their skills, competence and experience. In my professional opinion, I believe that I have sourced a competent and appropriate external consultancy.* She proposed the instruction of HR180 and pointed to their location, lack of awareness of the Respondent or its staff, a large number of HR partners and employees for a HR consultancy (thus having sufficient personnel to deal with the grievance and the investigation), and 'proven experience of dealing with businesses in trusts, family businesses/family dynamic and Director disputes'. Both Mr Cooper and the Claimant were asked to confirm their agreement/lack of objection to the appointment.

79. An agreement document between the Respondent and HR180 dated 10 June 2019 provides that

(in circumstances where the Client has instructed HR180 to conduct an internal procedure, such as a grievance or disciplinary procedure, and make a decision as to the outcome of that procedure on the Client's behalf) not interfere with or attempt to influence the outcome of that procedure but shall accept, support and put into effect whatever decision HR180 makes and shall procure that HR180 will have full autonomy in conducting such procedure and in determining its outcome. (clause 5.1.2)

80. Ms Mee wrote to the Claimant on 10 June 2019 with a notice of investigation meeting letter. The Claimant responded to that letter by way of a letter/statement dated 12 June 2019, in which she set out her surprise at receiving the correspondence at all and her belief that this was retaliation for her raising a grievance. The Claimant set out the background to what took place, her version of the incident, and stated that she did not believe there was anything further to add, a fact-finding meeting was not required, and she believed the matter was closed. Ms Mee responded on 14 June 2019.

81. Ms Mee interviewed Mrs Wright, Mr Cooper, Miss Gill and Mr Conway. Mr Smith was also spoken to.

82. On 22 July 2019, Ms Mee sent an email to her colleagues confirming that she intended to write to the Claimant and inform her the investigation was complete, and 'we're referring to disciplinary'.

83. On 5 September 2019, the Claimant was sent a letter inviting her to a disciplinary hearing scheduled for 9 September 2019.

84. By letter from the Claimant's solicitor dated 6 September 2019, a request was made for all witnesses to attend the disciplinary hearing to answer questions put to them. A request was also made for the hearing to be adjourned.

85. The Claimant commenced sick leave on 9 September 2019.

86. Several attempts were made to schedule the Claimant's disciplinary meeting. Dates were postponed for various reasons, including the Claimant being on sick leave and the disciplinary officer considering additional time was required to

consider material submitted by the Claimant. In addition, the disciplinary process was paused in early April 2020, pending the grievance appeal process.

87. The Claimant's disciplinary meeting ultimately took place on 14 September 2020 and lasted five and a half hours. Mrs Hayden found that the Claimant:

- a) Behaved in an aggressive and intimidating way towards Mrs Wright during a disagreement, which involved the Claimant shouting and using offensive language.
- b) Was verbally abusive toward Mrs Wright in front of members of staff and others.
- c) Behaved in a manner that is unbecoming of a Director.
- d) Behaved and conducted herself in a manner that breached the Respondent's good faith, trust and confidence in the Claimant.

88. Mrs Hayden did not find the following allegations made out:

- a) That the Claimant followed Mrs Wright into her office, when she walked away from her, after which the Claimant continued to be verbally abusive towards Mrs Wright
- b) That the Claimant was verbally abusive towards Mr Cooper, Managing Director, in front of members of staff and others

89. By letter of 16 September 2019, Mrs Hayden confirmed her decision was to dismiss the Claimant for reasons of gross misconduct and that the dismissal was to take effect immediately.

90. A letter was sent to the Claimant by Mrs Wright dated 18 September 2019 in which she stated:

Further to your letter provided by HR180 dated 16th September 2020, which outlined the decision made in respect of the disciplinary hearing, and which confirmed your dismissal, for reasons of gross misconduct. I am writing to confirm the details in relation to your employment being terminated with Wybone Limited. This is in line with the supply agreement between Wybone and HR180, which specified that the Company would carry out any sanction determined by HR180.

Appeal

91. The Claimant appealed against the decision to dismiss on 22 September 2020.

92. On 2 October 2020, the Respondent entered into an agreement with Mrs Tolley, to conduct the appeal. The terms of agreement set out that:

(Mrs Tolley's) conduct and findings will be entirely independent and (the Respondent) by signing this document authorises and guarantees such.

93. As part of the appeal process, Mrs Tolley re-interviewed both Mr Cooper and Mrs Wright. We noted that within the interviews, Mrs Tolley set out some of the Claimant's points, and obtained views on, for example:
- i. that the Claimant had acknowledged that she lost her temper, and in her memory of it, she swore once
 - ii. the texts between the two women after the event
 - iii. that Mr Cooper had 'reprimanded' Mrs Wright previously, which had resulted in Mrs Wright being in tears
 - iv. other, male, managers, including Mr Cooper, were not taken to task in the same way as she had been
94. Mrs Tolley also asked Mrs Wright about Mr Cooper or any other manager swearing, or engaging in behaviour as Mrs Wright had described from the Claimant, and whether she had either been made aware of, or witnessed, this happening. Mrs Wright replied that she had witnessed people swearing within meetings and within disagreements, but the only time she had seen someone 'where they've been hurling very direct insults at one another', was between the Claimant and Mr Cooper.
95. The appeal hearing was postponed several times, for various reasons including the volume of documents the Claimant provided over the course of a few weeks, at different times. In addition, the Claimant made requests to postpone for various reasons, and Mrs Tolley also postponed the hearing when the volume of additional documents became apparent.
96. One of the Claimant's complaints is that not all relevant information was considered as part of the process.
97. By email of 11 December 2020, Mrs Tolley had informed the Claimant that she would not be considering matters in connection with the following:
- the grievance, (as this has been properly investigated, heard and concluded) HR180 including the supply agreement and matters linking HR180 to the grievance,
 - the Claimant's DSAR,
 - documents in connection with the Director dispute,
 - any documents referencing the Without Prejudice communications,
 - documents relating to the Claimant's sick pay reduction,
 - documents relating to Company financial information.
98. Mrs Tolley told us that in the event, she did read the grievance outcome and appeal, at the Claimant's request. Mrs Tolley described her preparation for the hearing as follows:
- Having now received in excess of 250 documents from (the Claimant) and in view of the sheer quantity and volume of the information provided I needed to put some structure into what I would consider as part of the appeal hearing. I had spent a great deal of time reading through every document that was sent to me and indeed watched the videos of the disciplinary hearing. I watched the whole 5.5 hours as, whilst (the Claimant) had directed me to watch extracts that had concerned her, I wished to see the hearing in full, as reviewing extracts, I*

believed, might give a false impression of what was, by any standard, a lengthy disciplinary hearing.

I made the decision that many of the folders and documents were not relevant. In particular, I believed that any that were associated with the grievance (which I could see had been lengthy and again document heavy) had been reviewed and concluded upon by a thorough and objective external source. I did not therefore feel that it was appropriate to revisit its content within the appeal.

99. The appeal hearing ultimately took place on 8 January 2021 and lasted 8.5 hours. The Claimant was accompanied by her daughter. Mrs Tolley explained that: *It was established two hours into the hearing that the video recording had not activated. We agreed that we would repeat the content of the first two hours at the end of the hearing, to ensure all the content of (the Claimant's) appeal was captured on video.*

100. The Claimant used a PowerPoint presentation in making her submissions at the appeal hearing, which was primarily used as an aide by the Claimant. The Claimant emailed the presentation to Mrs Tolley after the hearing, and it was included within the Tribunal bundle. It runs to 82 slides and contains diagrams, submissions and references to case law.

101. The appeal outcome was communicated to the Claimant by letter dated 5 February 2021. Mrs Tolley set out the Claimant's grounds of appeal:

- HR180's authority to dismiss
- Unfairness (which subdivided into six areas of detail)
- Discrimination and disparity of treatment.

102. In summary, Mrs Tolley partially upheld the Claimant's ground of complaint in relation to the allegation that she had been verbally abusive towards Mrs Wright in front of members of staff and others. Mrs Tolley did not agree with Mrs Hayden's finding that the verbal abuse occurred in front of members of staff and others; it occurred in front of Mr Cooper. However, Mrs Tolley was satisfied that the volume was such that it was likely to have been heard by staff. Mrs Tolley nonetheless considered that the Claimant's conduct in respect of this allegation did amount to gross misconduct. Mrs Tolley did not uphold any other elements of the Claimant's appeal.

Disciplinary Context

103. Mrs Wright (who was the HR manager) told Ms Mee about other conflict in the workplace. The interview entry is as follows:

"Conflict between staff — sometimes an exchange and voices raised on shop floor. Generally, overall it deescalates quick. People are action orientated, when conflict happens, they aim to do what's needed and sort it out. They escalate and deescalate quickly. Don't have many conflict reports to HR where we have to deal with it. I think with the shop floor it's all men working together who seem

to work in a different way. They are few and far between at staff level. Few times there may be shouting, We had to step in twice and separate staff. Take statements, try and deal informally, if we need to then we go down disciplinary. Overall, they try and get on.”

104. Ms Mee asked how it was dealt with when people shout, and what the outcome would be, for example a formal outcome, note on file etc. Mrs Wright responded:

“All manner of things really, look at reasons behind it, sometimes there has been a miscommunication and we have mediated between staff. They can get hostile, once you sit them down they realise they have the wrong end of the stick. Shop floor staff often want to move on and not formally complain Altercations on shop floor and they shout and swear. They have been to disciplinary before. Altercation — physical – that was disciplinary matter. I suppose when you have worked here so long, you know what's serious and what is not. And Sometimes a manager will say We had to speak to this, they tell you the story but they've actually already sorted it out. Here we have a union in the building — staff report if they feel it's necessary. Always aim for informal if we can. If more serious we go formal.”

105. Mrs Tolley explicitly asked around the disciplinary context, asking what Mrs Wright would have done if she had seen or heard or read in the notes of someone that was reporting it to her, and whether this would be a disciplinary. Mrs Wright replied “Yes, we have done disciplinary proceedings for for less than for less than that.” (sic)

Grievance against Mr Cooper

106. On 17 May 2019, the Claimant submitted a grievance against Mr Cooper alleging: *continued bullying behaviour, your lack of any level of engagement/communication with me and your threat today of redundancy.*
107. This grievance was acknowledged (by Mrs Wright) on 24 May 2019, by letter that stated: *given the fact that the grievance is lodged against your Line Manager, who is the MD, the Company intends to arrange an external HR consultancy to deal with this matter. This was notified to you in the Trustees' Meeting on 22nd May 2019. Therefore, until the external consultancy has indicated their availability, I am not able to advise you of a meeting date. However, I would like to assure you that this will be organised as soon as possible.*
108. On 4 June 2019, Mrs Wright sent an email to the Claimant and Mr Cooper in which she set out that she had spoken to ‘several HR Companies’ who could hear the grievance and which were ‘entirely independent’ of them and Mrs Wright. Mrs Wright referred to one company, but considered that they were ‘too familiar’ with the company and with Mr Cooper and Mrs Wright, and therefore may not be regarded as fully independent by the Claimant. As above, Mrs Wright advised that the best way to approach the selection was to *compare*

them, based on their skills, competence and experience. In my professional opinion, I believe that I have sourced a competent and appropriate external consultancy. She proposed the instruction of HR180 and pointed to their location, lack of awareness of the Respondent or its staff, a large number HR partners and employees for a HR consultancy (thus having sufficient personnel to deal with the grievance and the investigation, and 'proven experience of dealing with businesses in trusts, family businesses/family dynamic and Director disputes (which was particularly important from the Claimant's perspective). Both Mr Cooper and the Claimant were asked to confirm their agreement/lack of objection to the appointment.

109. Following the Claimant's application for an injunction against Mr Cooper and the Respondent on 30 September 2019, which was heard on 19 and 20 December 2019, she re-submitted her grievance (on 20 December 2019). On, 12 January 2020, she sent a document to HR180 setting out her grievance.

110. Grievance meetings took place on 17 January 2020 and 4 February 2020. The decision in respect of Part 1 of the grievance 'Unfair Process in Disciplinary Proceedings' was sent on 20 February 2020. The grievance contained numerous specific allegations, none of which were upheld. Many of those allegations are repeated within the current claim (for example the authority of HR180, failures in the investigative process and the relationship between Blacks and HR180). The decision in respect of Part 2 'Bullying, harassment and intimidation, lack of engagement/communication and threats to employment', was sent on 6 March 2020. The overall decision was that the Claimant had *not been subject to a scheme of bullying, harassment and intimidation from (Mr) Cooper, that there have been no serious threats to your employment, but there have been some challenges in relation to a lack of engagement and communication (but with mitigation).*

111. The Claimant appealed the grievance decisions on 16 March 2020. The appeal decision was sent on 6 July 2020. The external HR professional concluded: *I have not upheld 21 of your 27 appeal points and I have partially upheld 6 of your appeal points. My overall conclusion is that your appeal is not upheld.*

112. These details are included for context. The Tribunal did not make findings about the grievance. This was not within the ambit of our role. That process had been carried out as a separate exercise.

UNFAIR DISMISSAL

HR180

113. The Claimant makes a number of specific complaints about HR180:

- i. Authority to Dismiss

114. The Claimant asserts that HR180 did not have the power to dismiss her in any event. The Tribunal reviewed the agreement document. We heard that this was a generic document and was primarily for retained clients, which explained a number of the clauses. As above, there is a clause that provides that *HR180 will have full autonomy in conducting such procedure and in determining its outcome*
115. In Mrs Hayden's letter dated 20 February 2020 inviting the Claimant to the disciplinary hearing, she says: *I will be conducting the hearing as the chair and decision maker.*
116. Mrs Wright confirmed the decision to dismiss in her letter of 18 September 2022. Mrs Wright was a member of SMT and the head of HR.
117. Albeit that Mrs Tolley is not part of HR180, she confirmed to the Claimant by email dated 9 October 2020 that she had been given complete authority to decide on the outcome of the appeal, which could include a decision to reinstate the Claimant.

ii. Independence of HR180/Bias

118. The Claimant told us that Blacks Solicitors were the company solicitors, not Mr Cooper's personal solicitors, yet were giving Mr Cooper advice. Mr Cooper told us that he had other solicitors for personal matters and that Blacks were the company solicitors. This was somewhat at odds with the content of the correspondence between Blacks and Freeths (the Claimant's solicitors) in 2018, within which Blacks referred to their client as Mr Cooper, not the Respondent company. The Tribunal also noted that the terms of the order made by HHJ Eyre QC explicitly allowed for redaction of advice from Blacks to Mr Cooper in a personal capacity (and the Claimant's file notes of the emails refer to redacted sections).
119. The Tribunal considered that there did appear to be something of a grey area as to how far Blacks were acting for Mr Cooper and for the Respondent. However, the relevance of this for the present case is limited. It is the Claimant's case that Blacks 'introduced' Mr Cooper and Mrs Wright to HR180, thereby undermining HR180's independence. It is the Claimant's case that HR180 were engaged to deliver a pre-determined agenda.
120. The Tribunal had sight of an email dated 21 May 2019 from a Mr Lawrence at Blacks, which was sent to Mrs Wright, and copied in Ms Mee (amongst others). That email stated:
- It was good to meet you earlier. I promised that I would put you in contact with a couple of HR consultancies with which you could explore options for outsourcing the disciplinary/grievance procedures we discussed. The first of these is HR180, our main contacts at which are (Ms) Morley-Jones and (Ms) Mee. I have outlined the circumstances to (Ms Mee) and she has confirmed that they would be happy to help.*

121. Mrs Wright's email to Mr Cooper and the Claimant on 4 June 2019 refers to her having spoken with several HR companies, though no further details were provided. Mrs Wright had set out her rationale for appointing HR180 and both Mr Cooper and the Claimant were given an opportunity to object.
122. There was no evidence presented to the Tribunal that Blacks had any further contact with HR180 about, or involvement in, their investigation following the email of 21 May 2019.
123. The Claimant asserts that HR180 was engaged to deliver a pre-determined agenda. The agreement between HR180 and the Respondent specifically set out that the Respondent would *not interfere with or attempt to influence the outcome of that procedure but shall accept, support and put into effect whatever decision HR180 makes.*
124. The Claimant says that HR180 was biased; she points to handwritten notes made by Ms Morley-Jones of a conversation with Mrs Wright on 3 June 2019 which the Claimant says is evidence of pre-determination. Having reviewed those notes, they appear to the Tribunal to be key points around the context, grievance and incident on 7 May 2019. They are brief, bullet-type notes, with no conclusions or obvious views being expressed by the author. They reference 'shouting and swearing at me in my office', but also 'arguments and blow ups – shouting and swearing at her', 'six of one and half a dozen of another' and that Mr Cooper 'said something about redundancy'.
125. Ms Morley-Jones was not ultimately the disciplinary officer.
126. As part of the Claimant's grievance appeal, the following recommendation was made:
- I would make one recommendation in respect of the disciplinary procedure and that is that (Ms) Morley-Jones should not have any involvement in it if it proceeds. It is apparent that Ms Morley-Jones did also review the grievance outcome, albeit she says only to check style and tone as opposed to query any findings. This process, in my view, should be kept separate from the disciplinary process. The dismissing manager must have complete independence to complete and conclude the disciplinary process, without any discussion or supervision or involvement from (Ms) Morley-Jones.*
127. Ultimately Ms Morley-Jones did not hear the disciplinary hearing due to a conflict of interest. Ms Morley-Jones had given a witness statement within the injunction proceedings.
128. The Claimant makes a number of complaints about Ms Mee's involvement. The Claimant says that Ms Mee had pre-determined the matter. The Claimant points to the 'notice of investigation meeting' letter sent by Ms Mee to Mr Cooper on 12 June 2019. The Tribunal did not consider there was any evidence of pre-determination within this letter. It is in standard terms and explicitly states that: *Should we find evidence to suggest that the*

allegations of the inappropriate behaviour and conduct have occurred and the incident could constitute gross misconduct which may lead to the Company taking disciplinary action. We ask you to bear with us whilst we conduct our investigations and re-iterate that all parties are presumed innocent of any possible charges unless evidence determines otherwise, at which point relevant individuals would be invited to a disciplinary hearing to discuss and respond to the issues in hand. That reference is made to inappropriate behaviour and conduct is reasonable; an incident had been reported.

129. The Claimant says that Ms Mee misunderstood the working dynamic, placing too much emphasis on what she considered to be the difference between the 'shop floor' and the 'office' side of things. The Claimant considers this influenced her decision making. The Claimant's case in this regard is not entirely clear, as the incident under investigation was within the office area and between individuals who on any view, are considered to be on the 'office' side.

130. It was Mrs Hayden, not Ms Mee who was the disciplinary and dismissing officer.

131. There was no correspondence or communication between Mr Cooper and HR180 other than administrative matters, for example seeking approval for the costs associated with the occupational health referral. Mrs Hayden explicitly denied any suggestion of collusion and the Tribunal accepted that.

iii. The decision made by the external company was made by the most "junior" HR partner.

132. The Claimant referred to the Respondent's disciplinary policy and in particular, paragraph 31 which states that *Only a Senior Manager may dismiss an employee.*

133. There is no specific provision within the policy for the outsourcing of HR functions. We noted that the Claimant did not assert that it was wrong to outsource the investigation in principle.

134. The decision to dismiss was taken by Mrs Hayden. Mrs Hayden told us she has 10 years' experience in HR, seven of which have been at HR partner level. Mrs Hayden was selected to chair and decide the matter within her role at HR180, as she had recently returned from a period of leave, and so had had no prior knowledge or involvement in the case.

135. The letter confirming this decision was sent by Mrs Wright to the Claimant on 18 September 2020. Mrs Wright was a member of the Senior Management Team (SMT) and the HR manager.

Procedure

136. On 10 June 2019, the Claimant was sent a letter from Ms Mee. The header at the top of that letter was 'Investigation of Concerns DW Quarterly Night Out'. The body of the letter stated:

It has recently come to our attention, that there has been an incident involving inappropriate behaviour and conduct involving a Director of the Company and another member of the management team.

*Our initial investigations lead us to believe that you **may** have been involved in this incident and therefore I would like to conduct a fact finding meeting on Friday 14th June at 2 pm in order to ask you some questions which will allow me to determine exactly what happened. This will take place over the phone, so please make sure you are in a place where you can speak confidentially. We reserve the right to change or add to these allegations as appropriate and in light of the results of our investigation.*

...

*Should we find evidence to suggest that the allegations of the inappropriate behaviour and conduct have occurred and the incident could constitute gross misconduct which **may** lead to the Company taking disciplinary action. We ask you to bear with us whilst we conduct our investigations and re-iterate that all 'parties are presumed innocent of any possible charges unless evidence determines otherwise, at which point relevant individuals would be invited to a disciplinary hearing to discuss and respond to the issues in hand.*

(original emphasis)

137. The Claimant responded by letter dated 12 June 2019, in which she expressed her surprise at Ms Mee's letter. The Claimant asserted that the investigation was being undertaken as part of a retaliation for her submitting a grievance on 17 May 2019. The Claimant stated that the matter being referring to was dealt with at the time by her and Mrs Wright. The Claimant indicated the reason for the investigation was the wider dispute between her and Mr Cooper.

138. The Claimant set out that this letter stood as her final statement on the matter and that it was *necessary or appropriate for this matter to be progressed any further and if it were, consider that this would be a witch hunt given the far worse instances of behaviour by (Mr Cooper) which have never been investigated and the frequency of swearing by many other members of staff. I trust that this will be the end of the issue. On the basis of the below I do not see that there is anything further to add and so a fact find meeting is not required.* The Claimant set out her account of the incident.

139. The Claimant's account in that letter was that when she had asked Mrs Wright why she had not followed up her menu choices regarding the quarterly work night out that evening, Mrs Wright had replied she 'hadn't time to chase people'. The Claimant said *I lost my temper and said "I am not just fucking people" (or similar words). I asked her whether she would have chased my Dad and I also said she would chase up (Mr Cooper)...I did not swear directly at (Mrs Wright). I was very angry but I was not aggressive towards her. I used a swear word in my sentence, but this was not focused at (Mrs Wright).*

140. The Claimant said that she did make a very brief apology to Mrs Wright (and Miss Gill) and that she asked to speak with Mrs Wright the following morning to apologise.

141. Ms Mee responded to the Claimant on 14 June 2019 in which she assured the Claimant that the disciplinary and grievance were being treated as 'two entirely separate matters'. Ms Mee went on to state:

Whilst you state that you feel there is no need for an investigation meeting, that is not, unfortunately, your decision to make.

Whilst I would have preferred to speak with you in person, thank you for submitting a written statement as your contribution to the investigation process. I must warn you that this does limit my ability to understand all aspects of the case, as I am limited by the amount of information you have provided and its relevance to the questions I have. Whilst we are continuing to conduct investigation meetings with the other parties involved in the alleged incident and, depending on what information comes out of the investigation, we may need to come back to you and schedule a further investigation meeting to clarify certain facts. This will be important in us establishing as full a picture as possible before deciding if any further action is required, if at all.

142. The Claimant complained that Ms Mee 'never came back to her' following this letter. That letter did not undertake to do so; it set out that it might be necessary. Ms Mee said that following her investigation and in light of the Claimant's very clear expressed position, there was no need.

143. The Claimant complains that Ms Mee did not interview sufficient personnel; not all relevant witnesses were interviewed. Ms Mee interviewed the individuals said to be present during the incident, as well as those who were on the periphery at any point. The following were interviewed: Mr Cooper, Mrs Wright (who were both present in the office at the time of the incident), as well as Miss Gill (who the Claimant had spoken to just before she had gone to the canteen), Mr Smith (who passed by the office during the incident) and Mr Conway (who had been present in the canteen).

144. The Claimant complains that Ms Mee investigated the grievance, which was outside her remit. The interview notes between Ms Mee and Mr Cooper show that Ms Mee asked Mr Cooper about 'an incident' that had occurred following a meeting between him and the Claimant. Mr Cooper responded by referring to the incident leading to the grievance. It is right that this response was not interrupted by Ms Mee and that she asked some clarification questions. However, she had also asked questions about the general set up and culture at the company and moved on to ask specifically about the 7 May 2019. Mrs Hayden confirmed to us that she did not take account of the grievance during the disciplinary process.

145. The Claimant complained about the use of pre-prepared questions during the investigation interviews. The Tribunal considered this to be standard practice. The Claimant says that not all questions were asked, which can be

seen from the striking through of some of them. We heard evidence that this occurred where the question was irrelevant, or had been answered in another part of the interview. Those being interviewed often provide answers that address more than the issue referred to in the question.

146. The Claimant complained that the allegations had been 're-framed' and in doing so, the number of allegations against her was increased. The Claimant referred to the investigation report of Ms Mee referring to *The witness statements, including (The Claimant's) show that the incident did indeed take place, with (the Claimant) shouting and swearing at (Mrs Wright) in public, under the belief that she had deliberately been excluded from a Company event.* The Claimant suggests that this preliminary investigation report confirms that the matter was akin to a simple disagreement, which is then exaggerated over time and is then alleged to be 'verbal abuse'. The outcome as quoted above comes from the executive summary section of Ms Mee's report, which goes on to detail the evidence in more detail and to identify the specific behaviours and allegations, which includes the Claimant allegedly swearing at Mrs Wright and repeatedly using abusive language, unbecoming of an employee or of a Director.

147. A letter sent by Ms Morley-Jones (who was originally going to carry out the disciplinary) on 5 September 2019 set out six allegations:

- i. Behaviour unbecoming of a Director
- ii. Speaking inappropriately towards a colleague
- iii. Behaviour that could be interpreted as derogatory, rude, offensive, abusive, threatening, intimidating and/or bullying towards another employee
- iv. Misuse of your position as a Director and senior manager
- v. Serious breach of the Company policies and procedures, specifically the harassment section of the Company's Equal Opportunities Policy.
- vi. Behaviour and conduct which could be perceived to be a breach of the Company's good faith, trust and confidence

148. Within the matters listed at (i)-(iv), some of the key evidence obtained was referenced. The matters at (v) and (vi) referred to 'matters above' (i.e. within (i)-(iv)).

149. Mrs Hayden's letter of 2 September 2020 detailed the allegations as

- i. behaved in an aggressive and intimidating way towards Mrs Wright, HR Manager, during a disagreement, which involved you shouting and using offensive language;
- ii. were verbally abusive towards Mrs Wright in front of members of staff and others;
- iii. followed Mrs Wright into her office when she walked away from you, after which you continued to be verbally abusive towards her
- iv. were verbally abusive towards Mr Cooper, Managing Director, in front of members of staff and others;

- v. behaved in a manner that is unbecoming of a Director; and
- vi. behaved and conducted yourself in a manner that breaches the Company's good faith, trust and confidence in you.

150. In the appeal outcome letter of 5 February 2021, Mrs Tolley addressed this issue. She stated:

Whilst I am mindful that the wording of the allegations initially put to you in September 2019 and those that formed the basis of the disciplinary hearing in September 2020 were not exactly the same, it is my understanding that they were amended for clarity and I find that the substance of the allegations remains the same. On that basis, I do not see that there is sufficient argument to undermine the fairness of the considerations of the dismissing officer in reaching her final decision.

The disciplinary procedure and the Acas code require that you were informed of the allegations against you prior to the disciplinary hearing and this happened. The disciplinary hearing lasted five and a half hours and you were able to respond to the allegations in detail. Your appeal hearing lasted 8.5 hours and it was clear to me that you understood the allegations you were dismissed for.

151. The Tribunal agrees that the substance of the allegations remained the same and they related to the same incident on 7 May 2019. There was no importation of fresh allegations relating to other matters.
152. We note in particular that within the bullet points under each of Ms Morley-Jones' allegations, specific reference is made to, for example, witness statements referring to the Claimant as angry and aggressive, following Mrs Wright into her office to continue berating her, and specific reference to the Claimant shouting at Mr Cooper. It is clear that both letters and both lists refer to the same incident and the Tribunal is satisfied that the Claimant knew what the allegations were. This is supported by her extremely thorough preparation for her lengthy disciplinary and appeal hearings.
153. The Tribunal was referred to a document headed 'Grievance Investigation Meeting', which identifies Mrs Hayden as the author. That document contains a list of questions to be posed to the Claimant and refers to an investigation. Mrs Hayden confirmed in her evidence that she had created this document. She told us that it was a template document, that various aspects would have been changed, and that the focus was identifying the relevant questions. She said however that the document was only a preparatory document and hadn't used because shortly after it was created, the Claimant went on sick leave. This did not accord with the evidence of Ms Mee, who told us she had created the document.
154. Mrs Hayden did not interview Mrs Wright or Mr Cooper. She said that there was sufficient information from the investigation.

155. The Claimant complained that she had not been permitted to call witnesses and suggested this was a breach of the ACAS Code. Mrs Hayden told us that she considered this request and had to determine whether it was necessary and appropriate. Mrs Hayden told us that she felt calling them would amount to the Claimant cross-examining them, which was inappropriate and unnecessary. Furthermore, Mrs Hayden sought to address the Claimant's concerns by offering her an opportunity to provide questions to Mrs Hayden, which she would then ask of the witnesses.

156. The Claimant alleges that audio recordings of the interviews were 'actively withheld' from her. The Tribunal had sight of documents from Mr Cooper, Mrs Wright, Mr Conway and Mr Smith that they did not consent to the audio of their interviews being released. When this was put to the Claimant, she responded that some of the witnesses had given dishonest testimony. The Tribunal finds that HR180 sought confirmation from the witnesses as to whether they agreed for the audio to be released and it was the witnesses who refused such permission.

157. Notwithstanding the above, the Claimant's legal representatives informed the Tribunal (by email, prior to the hearing) that the contents of the recordings were provided by the Respondent in late June/early July 2021 – shortly before exchange of witness evidence and the original final hearing. They confirmed it was a purely factual dispute and related to the fact that the Claimant submits that the transcriptions were not a correct record of the hearings and either omit, or wrongly transcribe, key words. Eight examples were provided within that email. The dispute was largely resolved, with the Respondent making various concessions and pointing out that the notes were intended to be notes, rather than transcripts. One of the examples was the omission from Miss Gill's interview, as set out below, which the Respondent accepted was on the audio recording. It was disappointing that this matter was not resolved earlier, particularly given the original hearing date.

158. The interviews with the Claimant and those undertaken by Mrs Tolley were transcribed and included in the bundle.

159. The Claimant complained that the CCTV footage within the corridor had not been viewed and said this could be used as evidence to show who was in the area and this would have supported her version of events. The Tribunal had an email that was sent by Mrs Wright to all employees on 22 January 2020 which set out:

Just to keep you updated, the electrical work being carried out on site yesterday, was to begin the installation of CCTV within the office corridors and Reception area. The work is not yet completed, and the cameras are not yet live.

The main rationale behind the installation is to expand our CVTV coverage within the building for security purposes.

160. The Claimant said this is not correct; she says that the Respondent has had CCTV on site for many years and this was just an extension of that. She explained that in January 2020, she saw electricians putting CCTV up and asked Mr Conway about it. She says Mr Conway explained the reason for additional cameras was in order to see **both ways** down the corridor. The Claimant said that there had already been CCTV showing from the canteen and reception and down the corridor (though this was not both ways). The basis of the Claimant's evidence on this was what she had been told by Mr Conway, rather than her own knowledge. In any event, it is unclear what relevance the CCTV has, as it was not suggested this captured audio; therefore it would not have captured the content of the incident. The inference was that it would show that there were not others in the vicinity, and therefore the incident would not have been overheard. Other evidence was available around this, notably from Mr Smith.

161. During the process, in addition to the grievance about the disciplinary process, the Claimant raised complaints with HR180. These were sent to Ms Morley-Jones, though the letter in response was sent by Mrs Hayden, dated 4 March 2020. That letter referenced the 13 points of complaint raised by the Claimant as follows:

- i. Mrs Hayden's invitation to a Disciplinary Hearing did not enclose or attach the witness transcripts from Ms Mee's investigation.
- ii. This same invitation was appalling and incoherent
- iii. Mrs Hayden had not allowed the calling of witnesses.
- iv. Mrs Wright and Mr Cooper must be called as witnesses to the signature of the HR180 Supply Agreement.
- v. Mrs Hayden had not specified the allegation against the Claimant.
- vi. The Claimant would be submitting other grievance points once she knew what the allegations against her were.
- vii. The Claimant believed that Mrs Hayden was not following ACAS Best Practice Guidelines in relation to this process.
- viii. The Claimant believed that Mrs Hayden had alleged the Claimant was coercing and forcing witnesses to give statements.
- ix. That the witnesses who supplied statements to Ms Mee were Mr Cooper's subordinates and may have been coerced or threatened by him.
- x. The Claimant believed that Mrs Hayden was delivering a Corporate line
- xi. The Claimant was unsure as to what Mrs Hayden meant in her letter in relation to *the Company will take all steps to ensure*.
- xii. The Claimant believed that Mrs Hayden's relationship with Ms Morley-Jones was concerning
- xiii. There was no clarity around the disciplinary process, decision making authority or appeals process.

162. Mrs Hayden responded to each of these points. In relation to not allowing the calling of witnesses, she referred to her previous reasons, though stated that she had slightly changed her position and was contacting the witnesses interviewed by Ms Mee to explore whether they would attend. In her oral evidence, she confirmed that she had not in fact asked the witnesses; she had made her own decision that it would not be appropriate as it would amount to

them being cross examined by the Claimant. Mr Rudd put to her that Ms Morley-Jones had confirmed that Mr Cooper and Ms Mee had agreed to attend. Mrs Hayden said she didn't know what Mr Rudd was talking about and she hadn't been told this. We find that Mrs Hayden did not act upon her stated changed position.

163. Within Mrs Hayden's letter of 4 March 2020, she stated that she found it 'strange' that the Claimant had submitted statements from her own witnesses which were *unsigned, undated, with no audio recordings. Some are submitted with absolutely no context and no reference to when the witnesses were employed by the Company or any dates as to the specific events they describe. As I'm sure you can appreciate, this is against best practice and therefore, as you have provided their contact details, I shall shortly be contacting them to arrange proper interviews in a formal manner.*
164. In her oral evidence, Mrs Hayden accepted she had not contacted these witnesses for formal interviews. She said that she couldn't explain it other than *"there was a delay and a lot of time had elapsed and things had moved on from that point and it was necessary to get the disciplinary done for the Claimant's health as much as anything else"*. The Tribunal noted that the Claimant was on sick leave between 5 March 2020 and 12 September 2020. Mrs Hayden denied that she did not contact the witnesses because she had closed her mind to the matters raised by the Claimant; she said that she had spent significant time looking at the documents and listening to the Claimant and, ultimately, accepted her witnesses evidence at face value.
165. Mrs Hayden also confirmed on 4 March 2020 that the Claimant was entitled to submit witnesses, but told her that the number sent across should be reasonable and absolutely relevant to *the allegations against you, otherwise I shall view them as a deliberate attempt at timewasting; On reading through the documentation, this matter does not seem to be overly complex and you have already admitted to the actions in writing. For information, I currently have more than enough evidence In relation to swearing in the workplace both within Wybone Ltd and the manufacturing industry in general.*
166. During the disciplinary process, the Claimant went on sick leave. A referral was made to occupational health. It was put to Mrs Hayden in cross examination that despite ticking a box on a referral form to occupational therapy, which confirmed that *this referral has been fully discussed with the employee either directly via telephone or formal consultation and that they understand the reason for this referral*, this had not been the case. Mrs Hayden said that the Claimant knew she was being referred and she (Mrs Hayden) was simply 'filling in her sections' of the form. She eventually conceded that she hadn't discussed the specific content of the form with the Claimant. The Claimant was referred, and a report was produced.
167. The Claimant complained that she was not permitted to have her solicitor present at the disciplinary meeting. The ACAS code sets out that the statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. There is no such right to be accompanied

by a solicitor. In the present case, Mrs Hayden said that she considered the Claimant's request and did not consider it was necessary.

168. The Claimant had a five-and-a-half hour disciplinary hearing at which she was accompanied by her brother-in-law, who took part in the hearing. The Claimant's daughter and partner also provided information to Mrs Hayden during that hearing.

169. The Claimant had a further, longer, appeal hearing at which she used a PowerPoint presentation as part of her representations. At the appeal, she was accompanied by her daughter. Mrs Tolley confirmed that the Claimant's daughter could state the Claimant's case and could participate; the only thing the daughter would not normally be allowed to do would be to answer a question if Mrs Tolley was to pose one to the Claimant directly

170. The Claimant says that Mrs Hayden refused to consider all the information she submitted and referred specifically to an email she sent on 16 September 2020 (which was after the disciplinary hearing). Mrs Hayden explained that the Claimant had been given ample opportunity to submit information before, during and after the hearing. Mrs Hayden said she had had to give a cut off, otherwise it would just continue. The Tribunal found that the Claimant did submit extensive amounts of information, and that a deadline was imposed by Mrs Hayden.

171. It was suggested that insufficient weight had been given to the Claimant's mitigation. Both Mrs Hayden and Mrs Tolley explicitly referred to the mitigation in the case. Mrs Hayden's letter of dismissal dated 16 September 2020 states:

I have taken into consideration the relevant mitigation you provided, which included that a culture of swearing exists at Wybone Ltd and that your actions were as a result of your pent-up emotions, due to a buildup of issues related to your co-directorship, amongst other pressures related to workload and staff absences. In addition, it is your belief that (Mr) Cooper and (Mrs) Wright are not impartial. Whilst I acknowledge the obvious dispute between yourself and (Mr) Cooper, I find no reason to question the credibility of (Mrs) Wright's testimony and I find that (Mr) Cooper was a key witness to the incident.

172. In her decision letter, Mrs Tolley stated:

I have taken time to review the mitigation which you gave to (Mrs) Hayden at the disciplinary hearing and reiterated to me, in particular your Disciplinary Mitigation document sent to (Mrs) Hayden on 16 September 2020. I have therefore considered all the points that you enumerate including the ongoing deterioration of the working and personal relationship with (Mr) Cooper, the effects of the bereavement after the death of your father in September 2017, and more recently other family members, the build-up of workload and stress at the time... I have carefully considered your Disciplinary Mitigation document and the points that you reiterated during the appeal hearing when you discussed aspects that you believed had not been given proper consideration by (Mrs) Hayden. In addition I have examined the points raised in the power point itself and in the light of the above, I have also carefully appraised the

decision reached by (Mrs) Hayden. I am satisfied that, in reaching her decision, (Mrs) Hayden did indeed review and consider the additional points that you submitted on 16 September 2020.

Delay

173. The Claimant complains that there were delays throughout the process, including the instigation of the disciplinary process, the scheduling of witness interviews, and the process as a whole. We do not find the delays were unreasonable. We found that Mrs Wright had gone on leave after the incident on 7 May 2019 and that enquiries began into external HR support on her return. We heard that the Claimant was notified of the intention to appoint external HR support on 31 May 2019, that Mrs Wright emailed the Claimant and Mr Cooper about HR180 on 4 June 2019, and they were appointed on 10 June 2019. The Claimant, Mr Cooper and Mrs Wright were written to within two days of that appointment. There were delays throughout the process, which included delays associated with 'pausing' the disciplinary process whilst the Claimant's grievance was heard. There were also postponements initiated by both the Claimant and the professionals for various reasons, which included the need to consider the wealth of documentation in this case.

Preference of Evidence

174. The Claimant says it is unfair for the evidence of Mrs Wright (and Mr Cooper) to be preferred over hers. In addition to the other references within this decision, Mrs Tolley set out the basis for her preference; she described in her decision letter that *during the appeal hearing, that you still believe that (Mrs Wright's) conduct was unacceptable and disrespectful in terms of how she spoke to you, that she (or Miss Gill) had not chased you, and that in your capacity as a Director, you should have been chased to establish whether you would attend the event. I believe this conviction has, to some extent blinded you to the effects your conduct towards another more junior employee, would have had. It is reasonable to acknowledge that a more junior employee would find it humiliating, hurtful and upsetting to be the object of a Director's anger, in circumstances where the Director is clearly losing their temper and repeating criticisms of the employee, their behaviour and their alleged disrespect of that Director. This would particularly be the case if the Director's comments were at a volume which, in the employee's mind at least, may be overheard by other employees. You have admitted that you lost your temper and I believe that in doing so, you also lost your ability to restrain what I acknowledge are perceived wider frustrations and as a consequence the behaviour that was directed towards Dawn Wright, was unacceptable, both as a colleague, but more importantly as a Director of the Company.*

175. Mrs Tolley also explained that she found Mrs Wright and Mr Cooper recounted their recollection of the incident with clarity and consistency. Mrs Tolley made particular reference to finding Mrs Wright's account of what she experienced and the impact of the incident, to be believable and sincere.

176. The Claimant complains that Mrs Tolley failed to consider the first statements against the later ones, and says there *are discrepancies in the statements which were apparent*. In her evidence, Mrs Tolley confirmed that she read the original disciplinary interviews and listened to them. She confirmed she did not do 'a forensic comparison.' The Claimant clearly had carried out such a forensic analysis. It was reasonable for Mrs Tolley to consider the original and second interviews, without carrying out a forensic analysis; the lack of such an analysis does not render the process unreasonable.

177. During her oral evidence, Mrs Tolley agreed that the Claimant had been consistent in her version of events. It was noted that she had found Mrs Wright to be genuine and powerful, and she was asked if she found the Claimant any less genuine. Mrs Tolley replied that she believed the Claimant had convinced herself she had only sworn once, but she (Mrs Tolley) could see no reason for Mrs Wright to have had to shout to get what she was being subjected to, to stop. This satisfied her that it was more than a one-sentence abuse.

WRONGFUL DISMISSAL

178. For the purposes of the claim for wrongful dismissal, we made findings as to what occurred on 7 May 2019, based upon the evidence before us.

179. The incident on 7 May 2019 was primarily between the Claimant and Mrs Wright, though Mr Cooper was present and was a part of the overall events. There was no witness statement from Mrs Wright for the purpose of these proceedings and she did not attend the hearing. The Tribunal drew no inferences from this, though acknowledged that it was not possible for her to be cross examined about the content of her interview notes, which were contained in the bundle.

180. 2019 was the 50th anniversary of the formation of the Respondent company. There had been some discussion and/or plan to mark this occasion in some way. An internal memo was sent by Mr Cooper to staff on 18 April 2019, which states:

On this week. 50 years' ago Wybone was incorporated and began trading...

...

As you are all aware due to Wybone being incorporated in April, this also falls on our financial year end. Therefore, as with all previous years, our efforts in the last month are always focussed on getting business in, and finished products out, as much as we can in order to end the year, in as strong a position as possible.

Therefore, it is with this focus in mind that as a company we will begin celebrating this momentous milestone from May onwards. We plan to do lots of events, internally and externally to celebrate our 50th year.

We had some ideas for today to mark our 50th birthday, however since we

became aware that (former employee) funeral was being held today we knew that staff would not be in the mood to celebrate. Therefore, after we return from the Easter break we will be sure to start the celebrations.

181. The Claimant says that despite this memo, nothing further happened, and there were no plans mark the occasion, which upset her. She said that the weekly company calendar for the week commencing 7 May 2019, which is circulated, made no reference to any celebrations.

182. 7 May 2019 was a Tuesday; the previous day had been the annual May Day bank holiday. 7 May 2019 was also the date for the Respondent's 'quarterly night out'. This occurs on the same day as the quarterly sales meeting and the dates are not fixed far in advance.

183. The Claimant felt that she had not been asked or spoken to about this night out. She initially spoke to Miss Gill (HR Assistant) in a corridor. The Tribunal was provided with notes of an interview conducted with Miss Gill by Ms Mee of HR180. The notes of Miss Gill's interview state as follows: *(The Claimant) collard me and said have we ordered food? Thought she meant lunch, I said no. It caught me by surprise she said no tonight. I said no worries, as soon as I do this interview, I will come up show you the menu and we can go through. She asked if I had done it, I said yes. Thought nothing of it. When asked about this in her evidence, the Claimant did not dispute this account. She said she did not recall Miss Gill saying she would show her the menu, but said "if that's what she's said, that's what she's said".*

184. Following the conversation with Miss Gill, the Claimant spoke with Mrs Wright in the canteen area. The Claimant said she could not recall precisely the content of the conversation in the canteen, but did not disagree when the account of Mrs Wright, as recorded in the interview with Ms Mee ,was put to her. This account was that Mrs Wright told the Claimant an email had been sent out the previous week and the Claimant had then searched for this message on her phone. When asked in cross examination if she had found the email, the Claimant responded *"I'm not saying I didn't if that's what (Mrs Wright) says."*

185. There was a general acceptance that the exchange in the canteen had not been significant. It was described in terms by the Respondent that the Claimant was being 'arsey', but no real issue was taken during the course of the hearing with her conduct at this time.

186. Whilst the Claimant could not be certain about precisely what had happened or been said, she did not dispute the accounts of Miss Gill immediately before, or Mrs Wright's account in the canteen itself. We are therefore satisfied that there was an exchange in the canteen where the issue of the night out was raised by the Claimant and that Mrs Wright responded to this by saying that the Claimant had been informed (by a company-wide email). We accept the consistent evidence, throughout the interview notes, and accepted during the hearing, that the tone and content of this exchange was, of itself, not particularly significant. We note that this was similar to the view taken by Mrs Hayden, who recorded in the disciplinary outcome letter dated 16

September 2020 that *During the first part of the incident in the canteen, witnesses described you as ‘arsey’ when you approached (Mrs Wright). I accept that it is likely you didn’t lose your temper until the later verbal exchange, that took place on the threshold between the MD’s Office and the HR Office.*

187. It is the Claimant’s own case and evidence that she was concerned and unhappy by Mrs Wright’s approach and response to the events around the night out, and that, as a consequence, went to Mr Cooper’s office to discuss this. In her witness statement, she describes that Mrs Wright

fell well short to the standard I expected from her in terms of including staff in events, and recognising that going ahead with the office night out when we had said we would be briefing all staff regarding the 50th Year celebrations on return from the Easter break was inappropriate. We have a workforce of circa 80 staff, we have 2 staff who live outside of a 20 mile radius of the business.

She has reinforced her failure to consider inclusivity and all staff groups in her decision making and especially regarding the timing of events.

188. The Tribunal was provided with photographs of the office layout. The HR office, within which Mrs Wright sat, is immediately off a corridor. Mr Cooper’s office is accessed ‘off’ the HR office; that is, in order to get to Mr Cooper’s office, one must go through the HR office. Neither room is large and the door to Mr Cooper’s office is immediately next to Mrs Wright’s desk.

189. The Claimant says her intention was to speak to Mr Cooper about the issue, not Mrs Wright. The Tribunal accepted this. The Claimant accepts that she did not go through into Mr Cooper’s office and close the door; rather, she was stood/standing on the threshold of Mr Cooper’s office and the HR office and in her words was “*most likely moving between the two*”. Given the exchanges that then followed, we accept the Claimant’s evidence on this. We find that whilst her intention was to speak to Mr Cooper, the incident took place on the threshold between the two offices and that all three individuals were party to the subsequent exchange to various extents.

190. The Claimant accepts that she was upset. She accepts that she lost her temper. It is consistent across the evidence available to the Tribunal that Mrs Wright stated during this exchange that she ‘didn’t have time to chase people’; i.e. once the invitation email had been sent, she did not have time to chase people up individually, to ascertain whether or not they would be attending the quarterly night out.

191. The Claimant accepts that in responding to Mrs Wright’s statement, she said something along the lines of ‘I’m not just fucking people’. She also accepted that she raised her voice, that she felt angry and upset, and felt she was being disrespected by both Mr Cooper and Mrs Wright.

192. There is consistent evidence that during the exchange, Mrs Wright said something along the lines of ‘you can’t talk to me like that’. The Claimant did not dispute this.

193. There is therefore a great deal of commonality between the parties as to what occurred on 7 May 2019. Where they differ is as follows:
194. The Claimant says that she only swore once, and that she did not swear 'at' Mrs Wright. The Claimant maintains she used the word 'fucking' just once. She denied behaving in a way that was an onslaught or a personal attack on Mrs Wright. The Claimant accepted that she felt Mrs Wright had 'fallen well short'. She accepted that she had raised her voice and that she was very angry. She accepted she had said Mrs Wright's conduct in not chasing her up was disrespectful and out of order, but said she had not prefaced these comments with a swear word. She told us she felt she was being disrespected by both Mr Cooper and Mrs Wright. The Claimant described it as a three-way process, an argument, with lots of shouting and raised voices, from all three.
195. Mr Cooper says that the Claimant said "*I'm not just fucking people*" 'multiple times'. Mr Cooper agreed that the Claimant accused Mrs Wright of disrespecting her and accepted she could have been explaining why she thought Mrs Wright was being disrespectful.
196. The interviews with Mrs Wright record her describing the Claimant as launching a personal attack and a 'major onslaught'. Within her interview with Ms Mee, Mrs Wright describes: *She wasn't stopping, she continued and continued until I shouted at the top of my voice to stop... I was trying to get out of desk, she wasn't stopping. (Mr Cooper) brought points in, that made it worse. At the time that seemed the only option to stop it.*
197. We read a statement taken from a Mr Smith, who was interviewed as part of the disciplinary process. Mr Smith confirms that he heard shouting on both sides. He said: *I heard (Mrs Wright) say something, which stood out because its not like her at all. I can't remember the exact wording. It was something along the lines of "who do you think you are talking to like that?" or "you can't talk to me in that way". Something that made me think something is going off in there for (Mrs Wright) to talk like that. Because (Mrs Wright), she's not really, she isn't that kind of person really.*
198. The primary issue in dispute was whether the Claimant had sworn more than once, and whether she had sworn at Mrs Wright, or 'simply' as a 'descriptor' or part of her frustrations, and whether this had been an 'onslaught' or 'tirade' of abuse towards Mrs Wright.
199. The Tribunal had no doubt that this was a heated exchange and that voices were raised on both sides. We are entirely satisfied that the Claimant made a comment along the lines of 'I'm not just fucking people' during the course of the exchange and that in so doing, she was casting herself in a different category or status than other employees. This is supported by the Claimant in her witness statement, which states: *given my role within the business both as a senior manager, director and that I am the daughter of the founder, that I was of importance in the planning of the event.*

200. The Tribunal found that the Claimant did swear during the exchange with Mrs Wright and did swear more than once as she claims. We also found that the Claimant swore at Mrs Wright, rather than just generally within the conversation. On her own evidence, the Claimant was 'very angry' and had 'lost it'. This was the same term used by Mrs Wright during her interview with Ms Mee: *'I would try to diffuse but she had lost it and was getting more aggressive, in the end that's why I shouted. I rarely even raise my voice. It's very unlike me, my reaction shocked her. She stopped and I think she realised she had gone too far.'*
201. We considered that in circumstances where the environment encapsulated a swearing culture, and where the Claimant was feeling aggrieved and had 'lost it', it is much more likely than not that the swearing extended beyond the use of one word. We also considered that when a person has 'lost it', it is likely to be more difficult for them to be precise or certain about precisely what was said, as opposed to during a calm and measured conversation.
202. It was the Claimant's evidence that she felt Mrs Wright had fallen 'far below' the standard the Claimant would expect and that Mrs Wright's conduct towards her was disrespectful. The exchange of course arose because the Claimant felt so aggrieved, that she had gone to Mr Cooper's office for the very purpose of complaining about Mrs Wright. This, the Tribunal found, demonstrates that this was an anger and frustration directly towards Mrs Wright, rather than at the situation in general.
203. We find that Mrs Wright responded to the Claimant's shouting, by raising her own voice and saying words to the effect 'you can't talk to me like that'. As above, Mrs Wright's interview notes confirm that as her account. We also note that Mr Smith had overheard Mrs Wright raise her voice and that he considered that this was unusual.
204. The Tribunal found that the Claimant did apologise at the time of the incident. This was the Claimant's evidence and was supported by interview notes with both Mrs Wright and with Miss Gill. Miss Gill's interview describes that she came in to the office towards the end; she did not hear any exchange between the Claimant and Mrs Wright. Miss Gill described that the Claimant *got upset, cried, turned her head to the side and just said sorry and walked out*, and went on to say: *Maybe she had a bad day and got tipped over the edge I don't know.*
205. There was an issue raised by the Claimant that the written accounts of the interviews between HR180 and employees of the Respondent were not accurately recorded, when compared to the audio recordings. This issue was not resolved until day one of the hearing itself. It was accepted by the Respondent that the audio file of the interview with Miss Gill recorded Miss Gill as saying *"(The Claimant) was more upset than anything"*, and shortly afterwards, *"But whilst I was in there though, (the Claimant) apologised to (Mrs Wright) for swearing. She said I wasn't swearing at you I was swearing at the situation"*. These statements were not included in the written transcript of the

interview in the bundle.

206. We consider the full account of Miss Gill's interview further supports the likelihood of this incident being both out of the ordinary and that there was repeated swearing. The recollection of Miss Gill that the Claimant said she was swearing at the situation, not at Mrs Wright suggests, in our view, that the swearing had gone beyond simply the statement 'I'm not just fucking people' and the Claimant felt she had to redress the situation. In her oral evidence, the Claimant said that she apologised "*if I appeared to have lost control*".

207. We consider that the fact the Claimant apologised at the time and also sought to apologise more formally the following day (see above) supports our findings, as it is of itself suggestive that there was something that required such apology, and that something out of the ordinary had occurred.

208. In her interview with Ms Mee, Mrs Wright explained that her relationship with the Claimant was overall good. She said that she had had heated discussions with the Claimant previously and the Claimant would question 'quite directly'. She said this was similar to Mr Cooper and she was used to that style. Mrs Wright went on to describe the incident on 7 May 2019, saying the Claimant 'slammed' into the office and said she wasn't happy, and it needed to be discussed (the email about the night out). Mrs Wright describes:

"(the Claimant) then turned back to me and hurled into the major onslaught saying, you are totally out of order, can't believe what you have done, how you treated me, this is disgusting, I don't accept what you are saying. Screaming at me, I tried to say id explained. She wouldn't let me speak, she started swearing — you are fucking out of order, you are fucking disrespecting me, it became a real personal attack. It was such a reaction, I said I can't understand why you are getting so angry She repeated and repeated - you are fucking this and that. She wouldn't stop, I got up to leave and she continued. I shouted who do you think you are speaking to you? You can't speak to me like that. She said yes I fucking can you are out of order. I said you cannot speak to staff like this. (Mr Cooper) then tried to diffuse, saying (to the Claimant) what are you doing. Asked her to go and calm down. Then I think she realised, and he said you can't go off shouting and swearing like that what are you doing. She said to me I'm sorry maybe I overreacted...She started saying sorry, then cried.

It's hard to remember obviously the words i said Is what she did - but she repeated the same thing on a loop it's hard to remember what order it came in. at the time you are shell shocked.

It became a real personal attack

She wasn't stopping, she continued and continued until I shouted at the top of my voice to stop. People will have heard it and will have heard me shout back I'm sure.

When she came in there was an aggression to her coming through, a stopping action. When she started shouting and swearing looking at me, pointing at me,

she was doing, saying it to me and turning to (Mr Cooper) and repeating it to him."

209. This again supports the view that the Claimant was complaining about Mrs Wright (as had been her intention) and that therefore what was said was personal and directed. When interviewed by Mrs Tolley, Mrs Wright said that she still remembered the incident (even though the interview took place some 19 or so months later) *"because obviously it's not something that you expect to happen every day at work."* She went on to describe matters in these terms:

"(Mr Cooper) does get heated, but staff, between staff things get heated, they do have heated discussions, the managers, the factory, and shop floor is a very different culture, there's a lot of, and there's a lot more banter between them, that involves swearing, they do shout at one another. And the managers in meetings will get heated with (Mr Cooper), it's quite an accepted culture at Wybone, that people do get heated and do shout. Erm, you know, most recently, we've had (Mr Cooper) and one of the production managers engage in quite a heated discussion on the corridor. But it's, I would say, it's generally always a fair, a fair engagement, where they're both equally involved in the shouting."

210. Mrs Wright described that the incident on 7 May as different because:

"I think it was the swearing aspect and the personal nature, when I say that people swear, erm I mean that they'll swear at the situation, or they'll have the odd expletive in there, you know, in part of the argument, but we don't, as a company condone people swearing at people. Erm and, you know, if that was to happen, we would obviously deal with that. And we've had instances on the shop floor where, erm there's just been a light exchange of a swearing between staff and we've disciplined them. So I think, although we do have a swearing culture, and we do have a heated culture, we are quite clear in that you shouldn't direct it at somebody."

211. Mrs Wright confirmed that it was this aspect that meant a line had been crossed.

212. Again, this supported our finding that what had occurred was out of the ordinary.

213. When considering the content of Mrs Wright's interviews, we were conscious that there was no opportunity for the Claimant to challenge these. However, we took account of the measured content. Mrs Wright did not, within those interviews, seek to demonise the Claimant. On the contrary, she referred to her working relationship with the Claimant as overall a good working relationship. She did not seek to 'overplay' matters; for example she referred to the Claimant having heated discussions and that she can question you *"quite directly"*, but noted that *"in that sense she is similar to Mr Cooper"* and went on to say *"it's not been anything of a real cause for concern"*.

214. Furthermore, Mrs Wright did not paint Mr Cooper as an angel. She

referred to him as follows: *“He is a very direct management style. Quite dictatorial people would say, uncompromising a bit like most MD’s. but at the same time, he does, he tends to be very involved in things and is very hands on which is sometimes he is very direct. He doesn’t sit behind desk and read reports. He is very operational - why have we run out of this? Where’s that? That causes challenges as staff think he can be too involved, but he likes that level of involvement.”*

215. Mrs Wright also referred to the pair essentially being as bad as each other: *“half of the time they both equally shout at one another. In which case, there is not really, it’s not that one shouts at the other, it’s that they both actively argue. They both shout and scream and swear and slam doors, they both leave and walk off.”* She also referred to hearing each of them tell the other to *“eff off”*.
216. The Claimant said that in the period leading up to the incident on 7 May 2019, she was feeling stress and pressure in relation to the financial year end and the demands of the job. She also said that the loss of her father was playing heavily on my mind in light of the pending 50th anniversary of the company. We accepted this evidence.

SEX DISCRIMINATION

217. The Claimant says that she was discriminated against in the following ways:
- i. Being subjected to disciplinary proceedings
 - ii. Being dismissed for the use of swear words/shouting and/or raising her voice
 - iii. Not being paid full pay during periods of sick leave
218. We have found that what occurred on 7 May 2019 was out of the ordinary, for the reasons set out above, and that following the incident, Mrs Wright *thought something needed doing about it...for it formally to be recognised that that wasn’t acceptable*. We also accept that due to the nature of the incident and the identity of those involved, it was *inappropriate and impractical for the investigation to be conducted internally*. The appointment of external HR was *to ensure that a robust, objective and fair investigation is conducted by a third party*. We find that it was the Claimant’s conduct and the comments of Mrs Wright in relation to this, which were the reasons for the Claimant being subjected to disciplinary proceedings.
219. It was Mr Cooper’s decision to have the matter investigated, following the comments from Mrs Wright that something needed to be done, which was ultimately the start of the process. We accept that decision was taken for the reasons set out above; i.e. that Mrs Wright had indicated something needed to be done about it, and the only realistic option was to outsource any investigation. Mrs Wright is clear in what she told HR180 that something needed to be done. The events as we have found them to occurred support the proposition that she asked for action. There is no evidence that this decision was related to the Claimant’s sex.

220. In her witness statement, the Claimant suggests that it was discriminatory that she was subjected to disciplinary proceedings, whilst Mr Cooper was 'only' subjected to a grievance. It was the Claimant who explicitly requested that her complaint against Mr Cooper be treated as a grievance. Mrs Wright did not formally raise a grievance, but wanted something to be done and so the matter was investigated externally. ACAS provide guidance around both disciplinaries and grievances, with one guide for investigations; there are significant overlaps in how investigations should be conducted.

221. In any event, we heard that HR180 had the authority to determine the outcome of the grievance raised by the Claimant and that the Respondent would adhere to that. We do not consider that the differences in the procedures engaged amounted to less favourable treatment; they arise from the origins of the respective complaints. Mr Cooper was ultimately subjected to an investigatory procedure.

222. The Claimant said that others had shouted and sworn, and provided some specific examples which she said were evidence of others behaving a similar way and yet not being subject to disciplinary proceedings.

223. The Claimant raised an example where Mr Cooper had shouted at Mrs Wright, causing her to cry, and yet was not subject to disciplinary proceedings. Mrs Tolley specifically asked Mrs Wright about this. Mrs Wright said that:

"(Mr Cooper) does shout and it does get get heated. Erm I have got upset once before at work. And but that was because it was in fact that I was I was in the wrong I'd forgotten to do something.

And the reason that (the Claimant) remembers that is because I got upset when talking to (the Claimant) about it. And I wasn't in tears when, with (Mr Cooper), it was afterwards that I'd got upset because I felt that I'd let myself down because I don't like to make mistakes or get things wrong. So. And it was a mixture of obviously being upset that I felt that upset him enough for him to be annoyed. And also, I was annoyed with myself that I, you know, forgotten to do something that was quite serious. So I do remember that instance."

224. This incident was, on Mrs Wright's own account, an occasion where she was upset with herself. She did not allege that Mr Cooper had sworn at her, or say that there had been a personal attack.

225. The Claimant relied on an email sent to her by a colleague (Ms Richards) on 12 January 2020 which refers to an example of Mr Cooper shouting at her (Ms Richards). The email states:

I'll really try my best to recount what happened but it is a while ago now...

From memory I think (Mr) Conway had already come into the buying office to

ask for my help with something. He was sat opposite me in (another colleague's) seat. It was also 'normal' to become surrounded by other colleagues (production managers, design team, (Mr Cooper) etc) all wanting information from either myself or (colleague). This is what followed shortly. Mr Cooper burst into the office, stood at the end of my desk and raising his voice considerably, demanded that we push suppliers to bring materials in for a particular job ahead of schedule. He was so demanding and rude that I could feel myself start to shake and couldn't hold back the tears. I wasn't concerned that I hadn't done my job insufficiently, just very taken back by his tone and attitude. Being 35 weeks pregnant at this point wouldn't have helped matters and I became increasingly worked up and left my desk and went to the ladies toilet.

Unprofessional outbursts like this weren't uncommon but I myself hadn't experienced it before. He 'apologised' the following day, asking to see me in his office. I wouldn't say it was exactly a 'sorry' but others commented that it's the closest I'd get and was lucky to get that!

226. Mr Cooper told us he remembered the matter differently, and that it was the colleague who had gotten frustrated. He said that he apologised to Ms Richards on the colleague's behalf. He noted that Ms Richards had left the company in 2017.

227. There is therefore a dispute as to what happened during the incident recounted by Ms Richards, which appears to have occurred some time ago. The account provided by Ms Richards did not allege Mr Cooper shouted (though does say that he raised his voice considerably). There is no reference to swearing, and there is no suggestion there was a personal attack. This is materially different to what it was alleged (and found by HR180 and the Tribunal) to have occurred between the Claimant and Mrs Wright.

228. The Claimant also relied upon notes dated 11 January 2020 made by a Ms Stainthorpe of a discussion with Ms Sidebottom, during which Ms Sidebottom said "Once (Mr Cooper) swore during a conversation with me, he said 'Why don't we get another f***ing supplier?'. (Mr Cooper) was frustrated with the supplier and I didn't think it was aimed at me." The Tribunal considers this materially different to the incident on 7 May 2019; Ms Sidebottom describes Mr Cooper swearing during a conversation, and did not feel it was aimed at her. On Ms Sidebottom's account, this is materially different to what it was alleged (and found by HR180 and the Tribunal) to have occurred between the Claimant and Mrs Wright.

229. The Claimant says that Mr Cooper and Mr Conway shouted and swore and were not taken through a disciplinary process. The Claimant referred us to an example during which she says Mr Conway was aggressive and intimidating to her on the shop floor in front of a number of staff; an incident which was not progressed to a disciplinary investigation despite Mr Conway being very angry and physically overbearing. There was no evidence this incident had been formally reported, or that the Claimant had raised a grievance about this. Mr Cooper was unable to comment on the incident.

230. The Claimant referred to an email sent by Mr Conway to all staff members in which he explained he was going on leave and commented to a named individual, within that company-wide email: *remember what I've told you I know where you walk your dog at night if you don't listen*. The Tribunal does not consider this could have been construed as a genuine threat, particularly where it was sent to all staff members.
231. We have accepted that the reason for dismissal, in the mind of the dismissing officer Mrs Hayden, was the Claimant's conduct. The Claimant was dismissed following a process carried out by an external HR company. It was suggested to Mrs Hayden, on behalf of the Claimant, that disciplinary proceedings were taken against her because she was a woman and sister of Mr Cooper, but whereby he did the same, there was no disciplinary action and no sanction. Mrs Hayden replied "*absolutely not. Her sex had no bearing*". Nothing further was put to Mrs Hayden. We accepted the evidence of Mrs Hayden that she dismissed the Claimant for her misconduct on 7 May 2019 and the decision was not influenced by the Claimant's sex. The Claimant identified no basis whatsoever on which the Tribunal could infer that that the decision of Mrs Hayden to dismiss had anything to do with the Claimant's sex and the Tribunal found that it did not.
232. The Claimant was paid sick pay in accordance with the written provisions of the contracts of the other SMT members (as she had no written contract herself). The SMT comprises both men and women and the terms as they relate to sick pay are the same.
233. Mr Cooper's written evidence was that to his knowledge, there had been approximately four or five instances where: *we have paid an employee more than their contractual entitlement and all those rare instances have been where an employee was diagnosed with a terminal illness. For those employees we agreed to extend their sick pay up to them passing away. In recent times, we have extended sick pay for two ex-employees. We have had one office employee who was paid an additional 2 months' sick pay, until they passed away in December 2018. We have also continued to pay factory sick pay to a factory employee who had a terminal diagnosis for an additional 6 months, until they passed away in March 2019. Currently we are paying another factory employee full sick pay following a terminal cancer diagnosis. Prior to this there have perhaps been a couple of other employees who have received an extended period of sick pay, relating to a serious or terminal illness.*"
234. The Claimant said she was aware that the company had paid individuals with terminal illnesses, and 'others as well.'. In her witness statement, she had identified one such individual. We heard that this individual was off sick and underwent surgery for a cancerous growth. He was then placed on Furlough leave (which the Claimant had not been aware). That Furlough was 'topped up' from 80% pay to 100%.
235. It was acknowledged that these individuals had been men, and that the majority of manufacturing 'shop floor' staff were men.

236. The Claimant relied on the comparator of Mr Cooper, or a hypothetical comparator, in respect of the Respondent's failure to pay her full pay during all her periods of sick leave. Mr Cooper said he had never taken a sick day, which counsel for the Claimant submitted was not credible. Whilst it is unusual for an individual to have no periods of sick leave within such a protracted period, it is not unheard of. However, no direct evidence was put to Mr Cooper of times or days he had been absent from work which were due to sickness. Furthermore, it was not suggested that he had had a period of six months absence at any time.

237. There was no basis on which the Tribunal could infer that the decision to pay the Claimant sick pay, in accordance with the contracts of the other members of SMT, and not in full for all periods of sick leave, had anything to do with her sex, and we find that it did not.

STATEMENT OF PARTICULARS

238. There is no dispute that the Claimant did not have a written statement of particulars or written contract.

239. Mr Cooper says that he spoke to the Claimant more than once about the need for a written contract. He told us he thought the first time he tried to discuss this was February 2018, despite the Claimant having been employed since for so long. He was unable to answer why it hadn't been attempted sooner. Mr Cooper also accepted that no document of any kind had ever been provided to the Claimant for her consideration/signature.

240. On 17 May 2019, Mr Cooper asked the Claimant to retrospectively fill out a holiday card, being a holiday request form, in relation to a recent holiday. The Claimant refused, saying that the time she had taken off was not in fact 'holiday' because she had done some work at home and there had been a discussion about time off in lieu. A discussion followed in which Mr Cooper said words to the effect of 'this is why you need to sign a contract of employment', to which the Claimant responded to the effect of 'I am not going to sign a contract of employment and there is nothing you can do to make me do it'. In response to this, there was an exchange during which Mr Cooper referred to making the Claimant's post redundant and then issue her with terms and conditions. This is the incident that led to the Claimant submitting a grievance against Mr Cooper. The Respondent says this was said in exasperation by Mr Cooper and not meant literally. Mr Cooper says that following this exchange, the Claimant became aggressive and started swearing at him. The Claimant says it was a threat.

241. The Claimant agreed this issue was why Mr Cooper had said they needed a trustees meeting – to agree terms and conditions.

242. We heard that the Claimant had drafted a job description document, but that Mr Cooper refused to agree to these terms, as they identified the Claimant as

Mr Cooper's deputy. When asked specifically about this, Mr Cooper was reluctant to answer the question. It was put to Mr Cooper that the dispute over the job description was whether or not the Claimant would deputise if Mr Cooper was not present. He replied there was "*no dispute*". He said the Claimant provided a job description and it wasn't agreed. When put that it wasn't agreed because he wouldn't agree the deputy point, he replied "*we had a SMT meeting*". When it was put again that he wouldn't agree because of the deputy point, he replied "*we had a SMT meeting to show there was no need to*".

SICK PAY

243. The Claimant was on sick leave between 27 June 2010 and 30 August 2019, between 9 September 2019 to 29 October 2019 and between 5 March 2020 and 12 September 2020.

244. The Claimant asserts that there was a custom and practice of paying full pay for periods of sick leave and the Respondent consistently exercised its discretion to make payments in full. She says this was not afforded to her and she should have been paid in full for her periods of absence.

245. As above, the Claimant did not have a written contract. The Respondent's case is that when the Claimant took sick leave, it decided that, as a member of the SMT, the terms relating to sick leave, as apply to the other members of the SMT, would be applied. The Tribunal had copies of the employment contracts of Mr Cooper, Mrs Wright and Mr Conway (who together with the Claimant comprised the SMT).

246. Mrs Wright's and Mr Conway's contracts, which were redacted, were dated April 2015 and both include the following term:

Your Company sick pay entitlement will now be 6 months at full pay, followed by 6 months at half pay.

247. Mr Cooper's contract is dated October 2004 and states:

Your sick entitlement is full pay for 6 months followed by 1/2 pay for 6 months

248. The Claimant says other people were paid in full during periods of sick leave, including Mrs Gascoigne.

Legal Principles

Unfair Dismissal

249. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.

250. Section 98 sets out that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

...

- (b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

251. The case of British Home Stores -v- Burchell [1978] IRLR 379 sets out the test when considering the assessment of reasonableness of an employer's actions when dismissing an employee for alleged misconduct to three questions:

- i. Whether the employer reasonably believed that the employee was guilty of misconduct.
- ii. Whether the employer had reasonable grounds on which to base that belief.
- iii. Whether it had arrived at that decision after conducting a reasonable investigation.

The test does not require the employee to have actually been guilty of misconduct.

252. Whether dismissal by reason of conduct is fair or unfair within s98(4) depends not on the label or characterisation of the conduct as gross misconduct, but on whether, in the circumstances (including the employer's size and administrative resources), the employer had acted reasonably in treating it as a sufficient reason for dismissing the employee.

253. We reminded ourselves of the well-established principle that when considering a misconduct dismissal, an employment tribunal must not substitute its own view of a claimant's alleged conduct, and must not substitute its own view of what should have happened; it is judging whether the actions of the employer were fair, not deciding what it would have done.

254. The Claimant referred the Tribunal to the case of Gallop v Newport City Council [2013] EWCA Civ 1583 and the principle contained therein that accepting a report or action without proper due consideration is inherently unfair and this is a principle an employer cannot 'rubber stamp' a report without giving it due and proper consideration and / or providing express authority to act in a certain way. That case was concerned with the acceptance or 'rubber stamping' by an employer of an advisor's (in that case occupational health) view as to whether an individual was disabled. That is not the issue before this Tribunal.

255. For the Respondent, Mr Weiss referred us to the case of GM Packaging (UK) Ltd v Haslem UKEAT/0259/13/LA in which the EAT considered the correct approach where a disciplinary process is outsourced to a firm of HR consultants, in circumstances where that firm recommends a decision to the employer, which the employer then accepts. The EAT considered that the reason for the dismissal was the reason in the mind of the HR consultants who recommended dismissal.

Wrongful Dismissal

256. A different test is to be applied to a claim of wrongful dismissal; the test to be applied is not whether the employer had a reasonable belief upon reasonable grounds that the employee had committed an act or acts of gross misconduct but, rather, it requires the Tribunal itself to determine whether the employer has established that the employee acted in repudiatory breach of contract such as to entitle the employer to summarily dismiss him or her. This requires the Tribunal to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place. The Tribunal's obligation to determine this question is not one that is simply parasitic on the employer's findings (Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15 and Cameron v East Coast Mainline Company Ltd UKEAT/0301/17).

Direct Sex Discrimination

257. Section 13 of the Equality Act 2010 provides that:
"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."

258. Section 23 provides that:
"On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case."

259. The burden of proof is dealt with by s 136 Equality Act 2010. The Tribunal had regard to the authoritative guidance about the burden of proof in Igen Ltd v Wong [2005] ICR 931. That guidance remains applicable: see Royal Mail Group Ltd v Efofi [2021] ICR 1263. In essence, the guidance outlines a two-stage process. First, a claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent had

committed an unlawful act of discrimination against the complainant. That means that a reasonable Tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see Madarassy v Nomura International plc [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires a respondent to prove that he did not commit the unlawful act. However, as the Supreme Court again made clear in Efobi, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

260. Mr Weiss referred us to the case of Nagarajan v London Regional Transport [1999] IRLR 572, in which the House of Lords held that if the protected characteristic (in that case, race), had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, however, 'why the complainant received less favourable treatment... Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

Statement of Particulars

261. Section 1 ERA provides that where a worker begins employment with an employer, the employer shall give them a written statement of particulars of employment.

262. 38 Employment Act 2002 provides that if the ET makes an award to the worker in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) of the Employment Rights Act 1996 the tribunal must, increase the award by the minimum amount (2 weeks' pay) or if consider it just and equitable in all the circumstances to increase this to the higher amount (4 weeks' pay).

263. The Tribunal only has discretion not to make such an award, where there are exceptional circumstances which would make an award, or increase under that subsection, unjust or inequitable.

Implied Terms

264. The courts will not imply a term simply because it is a reasonable one. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. There are a number of 'tests' for implied terms, one of which is terms implied by statute. There is a statutory minimum notice period.

265. A term can be implied under the test of 'custom and practice'. The traditional requirement for the implication of terms under this head is that

the custom in question must be reasonable, notorious and certain (see, for example, Devonald v Rosser and Sons 1906 2 KB 728, CA, and Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA). This means that the custom must be fair and not arbitrary or capricious, it must be generally established and well known, and it must be clear cut.

Scope of Reasons

266. We had regard to the case of Frame v Governing Body of Llangiwg Primary School and anor EAT 0320/19 in relation to the scope of the obligation to give reasons and that there is no duty to deal with every argument as presented.

Analysis

Unfair dismissal

Reason for dismissal

267. There is no dispute that the Claimant was dismissed. HR180 found that the Claimant had committed misconduct. This was the reason for dismissal. That dismissal was endorsed by the Respondent. Conduct is a potentially fair reason for dismissal.

268. The Claimant says this was not the real reason for dismissal and that Mr Cooper was effectively trying to oust her from the company, as can be seen, she says, from his behaviour towards her role of statutory director.

269. The Tribunal found that Mr Cooper did want to remove the Claimant as a statutory director (and she him). However, we are not persuaded that this was the reason for dismissal. Applying GM Packaging (UK) Ltd v Haslem, we are satisfied that the reason in Mrs Hayden's mind (and upheld by Mrs Tolley) was conduct, for all the reasons set out in their decision letters. We note in particular that Mrs Tolley explicitly considered the Claimant's case on Mr Cooper's motivations and concluded: *If I were to agree with your assertion that (Mr Cooper's) statement is based on his intentions to facilitate your dismissal, and discount it from consideration and examine (Mrs Wright's) statement alone, I believe that there remains sufficient evidence to instigate the investigation. (Mrs Wright) clearly perceived your actions as being unacceptable and stated that she wished (Mr Cooper) to do something about it.*

270. The Tribunal accepted as per Mrs Tolley that there are higher expectations of a director within a business. Mrs Tolley describes that: *"It is my view that Directors hold a senior position of trust and responsibility within a company. Since they are effectively in charge of the company, there is a greater obligation on them and a duty of care to their employees. As such, there is a higher standard for a director's behaviour than there would be for a junior employee.*

271. The question under s98(4) is whether the Respondent's reason (in this case, as outsourced to HR180) was a sufficient reason for dismissal. We accepted the evidence of Mrs Hayden and Mrs Tolley that they believed the Claimant had acted in the way they concluded she had. It was reasonable for Mrs Hayden and Mrs Tolley to reach the views they did; they had evidence from the key individuals, which supported those views, and it was reasonable for them to adopt the views they did based upon the evidence before them.
272. The Tribunal was not present at the interviews, but has seen the transcripts and has heard Mrs Tolley in evidence, who we found to be a careful and measured witness. We have no basis on which to conclude that her analysis of the evidence in these regards was unreasonable.
273. We also considered this in light of the Claimant's own evidence during the hearing, that she still maintained that Mrs Wright had fallen 'well short' and that she was disrespected by Mrs Wright. In addition, within her witness statement, the Claimant suggested that by Mrs Wright 'exclaiming' *who do you think you are talking to like that* was to "challenge me and display behaviour that could be deemed confrontational, threatening and intimidating. This suggests that (Mrs Wright) was not treating me respectfully."

Investigation

274. The decision to outsource the disciplinary investigation and decision making was reasonable and inevitable given the positions of those involved in the incident under investigation.
275. The Tribunal accepted that it is relatively common practice for solicitor firms to refer clients to each other and to other professional companies, such as accountants and HR companies, and there is nothing untoward with such a practice, as a principle.
276. We found no evidence that the independence of HR180 had been compromised by the 'introduction' made by Blacks.
277. As part of her case that HR180 was biased, the Claimant points to handwritten notes made by Ms Morley-Jones of a conversation with Mrs Wright on 3 June 2019; the Claimant says is evidence of pre-determination. Having reviewed those notes, they appear to the Tribunal to be key points around the context, grievance and incident on 7 May 2019. They are brief, bullet-type notes, with no conclusions or obvious views being expressed by the author. In any event, Ms Morley-Jones was not ultimately the disciplinary officer.
278. We note here that even in the absence of direct evidence from Ms Morley-Jones on the point, we reject the suggestion made by the Claimant that Ms Morley-Jones wanted the outcome of the process to be a dismissal 'because she wanted the drama of an employment tribunal'.

279. The clause within the agreement that *HR180 will have full autonomy in conducting such procedure and in determining its outcome* was sufficient to bestow authority on HR180 to decide the outcome of the disciplinary. In addition, the letter from Mrs Hayden dated 20 February 2020 inviting the Claimant to the disciplinary hearing, made clear *I will be conducting the hearing as the chair and decision maker*. It was clear to the Tribunal that the Respondent and HR180 had entered into an agreement by which they both understood and intended that HR180 had authority to decide upon any sanction. Mrs Hayden and Mr Cooper both confirmed they understood the agreement to be such. We were satisfied that HR180 had been given authority to dismiss if that was the decision.
280. The Claimant complained that not all witnesses were interviewed by Ms Mee. However, we found it reasonable for Ms Mee to interview only those witnesses who were party or witness to the actual incident. We also noted that both Mrs Hayden and Mrs Tolley had ample evidence about the overall culture of the business and that the Claimant was able to put forward additional evidence about this.
281. The Claimant complained about Ms Mee using pre-prepared questions. This is reasonable and may be considered good practice, in that it ensures all relevant points will be covered, as well as providing consistency of questions, which might allow greater transparency, and an avoidance of bias. These questions included matters such as the interviewees involvement and experience of the Respondent company, what happened on 7 May 2019 from start to finish, where people were and what their body language was. Mrs Wright was also asked *Did you raise your voice at (the Claimant)? Did you shout at her? Did you swear at her? Do you think your response was appropriate?*. Again, evidence that a full picture was being sought.
282. The Tribunal acknowledged that Ms Mee could have interjected and sought to move matters on more quickly when Mr Cooper began discussing the grievance. However, we do not consider that she was actively investigating the grievance; we heard that other HR partners were appointed to consider that. In addition, we note that by the time of the appeal, the Claimant herself requested that Mrs Tolley read the grievance documents (despite her having not intended to do so, as they were separate issues). We do not find that Ms Mee was investigating the grievance and we do not consider that this conversation undermined the disciplinary process.
283. The Tribunal did not find that the discrepancies over the 'Grievance Investigation Meeting' document to be particularly significant, though acknowledged the conflicting evidence as to who had created this document. We do not find this significant because it was an early document, which was, as Mrs Hayden confirmed, not used.
284. We do not find that the failure by Mrs Hayden to discuss the contents of the occupational health form with the Claimant undermines the reasonableness of the disciplinary process, though it is not good practice.

285. The Claimant complained that Mrs Hayden had not interviewed Mr Cooper and Mrs Wright herself. Mrs Hayden had full notes of the interviews that had been conducted, which were thorough. In any event, when considering the process as a whole, we note that Mrs Tolley re-interviewed both Mr Cooper and Mrs Wright.
286. We find that Mrs Hayden did not act upon her stated changed position as it related to contacting the Respondent witnesses. It is not best practice to undertake to carry out a particular line of enquiry and then abandon this. However, we take into account that there was no right for these witnesses to be called and cross examined. We further reflected that Mrs Wright herself had not agreed to attend and it was she who was the primary witness in this case. We also considered that Mrs Tolley had put some of the Claimant's key points to Mrs Wright/Mr Cooper (as above). We did not consider that this failure was sufficiently serious to undermine the reasonableness of the process as a whole.
287. The Claimant complained that she was not allowed to call witnesses of her own and submit information as part of the disciplinary process. Again, it is not best practice to undertake to carry out a particular line of enquiry and then abandon this. However, in this case, Mrs Hayden did hear from the Claimant's daughter and partner (who had been two of her witnesses) and so was able to explore matters further with them. Mrs Hayden told the Tribunal that they "*didn't add any substance*". Mrs Hayden also confirmed that she took the other statements 'as read'. On that basis, we do not consider the Claimant was prejudiced, or that the process as a whole was undermined or rendered unreasonable.
288. The Tribunal does not consider the issue of CCTV was significant. The evidence obtained from Mrs Wright was that she was sure people had overheard, and that people were talking about it afterwards. The evidence from Mr Smith was that he had heard something. It was reasonable for Mrs Hayden and Mrs Tolley to take that into account. Mrs Tolley partially upheld the Claimant's ground of appeal as it related to the incident happening 'in front of other people'.
289. The Tribunal notes that the 'splitting' and re-framing of allegations is a frequent issue raised in cases of unfair dismissal. Certain actions and types of behaviour are capable of engaging more than one aspect of an employer's disciplinary policy. In this case, it is clear that the allegations refer to the single incident on 7 May 2019.
290. We have to consider whether the re-framing had the effect of undermining the fairness of the investigation. We do not find that it does in this case. The Tribunal considered that the substance of the allegations remained the same and they related to the same incident on 7 May 2019. There was no importation of fresh allegations relating to other matters.
291. We noted in particular that within the bullet points under each of Ms Morley-Jones' allegations, specific reference is made to, for example, witness statements referring to the Claimant as angry and aggressive, following

Mrs Wright into her office to continue berating her, and specific reference to the Claimant shouting at Mr Cooper (i.e. the matters that were set out in Mrs Hayden's list). It is clear that both letters and both lists refer to the same incident and the Tribunal is satisfied that the Claimant knew what the allegations were. This is supported by her extremely thorough preparation for her lengthy disciplinary hearing.

292. The ACAS code sets out that the statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. There is no such right to be accompanied by a solicitor. In the present case, Mrs Hayden said that she considered the Claimant's request and did not consider it was necessary. The Tribunal acknowledged that in the circumstances of the case, it was likely to be more difficult for the Claimant to be accompanied by a colleague or trade union representative. However, we did not consider that this of itself necessarily meant that the process would as a consequence be unfair, in the absence of the Claimant's solicitor being present, even in a case where there was a risk of her being dismissed. We took into account the ability of the Claimant to safely navigate the process and it was reasonable to expect she would be able to do so. We consider she was, in fact, able to do so, as can be seen from her thorough preparation, challenge to the evidence and her participation in the process. We also noted that the Claimant was accompanied at both her disciplinary and appeal hearings, and that the person accompanying her on each occasion was able to interject and provide practical input to help the Claimant put her case and arguments forward.
293. It was reasonable for Mrs Hayden to impose a deadline for the submission of further documentation and information, particularly in a case which had been going on for many months, where there was already a significant amount of information available, and where there had been a disciplinary meeting of over five hours to discuss the issues. In any event, Mrs Tolley reviewed all the evidence referred to by the Claimant.
294. Whilst the Claimant may wish that greater weight was given to the mitigating factors in the case, to the point that the ultimate outcome was different, it cannot be said that the mitigation was not considered. That Mrs Hayden and Mrs Tolley did not consider the mitigation was sufficient to allow a lesser sanction is not of itself unreasonable when considering the range of reasonable responses.
295. Whilst the decision to dismiss was not taken by a senior manager within the Respondent company, it was taken by a HR partner with not insignificant experience. The Tribunal finds the appointment of Mrs Hayden reasonable and does not believe she can be fairly described as 'junior' given her years of experience.
296. Even if the Tribunal is wrong about that, Mrs Wright confirmed the decision in her letter of 18 September 2020. Mrs Wright was a member of SMT and the HR Manager. There can be no doubt that she was sufficiently senior to provide this decision.

297. We have found that the process as a whole was reasonable and thorough. There were some shortcomings, in particular relating Mrs Hayden's decisions which went against what she had set out in her letter of 4 March 2020, and the issues with the occupational health referral. However, these issues do not undermine the process as a whole, either individually or cumulatively.
298. The Claimant had numerous opportunities to submit information and she availed herself of that opportunity, producing numerous documents, and was afforded hearings of many hours to fully participate in the disciplinary process and fully put her case.
299. The Tribunal is satisfied that the investigation process itself was within the range of reasonable responses.

Dismissal within the Band of Reasonable Responses

300. The dismissal will only be unfair if no reasonable employer would have dismissed the Claimant for the reason given. We do not conclude that this is the case. Whilst some employers may have imposed a lesser sanction, dismissal is not, in our view, outside the range of sanctions that a reasonable employer could take.
301. In circumstances where findings had been made that a Director had shouted and sworn **at** another employee, who was more junior by virtue of the Claimant's status as a statutory director and the daughter of the founder (as the Claimant herself described herself), in circumstances where it was a personal attack on Mrs Wright's behaviour and attitude, and in light of the supporting evidence available, including as it relates to the 'out of the ordinary' nature of the event, dismissal was within the wide range of reasonable responses.

Wrongful dismissal:

302. As set out above, when considering this part of the claim, the Tribunal is concerned not with the reasonableness of the employer's decision to dismiss, but with the factual question: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?
303. In reaching our conclusion, we have considered all the facts and circumstances in this individual case. We have considered whether the Claimant acted in such a way as to fundamentally undermine the employment contract (i.e. repudiatory conduct), as well as whether the conduct was a deliberate and wilful contradiction of the contractual terms or amounted to gross negligence.
304. The Tribunal has found that the Claimant shouted and swore at Mrs Wright and that this was conduct unbecoming of a director. However, we

have concluded that whilst serious, it was not sufficiently serious to permit summary dismissal, in all the circumstances, for the following reasons:

- i. There was mitigation on the Claimant's part; we accepted her evidence that she was under stress, and until recently had been in a dispute over her recognition as a statutory director, as well as feeling grief and emotion over the loss of her father in the context of the 50th anniversary of the business.
- ii. There was a culture, emanating from the top, of shouting and swearing. It was difficult to know where the 'line in the sand' was. Though we acknowledge that as a Director, the Claimant ought to have been more mindful of her behaviour towards other employees.
- iii. It was a short incident, which took place behind closed doors (though at some volume).
- iv. The Claimant apologised immediately.
- v. This appears to have been the first incident of this particular type of nature, and was out of the ordinary, based upon Mrs Wright's interviews.
- vi. Whilst Mrs Wright was a junior employee in the sense that the Claimant was a statutory director, both women were part of the SMT.

305. Having taken those factors into consideration, we conclude that the conduct, was not sufficient, in all these circumstances, and crucially in the context of the culture of the business, to *fundamentally* undermine the contract of employment.

306. The Claimant did not have a written contract of employment. The statutory minimum imposed on the contract is 9 weeks. No evidence was provided of any other contractual notice period. We note that Mr Cooper's contract included the equivalent of the statutory minimum.

307. The Claimant was not paid for that period.

Sex Discrimination

308. There was noticeably very little time spent in evidence on the complaint of sex discrimination. This was a point also observed by Mr Weiss in his closing submissions.

309. It is not in dispute that the Claimant was subjected to disciplinary proceedings, that she was dismissed, or that she did not receive full pay throughout all periods of sick leave. The Tribunal must determine whether that was less favourable treatment based upon her sex. We remind ourselves that in making that determination, we must be satisfied that there is no material difference between any comparator's circumstances and the Claimant's.

310. In this case, we were able to make positive findings on the evidence, as set out above and summarised briefly below.

311. The decision to commence a process of disciplinary proceedings was made by Mr Cooper. We accept that this was because of the incident on 7 May

2019 and the comment made by Mrs Wright that he needed to do something about it/take advice elsewhere given her involvement. We accept that because that was the reality of the situation and that as the person on the receiving end of the conduct, it would have been extremely difficult for Mrs Wright to deal with the matter as HR manager.

312. The examples provided by the Claimant as they related to examples of behaviour/conduct by male colleagues were, in our view, materially different, for the reasons set out above.
313. There was no evidence that the decision was motivated by the Claimant's sex.
314. In respect of Mrs Hayden's decision to dismiss, there were simply no facts whatsoever from which the Tribunal could conclude, in the absence of an adequate explanation, that the Claimant had been treated less favourably because of her sex. We unhesitatingly accepted Mrs Hayden's evidence that it was not so motivated.
315. The Tribunal accepted the Respondent's evidence that previous occasions of paying full pay during sick leave has occurred on an occasional basis only and has been on compassionate grounds, in cases of terminal illness. That cannot be considered comparable to the Claimant's case. It was acknowledged that the individuals paid compassionate full sick pay were men, but it is a majority of men that work in the manufacturing industry.
316. As part of her complaint around sick pay, the Claimant relied on the fact that a female family member was paid full pay. This undermines her complaint that the failure to pay her full pay was based on her sex.
317. The Claimant was paid the same sick pay as the other members of SMT (male and female) were entitled to.
318. There is insufficient evidence upon which the Tribunal can conclude that the failure to pay the Claimant full pay during her sick leave was in any way related to her sex.
319. In all three complaints of sex discrimination, we concluded that the comparators identified by the Claimant were not sufficiently similar for us to conclude there had been unfavourable treatment. Furthermore, there was no cogent evidence from which to draw an inference that sex had been an influence in the decision to dismiss the Claimant.

Statement of Particulars

320. There is no dispute that the Respondent did not provide the Claimant with a s1 Statement of Employment Particulars. Whilst we found there had been some exchanges about this, little specific information was available, and no progress had been made. We consider the onus was on the Respondent to ensure such a document. However, we also recognise the difficulties between

the Claimant and Mr Cooper which centred around a power struggle. We therefore consider that there are no exceptional reasons to depart from the 'general rule' of awarding two weeks' pay for the failure to provide a statement of particulars.

Sick Pay

321. The Tribunal made findings that there was no custom and practice to pay full pay whilst an employee was on sick leave. We accepted the evidence that the Respondent had, on occasions and in its discretion, continued to pay full pay during periods of sick leave, primarily where the employee had a terminal illness. We did not find that this amounted to a custom or practice whereby all employees would receive full pay during periods of sickness.
322. We accepted there was an implied term that the Claimant was entitled to the same terms of sick pay as the other members of the SMT, including Mr Cooper, given the four individuals made up that team and the other three shared the same contractual terms in this regard.
323. We therefore conclude there was no breach of any implied term or of a custom and practice in relation to sick pay.

ACAS Code

324. The ACAS Code of Practice on Disciplinary and Grievance Procedures did apply in this case, but for the reasons set out above, we do not consider there has been any unreasonable failure on the part of the Respondent to comply with the Code.

Remedy

325. The remedy for wrongful dismissal is nine weeks pay. Her weekly pay was £1,596.15 (gross). This provides a total sum of £14,365.35.
326. The remedy for failure to provide statement of particulars is two weeks' pay, unless there are exceptional reasons to depart from this. We took into account that efforts had been made to provide a written contract, though this had been significantly after the Claimant had started employment. We also took account of the fact that there were disagreements over what any written contract ought to include. In those circumstances, we consider the 'standard' award is appropriate. The award therefore is £1,076.
327. In his closing submissions, Mr Rudd invited the Tribunal to conclude there had been a 'shortfall' in the sick pay paid to the Claimant in that when she was off sick for more than 6 months in a year, she wasn't paid full pay and that this was less favourable treatment. Mr Weiss observed that this was not the way in which the case had been pleaded, which was firmly on the basis that

there was a custom and practice of paying full pay, which hadn't been observed.

328. In discussion, Mr Rudd confirmed that the Claimant's primary case was that she should have been paid in full during her sick leave, under custom and practice. However, if the Tribunal does not agree and find that she was entitled only to six months full and six months half pay, then we should order the shortfall to be reimbursed.

329. This had not been pleaded. This is a case which has had the benefit of legal representation from the outset, and which has been meticulously prepared. It was not possible for Mr Cooper to respond to questions about the sick leave year, as this had not been raised prior to closing submissions. We do not make any award in respect of sick pay in those circumstances.

Employment Judge Anderson

28 July 2022