EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4108097/2021

Final Hearing Held by Cloud Video Platform on 8-10 March 2022, 29 and 30 June 2022, Deliberation Day on 1 July 2022

Employment Judge A Kemp
Tribunal Member J Auld
Tribunal Member M McAllister

Mrs J Bradbury	**Claimant** **In person**
Sky In-Home Service Ltd	**Respondent** **Represented by** **Mr R Alexander** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that:

1. **The claim of direct discrimination under section 13 of the Equality Act 2010 on the protected characteristic of race is within the jurisdiction of the Tribunal under section 123 of the said Act, and it succeeds.**
2. **The claimant is awarded compensation under section 124 of the said Act in the sum of FORTEEN THOUSAND POUNDS (£14,000) payable by the respondent.**

3. **The claim of indirect discrimination under section 19 of the said Act on the protected characteristic of sex, and the claim of victimisation under section 27 of the said Act, are both outwith the jurisdiction of the Tribunal under the terms of section 123 of the said Act and are dismissed.**

4. **The claim of unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 does not succeed and is dismissed**

5. **The claim of breach of contract does not succeed and is dismissed**

REASONS

Introduction

1. This was a Final Hearing on the claims made by the claimant. She acted for herself. The respondent was represented by Mr Alexander.

2. There had been three earlier Preliminary Hearings, on 6 May, 14 July and 1 December, all 2021. The hearing took place by Cloud Video Platform remotely in accordance with the orders made at the last Preliminary Hearing. Evidence in chief was provided by written witness statement.

3. None of those hearings had ordered a Schedule of Loss, and the claimant had not addressed losses in her witness statement. On 5 March 2022 the Tribunal sent a message to parties with regard to that and a number of other issues. The claimant tendered a supplementary witness statement and a Schedule of Loss on the evening of 7 March 2022, together with further details of the claims under sections 19 and 27 of the Equality Act 2010, referred to below.

4. At the commencement of the hearing the Judge stated that he and Ms McAllister were both Sky subscribers. Neither party had any objection to the hearing proceeding before them. After addressing a number of preliminary matters which are set out below, the Judge explained to the claimant how the hearing would be conducted, the function of cross examination being to challenge any aspect of the evidence by the other party not considered accurate, otherwise it would be likely to be considered established, and putting to the witness any matter not in their statement they should know about which the claimant would give evidence about. He explained that documents in the Bundle required to be referred to by page number and that if not referred to in the evidence either in the written statement or orally would not be part of the evidence considered; about Tribunal questions and re-examination; the closing of a case after which adding evidence was permitted only in exceptional circumstances, and about making submissions.

5. The Tribunal was satisfied that the arrangements for the Final Hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. It was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence it heard.

Preliminary Issues

6. There were a number of preliminary issues that the Tribunal addressed prior to the hearing of evidence. They were as follows:

(i) Claimant's applications

7. The claimant sought to add a claim for breach of contract. That was not opposed by the respondent, and was accepted as an amendment. The claimant opposed the hearing of the evidence of Ms Cook who had not been on the respondent's list of witnesses, addressed below. Her supplementary

witness statement and Schedule of Loss were also accepted. The claimant had further provided by email on the previous evening details as to the PCP relied upon and the detriments she said that she had suffered, and she elaborated on them in discussion. It was not clear whether the PCPs she did wish to found on were sufficiently specified, but the Tribunal considered that it was in accordance with the overriding objective to summarise them and hear evidence. Those matters are set out in the list of issues below.

8. The claimant was asked if she argued that the dismissal was discriminatory. Initially she said that it was on the ground of her sex, but when that was noted as not being the claim made from the last of the Preliminary Hearings she confirmed that she did not wish to argue that. She confirmed that the argument over dismissal was solely that it was unfair.

(ii) Respondent's applications

9. The respondent's proper designation was confirmed as above, involving the removal of one letter. Mr Alexander also moved to amend the Response to add arguments over time bar for the discrimination claims. It was explained that the point was noted only when Mr Alexander's firm was instructed, prior to which matters had been handled by an in house solicitor of the respondent. The claimant opposed that, but as that is an issue that the Tribunal requires to consider in any event, and as the respondent had at least given notice of the point in an email to the claimant, the Tribunal considered it in accordance with the overriding objective to allow that amendment. The respondent further moved to add an objective justification defence to the section 19 claim, stating that it had not been aware of the PCP founded on prior to the matter being clarified in discussion on the first day of the Final Hearing. The claimant opposed that, and although it was noted that in the last Preliminary Hearing the respondent's in house solicitor appeared to have stated that sufficient notice of the claims had been given, the Tribunal considered that there was force in the respondent's argument and that to accede to it was in accordance

with the overriding objective. The next issue was the evidence of Ms Cook. Whilst the respondent had not set out Ms Cook either in a list of witnesses referred to in the second Preliminary Hearing, nor in the witnesses identified in the last of the Preliminary Hearing, Mr Alexander again said that her relevance was noted only when his firm were instructed. The claimant argued that the evidence repeated what she had said to the internal investigation. The Tribunal explained to the claimant that that was not the same as evidence before the Tribunal, and that Ms Cook could be cross-examined by the claimant and questioned by the Tribunal, after which she withdrew her opposition. That was constructive of her, and we considered it in accordance with the overriding objective to allow that evidence.

Issues

10. The Tribunal identified the following issues for determination during the preliminary discussions, and raised them with the parties at the start of the second day of the hearing. They confirmed their agreement, save that the respondent considered that aspects of paragraphs (iii) and (iv) were not before the Tribunal. The Judge noted that and stated that the point could be made during submissions. The list of issues is:

(i) What was the reason, or principal reason, for the claimant's dismissal?

(ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

(iii) Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 on the grounds of her race by treating her less favourably than a hypothetical comparator in relation to (i) a call to her on 18 June 2020 by Ms R Cook, (ii) her absence from work in the period 19 – 24 June 2020 (iii) a review meeting in relation to, inter alia, that absence held on 11 September 2020 (iv) an effect on her mental health and (v) her earnings?

(iv) Did the respondent apply a provision, criterion or practice (PCP) to the claimant in relation to (i) the introduction of the Women in Home Service programme (ii) the support given to staff in undertaking their

roles under that programme, and (iii) am assessment of the claimant' use of ladders mounted on vehicles by Mr Douthwaite?

(v) If so, did doing so cause a substantial disadvantage to women?

(vi) Did doing so cause a substantial disadvantage to the claimant?

(vii) Has the respondent shown that any PCP applied to the claimant was a proportionate means of achieving a legitimate aim under section 19 of the Equality Act 2010?

(viii) Did the claimant do a protected act under section 27 of the Equality Act 2010 by intimating a grievance on or around 19 June 2020?

(ix) If so did the respondent subject the claimant to a detriment because she had done so under section 27 of the Equality Act 2010, in respect of (i) not investigating the issue she raised (ii) asking the claimant about how she would deal with the issue if it happened again at the absence review meeting and (iii) not facilitating a discussion with Ms Cook the claimant requested when withdrawing her grievance?

(x) Is any claim under the Equality Act 2010 outwith the jurisdiction of the Tribunal under section 123 of the Act and in that regard (a) was there any conduct extending over a period, and if so what conduct over what period, and (b) in the event that any claim is otherwise outwith the jurisdiction of the Tribunal is it just and equitable to consider the claim?

(xi) Was the claimant in repudiatory breach of contract entitling the respondent to terminate the contract of employment without notice, or was the respondent in breach of contract in doing so?

(xii) If any claim is successful, to what remedy is the claimant entitled?

Evidence

11. Evidence was given by the respondents first, commencing with that of Mr Douthwaite, then Mr Clarke, Mr Davey, Mr Stratford, Mr Brown and finally Ms Cook. The claimant then gave her own evidence, which did not conclude within the original days of the hearing and it was adjourned for what transpired to be an unfortunately long time. Evidence was concluded on the fourth day,

the fifth day was for submissions, and the final day was for the Tribunal's deliberations.

12. Evidence in chief for the witnesses was given by written witness statement, with cross examination and re-examination together with questions from the Tribunal. The witnesses' evidence is addressed further below.

13. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. Further documents were added during the course of the hearing such as the claimant's payslips with her current employer, and latterly her bank statements.

Facts

14. The Tribunal found the following facts, material to the case before it, to have been established:

15. The claimant is Mrs Jane Bradbury. Her date of birth is 25 October 1971. She identifies her race as Latino, although she was adopted and is not aware of the race of her parents. She was brought up as someone who was white British by her white British adoptive parents. Her skin colour is consistent with someone of Latino ethnic origin.

16. The respondent is Sky In-Home Service Limited.

17. The respondent is part of the Sky group of companies. It has other entities in its group including Sky Subscriber Services Limited.

18. The respondent provides services for the installation and maintenance of equipment in customers' properties. It has about 3,000 employees. It shares services with other members of the Sky group of companies, including for human relations and other areas.

19. The claimant was employed by the respondent on 8 November 2010. Her then job title was Customer Adviser.

20. The terms and conditions of the claimant's employment were set out in a written contract of employment. The respondent had a number of policies including a Conduct Policy. That set out examples of gross misconduct that included "any action that puts you or anyone else's health and safety at risk".

21. In about January 2018 the respondent launched a "Women in Home Service" programme. The engineers who attended customers' properties to install or maintain the respondent's products such as satellite television, broadband, and telephone services, were at that point about 98% male and 2 % female. The respondent sought to increase the proportion of females to about 20% over several years. The claimant was in the first cohort of entrants into that Scheme, consisting of six trainees.

22. Prior to the commencement of the programme Mr Stephen Douthwaite of the respondent held a meeting with the existing engineers about the recruitment of female trainees, how they should be treated, and how they should be spoken to. He was concerned that the engineers had been working in a male dominated environment and he sought to make it welcoming for the trainees with a reasonable environment for them. He raised issues including how wives of male staff might feel about those staff working with a female colleague during the day. The respondent invited existing engineers to act as mentors for the trainees, and staff volunteered to do so.

23. The training programme took around six months. The claimant started it in March 2018 and completed it in September 2018 such that she became a qualified Field Engineer.

24. Mr Douthwaite in consultation with colleagues from the Health and Safety Department carried out an assessment of the ability of each of the six female engineers newly trained to ascertain if they could safely remove ladders from the top of vans used by the respondent around September 2018. One female

engineer had expressed concern over her doing so because of the height of the ladders on the van. The respondent ascertained from that assessment that different mechanisms were required to do that safely for four of the trainees in the form of a ladder rack. It took about four months for those racks to be provided during which a sling was used to recover ladders from the top of the van, which had been risk assessed by the respondent. No such assessment was undertaken for any of the male engineers. The heights of the female engineers varied from around five feet three inches to five feet seven inches. One of the male engineers was about five feet four inches in height.

25. In about January 2020 the claimant's van was undergoing maintenance and she was provided with an alternative vehicle which did not have that ladder rack.

26. On a date not given in evidence the respondent provided information with regard to the Covid 19 pandemic to its staff on an internal website called Home Hub. It was updated as the provisions introduced into law or guidance were changed. One page was in relation to whether or not to self-isolate when returning to the UK from abroad. It stated "Anyone arriving in the UK from abroad will need to self-isolate at home for the first 14 days. Travel from some countries is exempt from the need to self-isolate." It had a link to a government website (the content of which link was not produced in evidence) and another link for travel from or to England, and other links for the other UK nations. It also stated "Please let your manager know in advance that you're going abroad and will need to self-isolate when you get back."

27. On 18 June 2020 Ms Rosemary Cook of the respondent telephoned the claimant. The claimant was on a day off when she did so, and the call was made to the claimant's personal mobile telephone number which Ms Cook had from earlier interactions with her. Ms Cook and the claimant were not friends outside work but had a reasonably good relationship as work colleagues. Both of them were Inclusion Advocates with the respondent. That

involved a role in promoting diversity and inclusion on the basis of all protected characteristics. Ms Cook is white.

28. They had a discussion of about forty five to sixty minutes in length about a presentation that Ms Cook was to give on issues of inclusion and diversity. It was not specifically about race discrimination but that featured as it was taking place against the relatively recent murder of George Floyd in the USA, and the emergence of the Black Lives Matter movement. The claimant stated that she did not agree with the terms of all of the slides she was told about, although at that time she did not have access to them. She had seen many of the slides earlier but new slides for the presentation had been developed by Ms Cook, which included slides to promote discussion on issues of systemic racism, amongst other matters. Ms Cook explained those slides. Ms Cook said to the claimant words to the effect that she [the claimant] would have suffered oppression because of her race, and the colour of her skin. The claimant expressed her views to the contrary, forcefully.

29. Later that same day the claimant sent a lengthy email to Ms Cook thanking her for telephoning and making detailed comments about working with her on "a message against prejudice against people of ethnic minorities or in fact anybody from a diverse group". She did not complain in that email about how Ms Cook had spoken to her or a reference to the colour of her skin or of having been the victim of oppression.

30. The claimant had discussions with Adam Clayton and Claire Littlewood, both Team Managers of the respondent with Ms Littlewood her line manager. She said that she had been very upset by the comments Ms Cook made to her that she would have suffered oppression, and was concerned that she was being or would be treated differently because of the colour of her skin. The claimant was made to feel self-conscious about the colour of her skin.

31. Ms Cook forwarded the email to a colleague Ms De Ann Dechausnay, who then telephoned the claimant and informed her that she was to be stood down as an Inclusion Advocate. During the discussion Ms Dechausnay said that

she was concerned for the claimant's emotional well-being. The claimant said that she agreed with the decision to stand her down in that role.

32. The claimant raised a grievance by email to Ms Littlewood her manager on 19 June 2020, and was absent from work that day until 24 June 2020. Her email stated that it was "regarding the colour of my skin…..I was told that I should understand this as I had suffered oppression. I have never felt oppressed in my life and I think it is wrong for this person to assume because of the colour of my skin I have without even knowing anything of my background ethnicity or upbringing."

33. On or around 25 June 2020 the claimant had a discussion with Ms Littlewood about the email she had sent. No immediate action was taken on the said grievance.

34. On 27 June 2020 the claimant emailed Ms Littlewood to state "I no longer want to proceed with this as a grievance as I feel there was no intent behind the comments made. However I do feel it would be beneficial for an off the record chat with Rosie as to how she made me feel to ensure no one else is made to feel uncomfortable in the workplace." No such chat ever took place. Ms Littlewood did not do so, nor did she check with the claimant if such a discussion had taken place. The claimant had intended the chat to have been between Ms Littlewood and Ms Cook, and was not aware at that time that such a conversation had not taken place.

35. On 11 September 2020 an absence review meeting was held between the claimant and Ms Littlewood. It was held remotely. A minute of it is a reasonably accurate record of discussions held. It concerned three periods of absence. The first was 2 -8 March 2020, the second 19 – 24 June 2020 and the third stated to be 16 – 17 September 2020 (which post-dates the meeting and is likely to be a typographical error for 6 – 7 September 2020). During the meeting the events leading to the absences on 19 – 24 June 2020 were discussed. The claimant explained that she had not been in a fit state mentally to be speaking to her colleagues following Ms Cook's remarks to

her. Ms Littlewood asked “Would you say if this happened again would you be comfortable to deal with it?” The claimant replied “I can’t answer that – it depends on the circumstances.” The claimant expressed the view that she wished that she had gone ahead with the grievance. That same day Ms Littlewood issued a letter confirming that no formal sanction would be issued.

36. At some time around 11 September 2020 the claimant told Ms Littlewood that she was going to Madeira on holiday. At that time Madeira was on the list of countries exempt from self-isolating on return. The claimant at that stage had a ticket to fly to Madeira. The claimant also held a ticket to fly to Spain. She discovered that she could re-arrange that for Madeira, but not that for Spain.

37. On 14 September 2020 the claimant went to Spain on holiday. She did not take a Covid test before doing so. She went alone. At that time Spain was a country which required a person who had been there and was entering the UK to self-isolate for a period of 14 days as part of the measures taken during the Covid 19 pandemic, unless on a list of exempt occupations. Not to do so was, potentially, a criminal offence.

38. On a Passenger Locator Form the claimant completed on her return on 18 September 2020, which she required to present to Border Force officials on entry to the UK, she stated that she was exempt from self-isolating. The reason she claimed that she was so exempt was as she was “Member of household is cabin crew under the navigation order of 2016/specialist worker responsible for safe operation of aircraft”. The claimant did not take a Covid test on her return to the UK.

39. Cabin crew were in a category of workers exempt from self-isolating when returning to the UK for the purposes of their work. That exemption did not extend to members of their household.

40. On the claimant’s return to the UK she did not self-isolate. She returned to work on 19 September 2020. She entered 38 customer properties in the period from that date up to 24 September 2020.

41. On 27 September 2020 officials from Public Health England attended at the claimant's property. They stated that she required to self-isolate. They explained that there had been no exemption for the household of cabin crew, and that if she self-isolated for the remainder of the 14 day period, to 2 October 2020, no action would be taken against her, although a failure to self-isolate in such circumstances was potentially a criminal offence.

42. On 28 September 2020, being a Monday and the next working day, the claimant telephoned Mr Douthwaite. She did so as Ms Littlewood was on leave. She told him that she had been to Spain, had originally told people that she was going to Madeira and not quarantined when she returned, had been in work from 19 – 24 September 2020, had been visited by Public Health England and required to self-isolate such that she could not attend for work. She did not during that call state that she was, or thought she was, exempt from self-isolating. She stated that she had been concerned about absence levels, or words to that effect.

43. Mr Douthwaite arranged a call with the claimant later that day as an investigation into what had occurred. A minute of it is a reasonably accurate record. He asked why she had said she had been to Madeira, which was not on the list of countries which required self-isolation at that time. She said "I told everyone I had been to Madeira as I didn't want any hassle. The only people who knew were my son and his friend as he is living with us at the moment." He asked if she knew that she should have been quarantining, meaning self-isolating, and she said that she did not as she lived "in a household with someone who doesn't need to then I thought this would be the same for me." She said that she had done so from the government website, which she had found, and refers to pilots and crew and "the guidance lists the jobs for person or household for exemption….."the government website… says any cabin crew are exempt from quarantine and my son is cabin crew. What it doesn't say is that it covers the people they live with but I thought it did. I just presumed that as he is flying in and out of Europe each day he is exempt from quarantine and I presumed that this would be me also"

The claimant said that she believed that she had not put customers at risk as she had followed the respondent's guidelines about PPE, and that by doing so the respondent had made it clear that it was safe to be in people's homes. At the conclusion of the meeting Mr Douthwaite said that he was suspending the claimant.

44. On 28 September 2020 Mr Douthwaite wrote to the claimant to confirm her suspension.

45. On 1 October 2020 Mr Douthwaite held a further investigation meeting with the claimant. A minute of that is a reasonably accurate record. He asked her if she had checked the respondent's Home Hub, where information for employees is provided, or sought other advice about the trip to Spain. The claimant stated that she had not as she had looked at the government website. She referred to documents she had sent him in relation to trips planned earlier to Madeira and Spain.

46. On 1 October 2020 the claimant took a PCR test for Covid after her son tested positive. The claimant's test result was negative.

47. On 11 October 2020 Mr Douthwaite wrote to the claimant continuing her suspension.

48. Mr Douthwaite completed his investigation and prepared an Investigation Summary, which was undated.

49. On 19 October 2020 Mr Douthwaite wrote to the claimant to call her to a disciplinary meeting to be held on 23 October 2020 by Teams. There were two allegations referred to:

- "Dishonesty by claiming you had visited a country that didn't require self-isolation upon return, as set out in the Government guidelines

- Actions which could have put the Health & Safety of customers and their families at risk by entering 38 homes over a period of 6 days when you should have been self-isolating."

50. The letter advised that the allegations if upheld would constitute gross misconduct and may result in dismissal. Mr Douthwaite's investigation summary and supporting documents were sent with the letter as detailed within it, together with the respondent's Conduct Policy.

51. The disciplinary meeting took place on 23 October 2020 before Mr Stephen Clarke. The claimant attended with a colleague. Mr Clarke had a note-taker. The meeting was held remotely. A minute of it is a reasonably accurate record. At the meeting the claimant alleged that she had been exempt from self-isolating when returning from Spain as she was in a household of a member of cabin crew. She expressed that view on a number of occasions. The meeting was adjourned for a week to enable the claimant to obtain the details of the government website statement on which she said she had relied, and for the respondent to make its own enquiries on the same. Later that same day the claimant emailed Mr Clarke to ask as to the submission of evidence and if any timescale required to be met. He replied to ask for it before the adjourned meeting "next Friday".

52. Ms Archibald of the respondent's HR department sought to find the statement on which the claimant had relied, but could not do so. She produced an extract from an appendix on the government website that detailed additions, removals and updates of the list of those exempt, and sent that with a link to a website to Mr Clarke on 23 October 2020. That list did not show any update, meaning any change, to the terms applicable to cabin crew in the period of at least six months prior to the claimant's holiday in Spain. It did show an update to provisions as to seafarers on 8 September 2020.

53. The disciplinary meeting was continued on 30 October 2020. A minute of it is a reasonably accurate record. The claimant indicated that she had not been able to find the details she had relied on, and referred to an email sent to

Public Health England which had led to a generic response not providing the information she had asked for. Mr Clarke provided the details he had received from HR, and adjourned the hearing for around thirty minutes to allow the claimant to read it. The meeting then continued. The claimant maintained her position that she had acted on the basis of unclear information on the government website that had caused her to believe that she was exempt as a member of the same household as cabin crew.

54. Mr Clarke then adjourned the meeting at 12.14 to consider his decision, which he gave to the claimant when the meeting resumed that same day at 13.00. He stated that he had believed the claimant's explanation on the first allegation and dismissed it. On the second allegation he stated that he strongly believed that the claimant should have checked the respondent's website and with her manager on returning from Spain. The guidelines had been extremely well publicised, he said. He said that he could find no evidence that the claimant was exempt. Her actions, in not self-isolating, had put at risk the customers and their families in the 38 homes she had visited. He took the decision to terminate her employment summarily.

55. He set out his decision briefly in a letter dated 30 October 2020, in which he advised the claimant of her right of appeal nut did not set out the reasons for his decision.

56. In making his decision Mr Clarke did not believe the claimant's explanation. He took into account that she had changed her position in her three discussions with Mr Douthwaite. He did not believe that the government website had contained the suggestion that a member of a household containing a person who worked as cabin crew was exempt. He took into account her length of service with the company which was a little short of ten years, but concluded that dismissal was appropriate given the circumstances of risk to health and safety of customers that he believed existed by the failure to self-isolate. He held that belief as HM Government had required self-isolation for 14 days for those returning from Spain (save if exempt) to reduce the scope for transmission of the Covid-19 virus, that the claimant had

required to self-isolate but had not done so, and that by not doing so in circumstances where she may have contracted the virus when abroad she had been a risk to customers when entering their homes and engaging with them.

57. The claimant presented a “complaint of victimisation” to the respondent by email on 3 November 2020. She alleged discrimination on grounds of race and sex. She sent a further message on 5 November 2020. The respondent tasked Mr Mark Stratford with investigating it. He exchanged initial emails with the claimant in relation to that.

58. The claimant appealed her dismissal by letter dated 8 November 2020. She referred to processes and procedures not being correctly followed, inconsistent and contradictory decisions made, and that the decision was too harsh.

59. An appeal hearing against the dismissal took place before Mr Chris Davey on 23 November 2020. It was heard remotely. A note-taker was present. The claimant was not accompanied. A minute of it is a reasonably accurate record.

60. O 2 December 2020 Mr Davey met Mr Clarke. A minute of their meeting is a reasonably accurate record.

61. Mr Stratford commenced his investigation into what the respondent treated as a grievance by the claimant, and conducted interviews with witnesses, commencing in January 2021 and continuing into May 2021. The witnesses were Mr A Smith, Mr S Douthwaite, Mr K Bunce, Ms J Nickless, Ms C Littlewood, Ms R Cook, Mr G Wilkinson, Mr A Scarborough, Ms N Firth, Mr C Sutton, Ms G Marsden, Mr S Douthwaite (for a second time), Ms M Davies, Ms D Bown, Ms T Gemmell and Ms D Dechausnay. Notes of those meetings are reasonably accurate records of the same. Mr Stratford received written evidence from the claimant and had emails from Rosemary Cook and Louise

Garft. Mr Stratford and the claimant had agreed that he determine her grievance without having a meeting with the claimant herself.

62. On 22 February 2021 Mr Davey wrote to the claimant refusing her appeal against her dismissal save for two points and explaining his decision to do so. He stated that he believed that the claimant had deliberately not self-isolated or raised the issue with her manager or with People Plus in the respondent, part of its HR service shared with other Sky companies, as it would have impacted her absence levels. The letter included consideration of a point raised by the claimant after the appeal hearing related to a decision not to dismiss three others of the respondent's staff who had breached Covid rules and not been dismissed. It concerned attendance at a 60th birthday party for Kay Burley attended by colleagues Beth Rigby and Inzamam Rashid. Mr Davey said that although it involved Covid breaches it did not involve putting 38 customers at risk, and was in his view not a comparable case. He considered that the claimant had been involved in deception, that there was a lack of awareness for customer safety, and that that made her a safety risk. He further referred to the deaths during the Covid pandemic and that "part of the reason it is spreading is because people are flouting the rules that have been set out by the British Government….You willingly put our customers at risk by not following the rules that were set out." He added that that was totally unacceptable.

63. Ms Burley, Ms Rigby and Mr Rashid were not employed by the respondent, but another entity within the Sky group of companies.

64. On 5 July 2021 Mr Stratford wrote to the claimant rejecting her grievance setting out his reasons in detail for doing so in the letter.

65. The claimant appealed Mr Stratford's decision by email on 9 July 2021. She provided reasons for her appeal on 25 July 2021 stating that she disagreed with the outcome based on the evidence supplied.

66. The appeal was heard by Mr Ian Brown. He met with the claimant on 10 August 2021. A note of their meeting is a reasonably accurate record of it.

67. Mr Brown met Mr Douthwaite to obtain detail from him on 17 August 2021. He met Mr Scarborough on 17 August 2021. He met Danielle Brown, Nicola Firth and Maria Davies in September and October 2021. They denied experiencing any sex discrimination at the respondent. He met Claire Littlewood on 8 October 2021, and Rosemary Cook on 11 October 2021.

68. Mr Brown wrote to the claimant to reject her appeal on 15 November 2021 providing detailed reasons for his doing so, but upholding it in one respect that Ms Littlewood had not dealt with the email of 27 June 2020 properly and "could have been clearer around her plan to ensure the concerns you had raised in relation to Rosie were addressed" He believed that it would have been best if Ms Littlewood had followed up to ensure that a conversation had taken place between the claimant and Ms Cook.

69. When employed by the respondent the claimant had net earnings per month of £1,632.62. Employer pension contributions were £172.13 per month. She had Sky TV, broadband and phone services worth £181 per month. She had private healthcare valued at £92.75 per month. She had the use of a company van for private purposes, including mileage. It had a value of £310 per month (for reasons set out below) and she paid by way of salary sacrifice for it at the rate of £70.83 per month such that it had a net benefit of £239.17 per month. The total value of that package was £2317.67 per month, the equivalent of £534.85 per week.

70. The claimant was unemployed from the date of her dismissal on 30 October 2020 to 29 November 2020. She then commenced new employment with Vitality Ltd. She did not receive any state benefits during the period of her unemployment.

71. The claimant had the following earnings at her new employment –

Date	Net pay (£)	Employer Pension Contribution (£)
15.3.21	1316.40	73.12
14.5.21	1370.70	73.12
15.5.21	1370.70	73.12
15.6.21	1634.79	73.12
15.7.21	1421.32	73.12
15.8.21	1467.30	73.12
15.9.21	1492.57	76.87
15.10.21	1487.91	76.87
15.11.21	1631.45	76.87
15.12.21	1461.89	76.78
15.1.22	1457.00	76.87
15.2.22	1767.35	90.00

72. The claimant has private medical insurance, for which she has a tax deduction of £84.12 per month. She has no other benefits from her employment. The value of her current package is £428.62 per week, net, exclusive of the private medical insurance.

73. The claimant contracted to hire purchase a vehicle after her dismissal. It has hire purchase costs of £140.29 per month. She pays insurance costs of £44.30 per month. She pays about £80 per month in fuel. She pays £11.84 per month for road tax.

74. The claimant felt distressed by what she saw as racist terms being used in relation to her, a failure of the respondent to deal with that appropriately, sexism in the workplace, and what she considered to be victimisation against her.

75. The claimant did not at any stage instruct a solicitor to act for her but has a friend who is one, and whom she consulted informally from time to time. She did not have a full understanding of issues of time bar and was seeking advice

from ACAS. She had commenced a grievance in November 2020 and was awaiting its outcome. She did not conduct internet searches as to remedies available to her or time limits to do so.

76. The claimant commenced early conciliation on 18 January 2021

77. ACAS issued a certificate for early conciliation on 12 February 2021

78. The present claim was presented to the Tribunal on 9 March 2021

Submissions for respondent

79. The respondent helpfully provided a very full written submission extending to 29 pages, with 22 authorities, many of which are referred to below, which he read out. The following is a very basic summary. The Tribunal was invited to accept the evidence from the respondent's witnesses, and not to accept that from the claimant where there was a dispute. It was argued that she had been evasive, inconsistent, and not truthful, in her evidence. Examples were given of evidence said not to be credible. It was contended that there had been a fair dismissal. The reason was conduct, and there had been a fair procedure followed in accordance with the ACAS Code of Practice. There had been a belief in misconduct on the basis of a reasonable investigation, and the penalty of dismissal had been inevitable given the belief by Mr Clarke that the claimant's actions had been deliberate, and had led to a risk to customers' health and safety that included death. The appeal had been reasonable. There had been a material breach of contract by the claimant justifying the respondent terminating the contract summarily.

80. In respect of the claims of discrimination, firstly they were outwith the jurisdiction of the Tribunal on account of timebar, with there being no continuing acts, and it not being just and equitable to extend jurisdiction, and secondly they were not justified on the facts. It was argued that there was no evidence sufficient to hold direct discrimination on grounds of race, Ms Cook's

denial of the remark attributed to her by the claimant should be accepted, and in any event there had been no detriment. It was argued that there was no sufficient evidence of any PCP for the purposes of an indirect discrimination claim on the protected characteristic of sex, and no sufficient evidence of any detriment for having made a protected act, with there having been no such act, it was submitted, in any event. Submissions were made as to remedy if the claimant's claims succeeded to any extent, contrary to that submission.

Submissions for claimant

81. The claimant gave an oral submission and the following is again a basic summary of it. She denied having lied, and said that she had not learned the pack off by heart, but had tried to remember things from two years ago. The Tribunal should look at whether the principal reason for dismissal was the same as the allegation made. It did not include an allegation that she had not been exempt, and had put customers at risk by not self-isolating. It did not refer to whether it was deliberate or accidental, or how that may have affected risk to customers. The Code of Conduct did not refer to breach of covid rules. There had been no evidence of how her actions may have impacted the business, it was just the belief of Mr Clarke. She questioned whether that was his belief at the time. There had been no evidence of any increased risk. The claimant had been told by Mr Douthwaite that the Covid test she took would not be used, but it was referred to in the decision letter. The minutes of meetings were inaccurate. The respondent had been selective in what it investigated. It had not included her own evidence such as documents showing the changed air tickets, or the passenger locator form, which had been accepted by Border Force. She had not been treated fairly when shown the document Ms Archibald had found during the hearing itself, having only 30 minutes to consider it, when she had been asked by him to provide documents before the meeting. Had Mr Clarke based his decision on advice from others? She could only appeal on those aspects allowed by the respondent's procedure. If the minutes of the meetings with Mr Clarke had been correct it may have changed Mr Davey's opinion. Mr Southwaite, Mr

Clarke and Mr Davey were all colleagues, it would have been fairer to have had the appeal outside the team entirely. Other Sky colleagues had been put on garden leave for breaking Covid rules, but she was dismissed, and that was not consistent treatment.

82. On the issues of discrimination, she did not accept that the claims were timebarred. There was no doubt Mr Southwaite made the comments he did, which were sexist, and that affected how women were treated in his team going forward. It led to a lack of support. She had given names to Mr Stratford to investigate, but he had not done so. He had spoken to females in a different team, and that showed that there had been an effect in Mr Douthwaite's team. The different treatment of women when training on ladders took place and then not being able to use ladders for three or four months caused resentment to others in the team. On the issue of racism she referred to the evidence Ms Cook had given with regard to those "half caste", which was not what the claimant's email had said. Ms Cook's evidence should not be accepted. Adam Clayton and Claire Littlewood had not been called to give evidence and could not be cross examined. If there was ambiguity in her email to Ms Littlewood, it was for her manager to check what was meant. It was wrong to say that the claimant should have dealt with matters if they arose again. The responsibility was on the respondent to investigate issues of racism where they occurred. There was a theme in the respondent's evidence of managers who were trained requiring action by staff who were not. The respondent had picked and chosen what evidence to rely on and did not take account of evidence provided to it. The appeal had not been conducted in a timely manner. She did not wish to make detailed comments on remedy but left that to the Tribunal to assess.

Law

(i) Unfair dismissal

(i) The reason

83. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

84. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

85. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Fair reasons include capability and some other substantial reason, as well as conduct.

(ii) Fairness

86. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> ""(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 [that reason] as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

87. There is a dispute between the parties as to the reason. The respondents claim that it is capability or some other substantial reason. The claimant alleges that it was his religion or belief.

88. Capability is defined in section 98(3) of the 1996 Act as "capability assessed by reference to skill, aptitude, health, or any other physical or mental quality'

89. The basic principle was set out by Lord Denning in ***Taylor v Alidair Ltd [1978] IRLR 82*** as follows:

> "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent'.'

90. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, made the following comments:

> "an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has

taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action."

91. Three factors are generally considered, as referred to in ***N C Watling & Co Ltd v Richardson [1978] IRLR 255***, being:

1. the evidence necessary to establish that the employer has reasonably concluded that the employee is incompetent;
2. the procedures adopted; and
3. to what extent the employer should seek alternative employment for the employee.

92. The Tribunal must not substitute its own views for those of the employer. The test is the band of reasonable responses both for the decision as to capability and the penalty of dismissal – ***British Leyland (UK) Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones 1982 IRLR 439*** for example. The Court of Appeal in ***McLaren v National Coal Board [1988] IRLR 215*** referred to the importance of ensuring that employees are given a proper hearing before dismissal.

93. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a document that the Tribunal requires to take account of.

Appeal

94. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures***.*** The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** being a conduct dismissal case, in which it was held that a fairly heard and conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall.

(ii) Discrimination

95. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

96. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that race and sex are each a protected characteristic. Section 9(1)(a) states "Race includes colour".

97. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

98. Section 19 of the Act provides

> **"19 Indirect discrimination**
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

……race, sex;…."

99. Section 23 of the Act provides

"**Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

100. Section 27 of the Act provides:

"**27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(*a*) B does a protected act, or

(*b*) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

……

(*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

101. Section 39 of the Act provides:

"**39 Employees and applicants**

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

……..

(c) by dismissing B

(d) by subjecting B to any other detriment."

102. Section 123 of the Act provides

""**123 Time limits**

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

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

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

(3) For the purposes of this section—

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

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

103. Section 136 of the Act provides:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

104. Section 212 of the Act defines "substantial" as "more than minor or trivial."

105. The provisions of the 2010 Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC,*** as well as the ***Burden of Proof Directive97/80/EC.*** The dismissal was prior to the United Kingdom withdrawing from the European Union, and those provisions remain part of the retained law under the European Union (Withdrawal) Act 2018.

(ii) Case law

(a) Direct discrimination

106. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made

out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

107. Further guidance was given in ***Amnesty***, in which the then President of the EAT explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of. ……
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……
> In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

108. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to

further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

109. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

110. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

111. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

112. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

113. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258***the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

114. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

115. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following(in a case which concerned the protected characteristic of disability):

> "5
>
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.
>
> 6
>
> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

Indirect discrimination

116. Lady Hale in the Supreme Court gave the following general guidance in ***R (On the application of E) v Governing Body of JFS [2010] IRLR 136***

> "Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

The same principle applies for other protected characteristics, one of which is sex.

Provision, criterion or practice

117. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science*** [***1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558.***

118. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not

> mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

119. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Disproportionate impact

120. The PCP must create a disproportionate impact on, in this case women, The wording of section 19 does not necessarily require statistical proof. As Baroness Hale put it in ***Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601*** the change in the Act over the predecessor provisions

> ~was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question~.

121. In ***Essop v Home Office [2017] IRLR 558*** the Supreme Court made the following comments:

> "A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men …"

122. In the recent case of ***Cumming v British Airways plc UKEAT/0337/19*** that quotation was referred to in relation to sufficiency of evidence as follows:

> "there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

123. In addition to group disadvantage there must also be disadvantage to the claimant herself.

Objective justification

124. The test in section 19 derives from an equal pay case ***Bilka Kaufhas GmbH v Weber von Hartz [1987] ICR 110,*** which had been applied to discrimination cases under predecessor provisions of the 2010 Act in ***Hampson v Department of Education and Science [1989] ICR 179.*** It was decided at Court of Appeal level and although later appealed to the House of Lords the issue of justification was not addressed. It was followed in ***MacCulloch v ICI [2008] IRLR 846***. It is for the employer to establish the defence on the balance of probabilities. It has the elements of

(i) The means to achieve the aim must correspond to a real need for the organisation

(ii) They must be appropriate with a view to achieving the objective

(iii) They must be reasonably necessary to achieve that end.

125. In ***Chief Constable v Homer 2012 ICR 704*** Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

126. The EAT held in ***Land Registry v Houghton and others UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in ***City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18*** as follows

> "proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (***Hardys & Hansons place v Lax [2005] IRLR 726***). On the other hand, the test is something more than the range of reasonable responses (again see ***Hardys***)."

127. Guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

Victimisation

128. There are two key questions – (i) has the claimant done a protected act (ii) if so did she suffer a detriment because she had done so. The second aspect is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425.*** Guidance on the issues that arise is in Chapter 9 of the EHRC Code of Practice. The burden of proof provisions apply to the terms of section 27.

Detriment

129. The key question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" ***Shamoon.*** It is to be interpreted widely in this context –

Warburton v Chief Constable of Northamptonshire Police EA-2020-000376 and ***EA-2020-001077***

Burden of proof

130. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or victimisation, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*.**

131. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

132. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

133. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

134. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> " To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

135. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

Jurisdiction

136. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387*.** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner*, *[2003] IRLR 96***)

137. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***).

138. Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, following ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** A different division of the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran***

UKEAT/0274/14 holding that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** in which the Judge added that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

139. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

140. In ***Rathakrishnan*** there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, which in any event does not apply in Scotland, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

141. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held similarly:

> "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion.

142. That was emphasised more recently in ***Adedeji v University Hospitals Birmingham NHS Foundation*** **[2021] EWCA Civ 23,** which discouraged use of what has become known as the ***Keeble*** factors, in relation to the Limitation Act referred to, as form of template for the exercise of discretion

(iii) **Breach of contract**

143. The Tribunal has jurisdiction over a claim of breach of contract by virtue of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994.The respondent did not give notice to the claimant. It has the onus of proving that it was entitled to do so on account of the repudiatory breach of contract by the claimant. The standard of proof in that regard is the balance of probabilities. If the respondent does not discharge the onus the claimant succeeds in her claim for breach of contract. These principles were confirmed, if that be needed, in the EAT in ***Hovis Ltd v Louton EA-2020-00973***. An entitlement to a minimum period of notice is established in section 86 of the 1996 Act and is for one week of notice for each year of continuous employment up to a maximum of 12 weeks.

Remedy

i) Unfair dismissal

144. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116 as follows:

> "(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.
>
> (2) If the tribunal decides not to make an order for re-instatement it shall then consider whether to make an order for re-engagement and if so on what terms.
>
> (3) In so doing the tribunal shall take into account –
>
> (a) any wish expressed by the complainant……
>
> (b) whether it is practicable for the employer…. to comply with an order for re-engagement and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms….."

145. It is for the employer to provide evidence to show that it is no longer practicable to employ the claimant in her original role (***Port of London Authority v Payne [1994] ICR 555***.) In this context 'practicable' means "capable of being carried into effect with success", not simply 'possible' (***Coleman v Magnet Joinery Ltd [1975] ICR 46***.) When considering

practicability, either for reinstatement of re-engagement, issues as to whether trust and confidence have broken down; whether the employer genuinely, albeit unreasonably, believed in the Claimant's guilt; whether the relationship has so soured to make it impracticable, will be directly relevant. It is the Tribunal which makes the assessment of practicability at first instance. This will include, for example, an assessment of whether the employer's view that trust and confidence has broken down is real and rational. It is the employer's view of trust and confidence which is material in this context ***United Lincolnshire Hospitals NHS Foundations Trust v Farren (UKEAT/0198/16),*** subject to scrutiny by the Tribunal.

146. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

147. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was

also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).*** There are limits to the compensatory award under section 124, which are applied after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

(ii) Discrimination

148. In the event of a breach of the 2010 Act compensation is considered under section 124, which refers in turn to section 119. That section includes provision for injured feelings under sub-section (4). The first issue to address therefore is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such

> as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

149. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

150. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2020, the Vento bands include a lower band of £900 to £9,000, a middle band of £9,000 to £27,000 and a higher band of £27,000 to £45,000.

151. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is "what would have occurred if there had been no discriminatory dismissal ……. If there were a chance that dismissal would have occurred in any event, even

if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

152. It was stated in ***Chief Constable of Northumbria Police v Erichsen 2015 WL 5202327*** that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

153. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

154. (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards made can include for injury to feelings, and for past financial losses. No interest is due on future losses.

(iv) Breach of contract

155. Where there is a finding of breach of contract an award can be made for loss during what ought to have been the period of notice, subject to proof of that loss and the duty to mitigate that loss. There may be a need to avoid double recovery with the unfair dismissal remedy if the same period of time is covered.

(v) International travel restrictions

156. Restrictions on international travel were imposed by the Health Protection (Coronavirus, International) (England) Regulations. 2020. There was a list of occupations exempt from the requirement to self-isolate set out in Schedule 2 Part 2, which included:

"10**.** Crew, as defined in paragraph 1 of Schedule 1 to the Air Navigation Order 2016, where such crew have travelled to the United Kingdom in the course of their work."

Observations on the evidence

157. The Tribunal's assessment of each of the witnesses who gave oral evidence is as follows:

Stephen Douthwaite

158. We were satisfied that Mr Douthwaite sought to give honest and reliable evidence. We did have a concern over his use of language in relation to the introduction of women engineers, which he in effect compared to changing from an all male environment to one involving children requiring moderation of language, which was far from a good analogy, but we accepted that his intention had been to promote female engineers in a welcoming atmosphere

Stephen Clarke

159. We were satisfied that Mr Clarke sought to give honest and reliable evidence. He explained the reasons for his decision to the claimant briefly at the meeting they held, but did not set those out in the letter of decision. We accepted that he had a belief in misconduct having occurred, that there was a risk to customers from what he considered to be a breach of the rules on self-isolation which were rules there to protect the public, and that the appropriate penalty in his mind was dismissal. He did not believe the claimant's explanations, which had changed during the process. These were views he genuinely held. We address them further below

Christopher Davey

160. We were satisfied that Mr Davey sought to give honest and reliable evidence. He considered the appeal carefully and methodically. He allowed the clamant to add to the points in appeal by referring to an issue of inconsistency, as she argued it to be, in relation to the treatment of three Sky presenters. He set out his decision in a detailed letter. He did not believe the claimant and considered that she had deliberately not followed the rules to avoid further periods of absence.

Mark Stratford

161. We were satisfied that Mr Stafford sought to give honest and reliable evidence. Mr Stafford investigated and determined the grievance. He interviewed fifteen witnesses over a lengthy period. He did not interview the four, or five witnesses that the claimant provided to him as he did not consider them to be relevant to the issues raised in the grievance.

Ian Brown

162. We were satisfied that Mr Brown sought to give honest and reliable evidence. Indeed he was an impressive witness. He had a good relationship with the claimant, as was clear to us when he gave evidence in answer to her questions. He conducted his own investigation and spoke convincingly about what he had decided and why. He did allow a small part of her appeal, as he considered that Ms Littlewood ought to have followed up the email from the claimant in relation to the suggestion of a conversation with Ms Cook.

Rosemary Cook

163. Ms Cook did appear to us to be nervous, which is not surprising given the allegations against her, which she denied, and we took that into account. What was a matter of some concern was the minute of her statement given

in the grievance process, where she had been noted to have made a remark about children of mixed race. She denied saying that, and the minute was not signed by her as it appeared in the bundle before us. She said both that she had not said that, and that she would not have said it. It did not accurately summarise what the claimant had set out in her email on the day of their conversation which Ms Cook contained some matters she described as "funny". She said that that word meant peculiar not amusing, but even taking such a definition the word funny was not the best term to use given the context of that email. Her evidence was very different to that recorded in the minute, and we did not consider that the minute was likely to be inaccurate to the extent claimed. We required to assess her evidence on the disputed conversation with that of the claimant, and all of the other evidence before us. For reasons we set out below we concluded that we should prefer the evidence of the claimant.

Jane Bradbury

164. The claimant acted for herself, and did so with no little skill. She argued her case tenaciously, not least during a lengthy cross examination. We did have some concerns over the credibility and reliability of her evidence. On occasion she had a tendency to choose words she said others had used, which were not an accurate representation of what those others had said. For example she said that Mr Douthwaite had said that the Covid test she took was irrelevant, but his comment was that it was not of material relevance. She is however a lay person, and the precise use of English in a Tribunal is not something she has experience of. On occasion she made a comment about what had been said or done, and when asked to show where that was within the documents before us could not do so. She made comments about matters of fact which were inconsistent. For example she said in answer to questions in cross examination that she had given names to Mr Stratford of people who had attended the meeting Mr Douthwaite held before the Women In Home Service was launched who had told her that they had heard him make the comments about that she alleged. What she had stated to Mr Stratford

however was “I do not know exactly who was present at this meeting….People I remember who were on the team at the time but I cannot guarantee that they were present as they may have been on RDO [rota’d days off]” then provided names. That is inconsistent with those persons having told her what had been said, in that to do that they must have told her that they were present. It appeared to the Tribunal that that oral evidence was wrong. She was adamant in answering a question in cross examination that she had asked HR about sending them evidence and the timescale to do so, but accepted on being shown her email of 23 October 2020 that she had asked Mr Clarke about that, and that he had replied.

165. The claimant had also given evidence inconsistent with material bodies of other evidence, such as that she said that other females in the WIHS programme had told her that they had been themselves told about the remarks by Mr Douthwaite at that meeting. When four of them were questioned on that however all four denied that, and refuted the claimant’s suggestion that there was sexism in the workplace. The claimant said that they were all lying. It appeared to the Tribunal that that was very unlikely, albeit that those witnesses did not give evidence to the Tribunal.

166. The claimant also alleged on the final day of evidence that she believed that the arrangements put in place to attend customer’s properties, which included use of masks and other PPE, questions asked of customers, sanitisation and other arrangements, entirely eliminated any risk of Covid-19. She did so when arguing that her not self-isolating on return from Spain did not lead to any risk to the health and safety of customers. The evidence from the respondent’s witnesses had been to the effect that the arrangements mitigated the risk, not eliminated it. That accorded with common sense. The claimant’s position firstly was not put in cross examination to Mr Clarke in particular, but secondly did not accord with common sense.

167. Towards the end of her evidence the claimant alleged that the last page of the minute of the meeting on 30 October 2020 which indicated that she had asked to see a minute of that meeting, that there had been an adjournment

from 12.39 to 13.11, that it had reconvened and said that the “notes are fine” as had her companion, were all matters that had been fabricated by the respondent, as they had not happened. Yet she had not raised that in the appeal process, it was not referred to in the Claim Form, it was not referred to in her own witness statement, and it had not been put to Mr Clarke in her cross examination of him. That all seemed extraordinary, and not credible.

168. The claimant had more generally denied that the minutes were accurate, particularly those of the meeting held initially with Mr Clarke. The Tribunal did not accept her evidence on that. Not only was her position on the minutes of the second meeting one we rejected as above, but it was also noted that in the meeting with Mr Davey she had not been able to tell him in what respect the minutes were inaccurate, or incomplete. That was also the position in the evidence before us. Taking the evidence as a whole we considered it likely that the minutes of the meetings were all reasonably accurate.

169. What was of further concern was the evidence in relation to the circumstances around her trip to Spain, where there was a very sharp difference in the positions of the parties. The claimant had at the least not been candid with her manager about where she was going. She had said to Ms Littlewood initially that she was going to Madeira, a place not requiring isolation. At that time we accepted that that was her intention, as she had an air ticket for there. She said that she had looked at the government website on self-isolation on 10 September 2020 and that was when she said that she noted the provisions as to households of cabin crew. Her flights to Spain had been changed once and she said that they could not be changed again. She did not tell Ms Littlewood about that, despite having an opportunity to do so on 11 September 2020 when there was the absence review meeting. Her reasons for not being candid with her manager, who was unaware of a change of plans as the claimant failed to tell her of that, were not clear from her evidence. She said initially to Mr Douthwaite when she called him after being instructed to self-isolate by Public Health England (PHE) that she had been concerned about her absences. That was in the context of the absence

review meeting less than three weeks earlier. She did not then mention that she had been exempt, at least by her own understanding. She did not adequately explain why she had not done so at that point. She set out her understanding in the later call that day, but did not ever produce any evidence to support what she said the government website stated, beyond her emails to PHE. She claimed that by the time of the call the website had changed. That call was around 10am or so. She would have known at the latest around 11am on 28 September 2020 that it was potentially an issue. By then PHE had told her that she was not exempt, they having done so the day before. She knew from her suspension that the issue was potentially a serious one. She did not however seek at that stage to secure the detail of what she said the website stated on 10 September 2020.She also later, in the investigation process, said that she had “presumed” that household members were covered, which is not the same as saying that that is what the website said, in terms.

170. At the disciplinary hearing she said that she had “copied and pasted” the words of the website into the Passenger Locator Form, which is a form of electronic copying, repeating exactly the same text in another document, but in evidence she accepted that that was not what she had done. That comment to the disciplinary officer was therefore not accurate. She said in evidence to us that she had copied it from the website to her phone manually, but did not write down the provisions doing so. Later in evidence she said that the website did not have a section simply for cabin crew, which is our understanding of the evidence she initially gave us, but that there was an initial comment on the website to the effect that members of households who fell into categories were exempt, and then a list of all occupations falling into that, one of which was cabin crew. What she said she copied appeared therefore not to be a single copy, but the copy of two sections, one a generic one which she says included household members in its phrasing, and the other with a list of occupations one of which was cabin crew.

171. She also accepted in evidence that the reference to the "navigation order of 2016" was not accurate, and that it should have been to the "Air Navigation Order 2016". The omission of the word Air, and not using capitals, was not properly explained. It was however not the key element of this, for the purposes of the claim before us, as that was the part alleged to include reference to household members. That aspect being amended would be a change to the terms of the document as a whole, rather than to that for a specific occupation, and that was not consistent with the document produced by the respondent in their investigation (page 173) which showed changes on 28 September 2020 but to specific occupations only, and not for cabin crew. The entry on 3 September 2020 was an update to exemption for seafarers, which contradicted the claimant's assertion that the list only recorded removal of existing roles, or adding new ones, and that the change she mentioned was not doing so, but changing wording. Other entries refer to more general wording changes, such as that on 7 and 8 June 2020. The meeting with PHE had been on 27 September 2020. That was the day before the changes she said had taken place, being on 28 September 2020. It was not explained on what basis PHE told her to act on rules not yet amended, on her own account. That is also not easy to reconcile with the fact that she had returned to the UK on 18 September 2020, when on her account she was following the rules if they were in the terms claimed. Finally, when it was put to her in cross examination that she had given different reasons for her position to Mr Douthwaite initially she said that they were not "either ors" but were each true.

172. It was not clear what the terms of the website she said she had seen, and sought to rely on, were. No application for a document order to obtain the terms of the same in force as at the date of her leaving for Spain had been made by either party, and the extent to which the website mirrored the legislation or did or did not have the words the claimant alleged it did is therefore not as clear in the evidence before us as it might have been. The claimant is not alone in this regard however. The respondent did not provide all the detail it could have either – the links from its own page on isolations

were not provided, and the what exactly Ms Archibald looked at when accessing a link, whether that was the list produced or another document of which it was a part, was not clear, not least as she did not give evidence.

173. The claimant's evidence on what had been said to her by Ms Cook was contradicted by her, and we assess that below.

174. The picture presented to us by the above is not simple or entirely clear, but we concluded from all of it that the inconsistencies and concerns over the claimant's evidence were material, but required to be considered in the light of all the evidence that we heard, and the circumstances overall.

Discussion

175. The Tribunal decision is unanimous. We address each of the issues before us in turn:

(i) *What was the reason, or principal reason, for the claimant's dismissal?*

176. The Tribunal was readily satisfied that the respondent had proved that the reason for the dismissal was conduct, in that there was a belief that the claimant was guilty of gross misconduct in not self-isolating on her return from Spain and that doing so created risk to the health and safety of their customers whose houses she visited in that period.

(iii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

177. This was far from an easy decision. Firstly it was clear that there was a belief in gross misconduct having taken place. Secondly we considered that there had been generally a reasonable investigation, which includes both the steps taken by Mr Douthwaite and those by Mr Clarke during the disciplinary hearing – when it was adjourned to allow the claimant time to obtain evidence

to support what she said had led her either to be exempt, or to believe that she was. She did not do so, and the documents produced by HR indicated to Mr Clarke that there had not been the change she argued for, although we had some concerns over that as addressed below. Thirdly, we considered that there had been a reasonable belief formed as to gross misconduct. There was no direct evidence of the claimant creating a risk of spreading Covid to customers, but it was an inference from the combination of the rules as to self-isolation on return from Spain, the purpose of those rules which was clearly to reduce transmission of a deadly virus, as Mr Clarke believed, and the possibility that someone was infectious but without exhibiting symptoms. The claimant had not tested for Covid prior to going to Spain, prior to returning to the UK, or at the stage of her being in the UK and working. That test occurred only after she was suspended. It is not possible to know if a risk certainly existed, as she may have had the virus without being aware of that, and being asymptomatic. Fourthly we considered that the procedures followed were fair, and within the band of reasonable responses. There was, we concluded, no breach of the ACAS Code of Practice. Some aspects may well have been handled better than they were, but that is not the test.

178. Pausing at that point, there were some issues that we discussed at length. The first was that the documents Ms Archibald had passed on to Mr Clarke on 23 October 2020, containing information as to changes to the government website, were not passed on to the claimant then, or in full. What she was given, during the hearing, was the second page of the document, and not the email with the link. The link made clear that it was to a government website, but it did not have (at least as presented to us) the wording shown at the time the claimant travelled to Spain, or in force when she said she looked at it shortly before hand. If that had been the only evidence that may have been a fatal flaw, but it was not. There was also the changes of position the claimant had given to Mr Douthwaite, and the timing of the changes she argued for, against the date of the visit by PHE officials which was on 27 June 2020 and the day before the change of wording she argued for. The sheet she was shown did not support her arguments, but did not conclusively

disprove them. We are conscious however that the test is not what we would have done, but whether the respondent acted within the band of reasonable responses, and we concluded in this regard that it had, given all the evidence it had. The document that was produced did indicate at least in general terms, and if one assumes its accuracy, that the change to wording that the claimant alleged had not taken place. That was supported by the evidence overall, which indicated that there had not been wording covering households of an occupation, including cabin crew, at any stage and that the claimant had at the best for her presumed it to have been the case.

179. We had concerns over the document from the Sky Hub, which was argued to be a form of policy. We did not agree. It appeared to us to be a form of information page. The claimant said that she had not seen it, and there was nothing that indicated that she should have looked at it. In any event, the allegation was not of a breach of policy, but a risk to health and safety, which appeared to us to be related directly to the second bullet point in the list of gross misconduct examples in the Code of Conduct document. The respondent had not set out a policy for working with Covid, before us at least, which referred to travel abroad, and how a breach might be treated as gross misconduct, but we accepted that the issue of risk to health and safety was in the Code of Conduct itself.

180. Whilst the claimant did not think that there was an increased risk from her visit to Spain, that was not we considered correct. Firstly the requirement to self-isolate on return from abroad was introduced to reduce the spread of Covid, which is a matter of which we take judicial notice. Secondly, the claimant was wrong to say that the arrangements to mitigate risks when visiting customers' properties, such as PPE, sanitisation, opening windows and avoiding contact, eliminated that risk. It did not, it reduced it, but risk remained. Thirdly, we accepted that the provisions in force at the time did require the claimant to self-isolate. We inferred from that that there had been a risk, in the sense of a possibility of danger to those customers, of the claimant working and not self-isolating. One does not know the extent of the

risk as no Covid tests were carried out at the material time, therefore a risk existed. At the very least Mr Clarke was entitled to consider that that was the case.

181. We were also concerned at the timing of the decision, with an adjournment for 46 minutes, and a short decision with limited reasoning. No reasons were given in the letter of dismissal. The reasons were not documented. That at the very least is not good practice, and the lack of a lengthy consideration was an issue for us, but again we did not conclude that that took it outside the band of reasonable responses. We noted that there had been an earlier meeting, adjourned to see if wording could be found to support the claimant's argument, and that wording was neither found by the respondent nor produced by the claimant. Emails to state that she had tried did not provide the answer that was needed by her in this respect.

182. That left the final issue, was the penalty of dismissal within the band of reasonable responses? That was not straightforward. The claimant argued inconsistency. We concluded that that argument did not succeed. The comparators for that purpose were not employed by the respondent, albeit another member of the same group. But more substantially there were material differences between the cases, particularly that for the comparators there was no suggestion of risk to the health and safety of customers. That was a distinction that was sufficient to make the cases not comparable, as they were not "truly similar" – see ***Hadjioannu v Coral Casinos Ltd [1981] IRLR 35***.

183. We considered the broader issue of penalty. Just because there is a finding of gross misconduct does not mean that a dismissal is fair – ***Babapulle v Ealing 2013 IRLR 854***. Length of service can be taken into account ***Strouthous v London Underground 2004 IRLR 636*** and for the claimant that was over 9 years, indeed it was very nearly 10. She had no prior disciplinary record. The consensus view of the Tribunal members was that given all the circumstances, had we been the employer, we would have issued a final written warning.

184. But that is not the point. We are not entitled to substitute our view for that of the respondent. We must consider whether the decision that was taken was in the band of reasonable responses or not. We concluded that Mr Clarke was entitled to believe that the claimant had deliberately breached the requirement to self-isolate, and that doing so had created a risk of infection for customers whose houses she visited, with that risk potentially including death. He was entitled to the view that the government website had not contained the provisions that the claimant alleged, even if the precise wording at that time was not before him. He had other evidence to base his decision on, including that the PHE visit had been on 27 September 2020, and that that was the day before the change the claimant suggested had taken place, at least at one point. He also had her comment to Mr Douthwaite about her presuming that she was covered as household, a word that does not equate to checking and seeing wording to that effect, quite apart from the initial call when no mention of being exempt was made. We consider that his concern that customers may have come to harm from the claimant's failure to self-isolate was genuine, and material. Against that background we concluded that dismissal was within the band of reasonable responses.

185. We concluded that the dismissal was not unfair under the terms of section 98(4) of the Employment Rights Act 1996, and that claim is dismissed.

(iii) Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 on the grounds of her race by treating her less favourably than a hypothetical comparator in relation to (i) a call to her on 18 June 2020 by Ms R Cook, (ii) her absence from work in the period 19 – 24 June 2020 (iii) a review meeting in relation to, inter alia, that absence held on 11 September 2020 (iv) an effect on her mental health and (v) her earnings?

186. We required firstly to consider whether we accepted the claimant's evidence of her having been told by Ms Cook that she had been oppressed because

of the colour of her skin, to paraphrase the remark, or not. There was no witness to the call beyond the two participants. In light of the other concerns over the accuracy of the claimant's evidence we would not have accepted her word about the call in isolation. There was however supporting evidence for the claimant in this respect. The claimant said that she had referred the allegation to her managers, including to Mr Clayton initially, then to Ms Littlewood, which was not challenged, and neither of them gave evidence in any event. Separately, on the following day, the claimant set out her position by email to Ms Littlewood, and although she had not mentioned it at all in an email to Ms Cook on the evening of the call her not doing so is to a degree consistent with what she later told Ms Littlewood that Ms Cook did not intend to cause her upset. It is understandable that the claimant raised it with her manager only, not with Ms Cook herself, in our view.

187. The claimant then withdrew the grievance, by email dated 27 June 2020, but when she did so she added the word "However". It was not therefore simply an unconditional withdrawal of it. Her sentence that followed was ambiguous. It was not clear if it meant that the claimant or Ms Littlewood should speak to Ms Cook. But Ms Littlewood was the manager, and should have checked, as was one of the findings during the grievance and appeal processes. That was so particularly given the context of a remark said to have been made as to the colour of skin. The claimant had been distressed, felt self-conscious about colour, and took some days off work. That is most unlikely to have been the case if the issues were only those she set out in her message to Ms Cook, and was far more likely to have been caused, in our view, by the remark made to her as she claimed. That she was distressed is supported not only by her email to Ms Littlewood on 19 June 2020, and the fact of the absence, but also the statement later taken from Ms Dechausnay who referred specifically to the claimant's well-being. That indicates at least some form of discussion as to the claimant's mental health, and that is again most likely to have been because of the distress caused by Ms Cook's remarks as to the colour of her skin.

188. We concluded from the evidence as a whole that the claimant's evidence was sufficiently reliable given that strong level of supporting material to hold that the comment she alleged by Ms Cook had been made. We did not agree with the assessments of Mr Stratford and Mr Brown, who considered that it was just a case of one person's word against another's. We considered that there was other evidence, as we have described, that supports the claimant's version sufficiently to accept it. In any event there is no requirement for corroboration.

189. The remark was one particularly concerning the colour of the claimant's skin, which is not white. It was clear to the Tribunal that the remark was made because of that colour, such that it was a kind of discrimination akin to that in ***James***, but separately would not have been made to a comparator whose skin was white. In short, the remark equated the colour of the claimant's skin with her having been oppressed and that the claimant would have felt that oppression, which had not been the claimant's view or experience. We considered that the claim of direct discrimination on the ground of the protected characteristic of race was established by these facts, at least to the point of a prima facie case.

190. We considered however that matters did not end at the point of Ms Cook's comment, as firstly Ms Littlewood did not follow up the withdrawal email point about the "chat" with Ms Cook, which included asking the claimant if it had taken place and if so had it been successful, at which point the misunderstanding of what was intended would have become clear and could then have been remedied by Ms Littlewood, secondly Ms Dechausnay informed the claimant that she would no longer be an Inclusion Advocate (and as she did not give evidence the reasons for that could not be explored), and finally Ms Littlewood made what we consider to be an inappropriate comment at the absence review meeting in September 2020 about handling the same issue again, which did not indicate any understanding of the potential seriousness of language Ms Cook had used. That was a form of dereliction of duty by the manager. A person in receipt of such language should not be expected to handle the issue herself, with the inference that that should be

without having time off work given the context of an absence review meeting. This was an issue that the manager should have addressed directly, but again as she was not called as a witness that issue could not be explored with her.

191. We should make it clear that we did not consider that Ms Cook deliberately used offensive language, nor did she deliberately seek to cause harm. The claimant also accepted that that was the case, as she indicated when withdrawing the grievance. Motive is not however the point - ***R (On the application of E) v Governing Body of JFS and others [2010] IRLR 136*.** There was a lack of appreciation of the circumstances of the claimant, and something of a blunt use of language which did not reflect the nuances of the position some people, such as the claimant who is of mixed race, may feel. Ms Cook appears to have assumed that as the claimant's skin colour is not white that she must have suffered oppression, which is a form of stereotyping.

192. We concluded from the evidence before us that the claimant had established a prima facie case, and we did not consider that the respondent had come close to discharging the onus of establishing that the reason for the acts or conduct was in no way whatsoever on the ground of the protected characteristic. That is firstly because Ms Littlewood, Mr Clayton and Ms Dechaunasay did not give evidence, secondly because Ms Littlewood did not follow up the conditional withdrawal of grievance at all when she should have done, and thirdly from the terms of the comment itself, which referred directly to the colour of skin in the manner set out above.

193. We considered that the remark and the manner in which it was handled by the respondent did amount to less favourable treatment. It caused the claimant understandable distress. It amounted to a detriment given the circumstances. For completeness we add that although the claimant argued a claim under section 13(5) of the 2010 Act there was no evidence that the claimant had in fact been segregated from others, and that part of her claim did not succeed.

194. The claim of direct discrimination on ground of race we considered had been established, subject to the issue of jurisdiction addressed below.

(vi) Did the respondent apply a provision, criterion or practice (PCP) to the claimant in relation to (i) the introduction of the Women in Home Service programme (ii) the support given to staff in undertaking their roles under that programme, and (iii) am assessment of the claimant' use of ladders mounted on vehicles by Mr Douthwaite?

195. It was far from clear what PCPs were applied, as alleged by the claimant, but in any event we concluded that the claimant had not proved her case in that regard. Her first complaint was that a meeting had been held with the male staff which made the support given to women less than it should have been. The claimant was not present at it. Having such a meeting was not unexpected, given the introduction of a new programme. That programme sought to improve the number of women engineers. The claimant suggested that other women trainees had been told that, but they did not support her in that, and their evidence in the investigation was that there had been support. The claimant alleged that they were lying as they were still employed, but we did not consider that likely. The claimant had a little support from Mr Sutton, who sent her an email and said in an investigation that some women had reported to him what may be described as an unnecessary and unfair level of criticism. But that one comment is rather vague, and stands in stark contrast to the evidence of the other female staff interviewed. The claimant did not herself call Mr Sutton, nor any other witness who she said could have given support.

196. The Tribunal did accept that Mr Douthwaite had conducted an assessment of all six female staff in around September or October 2018. He did so to check if they could remove the ladders safely using existing equipment. He found that four of the six could not, at least in his view, and ladder racks were ordered for them. The claimant accepted that those ladder racks were helpful.

The evidence however was overall that the same, or a sufficiently similar, assessment was performed for all trainees, but at a different stage for male trainees. We accepted that evidence. The claimant did seek to pursue a more general line to the effect that women were treated less well in Mr Douthwaite's team. She did not however identify any PCP in that regard that we could identify. Her pleadings did not extend to that claim, and the evidence before us did not support it. The evidence from the grievance investigation and appeal, which was hearsay before us as the witnesses spoken to by Mr Stratford and Mr Brown were not called before us, contradicted that of the claimant. The claimant alleged that women from Mr Douthwaite's team had not been interviewed. That is perhaps the case so far as that point went, but the important matter for us is that they were not called to give evidence before us either. A failure by the respondent to speak to all witnesses who they might have does not provide positive evidence of a PCP supporting the claimant's case. We do not know what those witnesses may have said. The initial onus in this regard falls on the claimant. We did not consider that she had discharged it. We had concerns over the reliability of the claimant's evidence as set out above, and in this regard there was not sufficient evidence to support what she said. The claimant sought to point to handwritten notes she had taken, but we did not consider those to be sufficiently relevant or reliable to establish any case in this regard, where the witnesses who could have given evidence about the points she sought to make did not. There was also a general text message from Mr Sutton, but when interviewed by Mr Stratford his evidence did not provide any detail. Quite apart therefore from an absence of fair notice in the pleadings of Mr Douthwaite's team operating differently because of some form of stance he took, we did not consider that the claimant had established any PCP as that term is defined in law, and that being the case the claim of indirect sex discrimination could proceed no further. If anything the claimant's allegations were more those of direct discrimination on the ground of sex, but that case had not been pled.

(vii) If so, did doing so cause a substantial disadvantage to women?

This issue does not now arise. There was in any event no sufficient evidence that it did

(viii) Did doing so cause a substantial disadvantage to the claimant?

197. This issue is not now relevant.

(ix) Has the respondent shown that any PCP applied to the claimant was a proportionate means of achieving a legitimate aim under section 19 of the Equality Act 2010?

198. Again this issue does not now arise.

(x) Did the claimant do a protected act under section 27 of the Equality Act 2010 by intimating a grievance on or around 19 June 2020?

199. We consider that the email on 19 June 2020 was a protected act. She intimated a complaint of a breach of the Equality Act 2010, albeit not saying so in terms. She complained of language referring to the colour of her skin. That we consider to be sufficient.

(xi) If so did the respondent subject the claimant to a detriment because she had done so under section 27 of the Equality Act 2010, in respect of (i) not investigating the issue she raised (ii) asking the claimant about how she would deal with the issue if it happened again at the absence review meeting and (iii) not facilitating a discussion with Ms Cook the claimant requested when withdrawing her grievance?

200. We did not consider that there had been a detriment established. Firstly there was no need to investigate a grievance that had been withdrawn. The claimant accepted that there had not been ill intent on the part of Ms Cook.

She told Ms Littlewood that initially by telephone on or around 20 June 2020. The claimant had emailed Ms Cook to offer to work with her on the presentation, although that later did not happen as the clamant ceased to be a Inclusion Advocate following the intervention of Ms Dechausnay. The claimant appeared clear in her later email to Ms Littlewood that she did not wish there to be an investigation. Not investigating in that situation cannot be described as a detriment. It is what the claimant said that she wanted, and had the respondent done so it would have been open to the challenge that doing so materially adversely affected the claimant's mental health.

201. The second issue is the absence review meeting with Ms Littlewood. It is certainly true that the question asked of the claimant was not appropriate as we address above. Ms Littlewood did not give evidence before us. In all the circumstances we did not consider however that detriment had been proved to have been caused by the claimant making the grievance initially. The grievance had been raised then stopped about three months earlier than this meeting. That timeframe does not support any causative link. The reason for the discussion was that this was an absence review meeting to consider three sets of absences, and those absences were the reason for the discussion. It was in relation to the absences in June 2020 that the claimant made comments, to which Ms Littlewood replied. Her doing so as she did was not because of the grievance presented in June 2020, shortly afterwards withdrawn, but in answer to the remarks made by the claimant.

202. The final issue is not facilitating discussions. It appears that the claimant wished the respondent to speak with Ms Cook informally, to tell her how the claimant felt. But that was not a requirement she sought to impose, she said that doing so would be "beneficial". She did not follow it up, and did not ask about it at any stage thereafter with Ms Littlewood, although there was an opportunity at their meeting on 11 September 2020. More significantly however Ms Littlewood misunderstood what the claimant meant, thinking that the claimant would have that discussion. Whilst she did not follow it up as she should have, an issue we address further below, that did not we concluded

lead to a basis for a finding of victimisation. The reason for not following the matter up was the ambiguity in the email from the claimant, and Ms Littlewood not appreciating as a result what the claimant had meant. We concluded that no detriment had been proved as having been caused by the protected act. The claim of victimisation is therefore dismissed.

(xii) Is any claim under the Equality Act 2010 outwith the jurisdiction of the Tribunal under section 123 of the Act and in that regard (a) was there any conduct extending over a period, and if so what conduct over what period, and (b) in the event that any claim is otherwise outwith the jurisdiction of the Tribunal is it just and equitable to consider the claim?

203. We did not consider that conduct extending over a period had been proved for any of the discrimination claims. It appeared to us that the issue of race discrimination, as alleged, did not continue beyond the stage of the absence review meeting on 11 September 2020 at the latest. The claimant argued that the position continued as there was no action by the respondent, but Ms Littlewood did not act as she did not understand that there was action for her to take, as she thought that what was to happen was the claimant to speak to Ms Cook. She should have checked about that, as Mr Brown found in his appeal, but we did not consider that that failure amounted to conduct extending over a period. There was no underlying policy that was of the kind spoken of in authority.

204. So far as the alleged sex discrimination was concerned it focussed on events in September 2018. The claimant alleged ongoing lack of support and a form of anti-woman atmosphere more generally in Mr Douthwaite's team but that evidence was contradicted by other female engineers, as addressed above, and we did not consider that there was sufficient reliable evidence provided by the claimant to support her allegations. What had been pled was in any event somewhat more restricted.

205. These claims both as to race and sex discrimination were, we concluded, out of time unless it was established by the claimant that it was just and equitable to allow them to be received.

206. The claimant's explanation for being late was firstly that she did not want to challenge her managers at the time, secondly that she was not receiving formal legal advice, but did have advice from a friend who was a solicitor, thirdly that she did not do much research of the position, fourthly that she had advice from ACAS and fifthly that she thought she had to give the respondent time to deal with her grievance.

207. So far as the claims of discrimination on grounds of sex were concerned we did not consider that the claimant had established that the just and equitable extension applied. The delay was very lengthy, at well over two years.. She had not formally raised the matter at the time, and investigating the points at this stage was inevitably more difficult for the respondent in light of that. We considered the issue of prejudice. For these claims as to the protected characteristic of sex the prejudice to the claimant was limited, as we did not consider her claims at all strong. There was, we concluded, little of substance to them. Those that might have supported her evidence in the event did not do so. We came to the conclusion that it was not just and equitable to extend jurisdiction to the claims as to sex discrimination, and those claims are outwith the jurisdiction of the Tribunal accordingly.

208. We took a different view of the claim of direct discrimination on the ground of race under section 13 of the Act. The delay in this respect was far less. The incident occurred on 18 June 2020, but continued to an extent firstly as the claimant expected that her manager would speak to Ms Cook, but unbeknownst to her that did not happen, and secondly Ms Littlewood raised the absences that followed it in June 2020, and made her comment as to dealing with the matter again, at the absence review meeting on 11 September 2020. These are factors that mean the actual delay is more limited than that for the claims of indirect discrimination. The reason for it is partly, although not very well, explained by the claimant not wanting to challenge her

managers. The respondent argued that that point does not apply in respect of the claim of race discrimination, but that is not entirely correct in our view, as it included the issues with how Ms Littlewood, her manager, addressed the position both in June 2020 and at the absence review meeting.

209. The overall period of delay is also partly explained by the need for early conciliation. As the claim was not commenced timeously the provisions on that do not automatically extend the period, but at the least the period from commencing conciliation to the provision of the early conciliation certificate was a time during which a claim could not competently have been submitted. The claimant might have presented the Claim very soon after that certificate was issued, but we take into account that she was someone who was not represented by a solicitor, that having some informal advice is far from the same as that.

210. In this case there is another factor that we consider relevant, which is that the claimant did not know at that stage that Ms Littlewood had not spoken to Ms Cook, as at least the claimant had thought her withdrawal email indicated she should. The position in that regard in fact was addressed at the appeal of the grievance, in Mr Brown's letter of decision dated 15 November 2021.

211. That evidence all means, in our view, that although there is a less than complete explanation for delay the position is not that the claimant was simply at fault, or has not provided an explanation for it. If one considers the remarks by Ms Cook in isolation, early conciliation ought to have commenced by 18 September 2020. If one takes account of the absence review meeting, early conciliation ought to have commenced by 11 December 2020. In fact, it was commenced on 18 January 2021. There is, after the certificate was issued, a further period of about four weeks before the Claim was presented. That was longer than it might have been, but the claimant is essentially a party litigant, with an incomplete understanding of the law, and very limited assistance from a friend. Although the delay is not particularly well explained, for all of the periods in question, by the claimant there is an explanation for a material part

of it, the explanation includes matters of which she had not been aware, and its length is not we consider undue as a whole.

212. We further consider that the issue of delay is not to be seen in isolation. We prefer the line of authority including ***Rathakrishnan,*** which we consider is supported by the two more recent Court of Appeal authorities of ***Morgan*** and ***Adeji***, that the discretion is a wide one, which infers that no single factor is determinative.

213. The further point to weigh in the balance is prejudice. The claimant would suffer substantial prejudice if not able to pursue her claim of breach of section 13 on grounds of race, in circumstances where we consider that the claim is well founded. The respondent may have suffered a degree of evidential prejudice in defending the claim because of the passage of time, but it was limited as much of the evidence comes in written form. The conversation with Ms Cook was only between the two of them, and Ms Cook denied that she had spoken as alleged. Her own evidence we did not accept, but we did not consider that the passage of time had materially adversely affected that evidence.

214. Taking all the evidence into account, we concluded that the claimant's claim of direct discrimination on the ground of race, on the merits, was one that was, prior to hearing evidence, at least arguable and has now been upheld. We concluded that the circumstances were sufficiently strong to overcome the issues that there were over some aspects of the delay, and that it was just and equitable to extend jurisdiction to that claim.

(xiii) Was the claimant in repudiatory breach of contract entitling the respondent to terminate the contract of employment without notice, or was the respondent in breach of contract in doing so?

215. This issue depends on proof on the balance of probabilities, not on the issue of belief, or the band of reasonable responses. Was the claimant in repudiatory breach of contract? The onus of proof of that falls on the

respondent. The claimant did not self-isolate on return from Spain. That was a breach of the provisions on foreign travel, introduced to reduce transmission of the virus. There are two aspects to consider, firstly did the claimant do so knowingly, using the argument over the household of cabin crew as a form of cover for her, or secondly did she do so recklessly by not undertaking adequate enquiries either with the respondent or separately which would have shown her to be not exempt? We have concluded that the claimant was in repudiatory breach of contract. She did not isolate on returning from Spain when she ought to have done so. The evidence before us was that there never was an exemption referring to the household of cabin crew, or of occupations more widely. That would have been an odd provision in any event, entirely different to the statutory provision itself which concentrates on the occupation. Whilst one can see the rationale for those involved in international transport being exempt from self-isolation requirements, there is no obvious rationale for extending that beyond the person carrying out that function to those who happen to share the same household.

216. We did consider the fact that the respondent had not produced the guidance in force at the time. They had attempted to find it during the disciplinary hearings, and what they did discover was produced at the second meeting, but only in part. Ms Archibald who was partly engaged in that did not give evidence, nor did her colleague who carried out the search, whose name was redacted from the documents for reasons not explained to us, do so. It would have been possible for the respondent, as well as the claimant, to have sought an order for documents, being the pages current at the material time on the government website, but that was not done. We did not however consider that that meant that the respondent had failed to discharge the onus on it. There was evidence from a number of sources, as set out above, which were to the same general effect that the claimant's version of what the online government guidance had said was not reliable. We concluded on the balance of probability that the claimant was reckless in how she dealt with the issue, at the very least. She acted on the basis at best of a cursory consideration of the provisions on self-isolation, and with a greater regard for

avoiding absences on return than on the safety of others, including her employer's customers. From all of the evidence before us we concluded that it was likely to have been a reckless misreading of the rules using an argument over households of cabin crew, not within the guidance online, to seek to avoid self-isolation. We do not rule out the possibility of unclear wording in the government website, but the actual wording at the time was not before us and we must proceed on the evidence we have.

217. What we consider likely to be closest to the truth is the comment the claimant made in the second conversation with Mr Douthwaite where she referred to her having "presumed" that as a member of the household she was exempt, and even that is being rather generous to her. That had been repeated on the Passenger Locator Form which she provided on entry to the UK. It did not establish much in her favour however, not least as she was wrong in her evidence as to how she completed it. For the reasons given above, those facts of a failure to self-isolate on return from Spain, where the law required that to seek to reduce the spread of the Covid-19 infection which can cause serious illness and death, with the claimant then attending work when she ought not to have done, visiting customers' properties when doing so in circumstances where both she had not tested for Covid and could not know if she caried the infection or not, thereby placing them by those facts at an increased level of risk, were sufficient to found a finding that the claimant had been in repudiatory breach of contract. We concluded that the respondent had discharged the onus upon it, and the claim in this regard is dismissed.

(xiv) If any claim is successful, to what remedy is the claimant entitled?

218. We considered firstly the issue of injury to feelings. We concluded that there was more than one element to this, not just the immediate upset at the time, which led to a period between 19 and 24 June 2020 of absence, but also the later comments at the absence review meeting. The level of upset and distress she spoke to we considered genuine, and significant. It caused the

clamant to feel self-conscious about the colour of her skin, and to fear being excluded (although that did not in fact occur). Against that background we concluded that the case was at the lower part of the middle band of ***Vento***, and we awarded the sum of £12,000. Interest is due on the same for the period from 19 June 2020. That is a period of just over two years. Given the date of the decision and expected date of payment we calculate the period at 25 months, and the award for interest calculated at 8% per annum is the sum of £2,000.

219. We did not have before us evidence of what, if any, earnings the claimant lost when she was absent from work for the period 19 – 24 June 2020. She had made a general claim for that, but it was not dealt with in either of her witness statements, and there was no documentary evidence before us to establish a loss. In light of that, we cannot make an award under that potential head of loss.

220. The total award is accordingly the sum of £14,000.

Conclusion

221. In light of the findings made above, the Tribunal dismissed all the claims made save that for direct discrimination on the protected characteristic of race under section 13 of the Equality Act 2010, on which we make an award as above.

Employment Judge: Sandy Kemp
Date of Judgment: 06 July 2022
Entered in register: 07 July 2022
and copied to parties