Case numbers: 2200627/21, 2200628/21, 2200227/21, 2200228/21, 2200629/21

EMPLOYMENT TRIBUNALS

Claimants: (1) Ms Hye Jung Lehtonen
(2) Ms Huda Kademi
(3) Ms Meena Gopil

Respondent: Hansbiomed Europé Ltd

London Central (by CVP) **25-27, 30-31 January 2023**
Deliberation 1 February 2023

Employment Judge Goodman
Mr. A. Adolphus
Mr M. Simon

Representation:
Claimants: in person
Respondent: Mark Greaves, counsel

JUDGMENT

1. The first claimant's claims are dismissed on withdrawal under rule 52.
2. The second claimant's claims do not succeed.
3. The third claimant's claims are dismissed on withdrawal under rule 52.

REASONS

1. The three claimants have differing claims against the company, Hansbiomed Europe Limited, but as much of the subject matter and evidence overlap, they were listed to be heard together.

2. The respondent is the start-up London branch of a Korean company selling medical treatments. The first claimant, who is Korean, was operations manager. She was dismissed on 22 October 2020. The reason given was conflict with her managers. The second claimant was a sales agent in the London office. She was dismissed on 2 October. The third claimant applied for a job in August or September 2020 but was not offered one.

3. The first claimant stated she was dismissed and subjected to detriment

because she made public interest disclosures about coronavirus protection and regulation of their products, and because she complained about less favourable treatment of non-Korean staff. There are also claims of direct discrimination and harassment by association with the age of the third claimant and the race and disability of the second claimant. The third claimant brought claims of direct race (and association with race) discrimination, age discrimination, age harassment. Both withdrew their claims before the tribunal could determine them.

4. The second claimant presented claims for direct discrimination because of race, harassment related to race and to disability, detriment and dismissal for making protected public interest disclosures, detriment and dismissal for leaving or proposing to leave the workplace because of danger to health and safety, breach of contract and victimisation.

5. The detailed agreed lists of claims and issues before the tribunal for the second claimant form the appendix to this judgment. There were similar lists for the other claimants which are omitted now the claims have been withdrawn.

6. The three claimants were not represented at this hearing, or at two earlier case management hearings, but they had had advice and assistance from a solicitor in preparing Scott schedules detailing their claims, drafting the lists of issues, preparing witness statements and disclosing documents.

Evidence

7. The tribunal heard live evidence from **Hye Jung Lehtonen**, the first claimant, for about three hours, until she withdrew her claim overnight and did not return to the hearing. She had provided additional witness statements in support of the second and third claimants, but was not available to be questioned about them. We read those statements.

8. We also read a statement from **Sara Garcia Ruiz**, who had worked for the respondent as a contractor, and left after a dispute about use of her copyright.

9. We then heard:

Huda Kademi – second claimant
Seanggon (Sam) Yu, HR and Accounts Manager
Jinsoo Kim, Managing Director, by the Korean interpreter

Documents – there was a main hearing bundle of 1,301 pages. The claimant added a clip of 57 pages two days before the hearing start, and another 5 pages shortly before the hearing. These additions included several transcripts of recordings made without the knowledge of the respondent. After questioning and discussion, the recordings themselves were sent to the respondent, which after the overnight adjournment then agreed the transcripts were accurate and could be admitted without objection. Some of the documents were variant translations of Korean documents, both being certified translations. We decided to read both where there was a dispute. Two other items (pages 12 and 13 of the 57 page clip) were hearsay accounts of what others had said, where the others were reluctant to give evidence themselves. We indicated these could

not be given much weight. The third bundle of 5 pages was admitted later without objection.

10. On day 4 the second claimant added two medical letters from September and October 2020, and a missing WhatsApp screenshot. One of the medical letters is from the GP about a possible Covid infection, dated 15 September 2020. We do not know if this was ever given to the respondent.

Conduct of Hearing

Application to strike out claims of Second Claimant, Huda Kademi

11. The respondent applied in writing on Friday 20th January 2023 to have the second claimant's claims struck out under order 37(1)(b) of the Employment Tribunal Rules of Procedure on the ground that the second claimant's conduct in relation to some WhatsApp messages in the bundle was scandalous, unreasonable or vexatious. They were the messages (pages 616-620) for 28 September 2020 between the second claimant and Sam Yu, the Finance Manager, and another n page 925.

12. The second claimant, through the solicitor who was assisting her, disclosed her documents to the respondent on 8th September 2023. This included the WhatsApp messages in question. On examining them, the respondent identified suspicious features. On 26th September they asked why the second claimant's messages appeared on the left, and Sam Yu's messages on the right, when on previous days the order was reversed. This indicated the screenshots were taken from Sam Yu's phone, not the second claimant's. Secondly, they said they had checked the full log of the conversations between Sam Yu and the second claimant, and it did not include the conversations on pages 616-620. The solicitor said the second claimant would respond direct about this. The second claimant wrote very briefly on 6th of November attaching a flow chart, and stating that the first claimant is her witness to this. This suggests the first claimant prepared the flow chart for her. The chart showed Sam Yu with two phones, A and B. It said he kept phone A at all times. It was asserted phone B was lent to the second claimant when she lost her company phone (at the beginning of September), that she returned phone B to him at around the time of the grievance meeting at the end of September, that Sam Yu put phone B away, out of reach, but kept phone A on his desk, and when he left his desk for a few minutes, the second claimant used it to make screenshots.

13. The respondents make their strike out application on the basis that this is simply untrue. They say the conversations on the 28th September 2020, pages 616-620, have been faked. Sam Yu's evidence in his witness statement is that he did not have two phones, that the call log for his WhatsApp messages (which is in the hearing bundle) shows that the second claimant continued to send messages from her personal mobile, not from another phone, after her company phone went missing, and that these messages are from an Android phone, and his is an Apple.

14. Page 616 purports to be the start of a conversation on 28th of September, but the date banner is in a larger font then the date banners for messages in the

preceding days. On close examination of the background to the messages, there is a line across, just below the date banner, where the background colour changes from pinkish grey to brownish grey. Further, the background patterns on both sides of the line do not match up, indicating the colour change is not down to shadow. The messages do not appear in the log of WhatsApp messages. The timing of this thread does not match up in its content when compared with another thread of messages (bundle page 1294) between Sam Yu and the second claimant for the same afternoon. The respondent also says the second claimant was working from home at the time she says she picked up the phone and made a screenshot. The second claimant has not provided her own phone for inspection which might show how the messages appear on her phone, as against those said to be screenshots from Sam's phone A. In addition, the time of the screenshot is shown as 7.30 am, when it is very unlikely that both were in the office, and there are different times (compare page 925, where the messages are also reversed), indicating that her screenshots from Sam Yu's phone were taken on more than one occasion, not just the one in her explanation. Also "Sam Hansbiomed"(at the top of the suspect pages) is how the claimant recorded Sam's identity on her phone, and is not how it appeared on his own phone, which is where she says the messages come from. The respondents suggest that at some later point someone has used a second phone, given it "Sam Hansbiomed" as a WhatsApp ID, used the two phones to create a series of messages on pages 616 to 620, and then added the date banner in larger type, perhaps pasted in from another phone, to create the sequence of messages that appears in the bundle. They ask the tribunal to heed the content of these messages. It suggests that the second claimant's senior managers were very pleased with the performance, which contradicts their reasons for dismissing her. They include a detailed account of one of the protected public interest disclosures in this case, about CQC registration of premises where training was carried out involving the respondent's products. Following this there is a purported message from Sam Yu that she should not tell the first claimant about it, and Jin (the director) has given this instruction - "if you want to keep your job!!!" They include a complaint from the second claimant about being treated unfairly, and a comment coming from Sam Yu: "we Koreans stick together no matter what". In other words, say the respondents, these messages contain important material on several of the disputed issues in this case

15. The respondent says not only is the conduct scandalous and abusive of the tribunal process, but that it is not possible to have a fair hearing, because if the second claimant falsified written evidence, the tribunal cannot trust that she has complied with disclosure obligations generally.

16. The second claimant replied to this on the 23rd of January 2023. She said

> "My original phone is cracked and old. And most of the time it switches off on its own. And it has deleted most of my images automatically without knowing.I have screenshotted a WhatsApp message and forwarded it to the spare phone, my dad gave it to me for a month and I gave it back, in case my original phone will stop working. That will explain the cuts of the edges. When I screenshotted it, it captures the time when it was captured.

And the date appears 28th September 2020 bigger. Explaining the reason as I have zoomed in to my messages to see more clearly of my sight.
Sam explained he only had one phone and is Apple in his witness statement claim. There is no evidence, he didn't have another phone. All members of Hansbiomed had two phones and were given by Sam coordinated and ordered by him. One for personal use and another company phone to use. Furthermore I do not have qualification graphically to fake or use photoshop to mislead the court of justice".

17. On 21st January the first claimant also wrote with an explanation. She remembered the second claimant had lost her phone on holiday, and she spoken to Sam Yu about getting a spare phone. She says on 20 January 2023 she showed the disputed WhatsApp exchange to Sara Garcia, a graphic designer who had worked for respondent in the past as a contractor. (Her witness statement for this tribunal hearing shows she left after a dispute with the respondent about use of her copyright). Ms Garcia was asked if pages 618-620 were a fake, but not told what the specific criticisms were. Ms Garcia replied by Whatsapp that it was too perfect to be a fake. The first claimant also adds that the conversation on pages 616 to 619 matches the conversation on page 1270 of the bundle, where the second claimant says she had just spoken to a Dr Kam, who had not heard anything from Su Park about the clinic, and the second claimant thought Su Park had told her she had asked about the clinic. This message is dated 28th September at 16.37.

18. Employment Judge Hodgson reviewed this correspondence and directed that the application was to be heard at the start of the final hearing.

19. The respondent filed written submissions at the hearing, and counsel reviewed the essential points orally. He also asked us to compare the signature picture for Ms Kadima on pages 1270, 1208,1269, and1275. Three of the four show a woman alone in portrait, while that on page 1270 is dark with several people, suggesting it too is not authentic. He invited us to compare the timing of the messages on page 618 compared to page1294. He also drew our attention to page 925, another WhatsApp message between Sam Yu and the second claimant, no date apparent, where the messages are reversed, suggesting this also came from a screenshot taken on Sam Yu's phone, but with the screenshot taken at 11:37, just after the time of the last message on it.

20. I took the second claimant slowly through the sequence of events by which she said the messages had been screen shotted, and tried to understand which phones she was using at any time. She explained that she had had to hand back Sam's second phone before she was issued with a new one. So she was using a personal phone, which seems to have been the damaged phone. She had picked up Sam's phone on his desk, made a screenshot of the message, sent it her own phone, then deleted the sent message and the screenshot. She explained the 7:30 am time as being not when she made this screenshot in the office, but when she used a spare phone supplied by her father to take a screenshot off the screenshot she made on Sam's phone B in the office. She still has the old damaged phone. She has had to hand

back her father's phone and he has given her another one. The date is larger than others because she zooms in. The line across the background is because of the screenshot. The colour changes are because of different light. As for the timing of messages on page 619 as against 1294, Sam Yu could have been using two phones. She insisted he was wrong about having only one phone, and that he did have two phones, as everyone had a company phone which they would use as well as their own phones.

21. The third claimant intervened saying the matter should be decided by expert evidence. She agreed none of these disputed documents concerned her own case against the respondent.

22. The Tribunal discussed the application when we adjourned to continue reading. Rule 37 of the Employment Tribunal Rules of Procedure states:

> **37.**—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing.."

17 In relation to strike out for scandalous behaviour, we considered **Abergaze v Shrewsbury College of Arts and Technology (2009) EWCA Civ 96**, which directs tribunals to consider first whether the conduct was scandalous or vexatious, then whether there can be a fair trial, and finally whether there is a sanction less than striking out that is appropriate or consistent with a fair trial, and **Blockbuster Entertainment v James 2006 EWCA Civ 684.** That case considered, among other things an undisclosed audiotape, as well as several blatant breaches of rules and orders. It was observed that wherever possible, triable cases must be tried.

Discussion

18 The tribunal first examined the disputed WhatsApp messages on pages 616-620. Some expert evidence would have been useful, but Sara Garcia's WhatsApp exchange with the first claimant does not begin to approach the requirements of expert evidence, and she does not discuss the respondent's specific criticisms, which have not been drawn to her attention, or the explanation. The issue is not discussed in her witness statement. We have to rely on our own experience of WhatsApp, and on making sense of the claimants' explanations.

19 We considered the explanation of zooming in accounting for the different size of the date banner implausible, when the text size above and below had not been enlarged. We were very concerned about the difference in colour, the apparent line, and the failure of the background to match. A cut and paste was a more plausible explanation than some lighting change. If the difference arose from screenshotting from one phone to another, why were the separate screenshots not shown? Why does one of Sam's phones show the messages coming from "Huda Kadima" and the other phone "Sam Hansbiomedic", if both were his phones?

20 When we matched the messages from 28th September on page 618 with those on page 1294, which we are invited to find are different threads, both between Sam Yu and the second claimant on the same afternoon, because they were on two different Sam Yu phones, we considered it possible, but very unlikely, that someone with two phones (assuming Sam Yu had two phones) would switch between them to converse with someone on a WhatsApp thread from moment to moment. On page 618, the claimant's sends messages recorded at the top of the page as to “Sam Hansbiomedic” at 4:09 PM, 4:13 PM, 4:18 PM, 4:23 PM 4:27 PM and 4:30 PM, then at 4:35PM: “just to confirm my grievance meeting tomorrow at 2:00 PM? It's still happening”, then at 4:38 she receives the message “we have received your e-mail requesting meeting. I will send you zoom link tomorrow”, followed by a question about the subject matter of the grievance meeting, to which she replies at 4:43PM and 4:51PM. On this thread Sam Yu messaged her at 4:12, 4:18, 4:18 PM, then a cut-off date, then 4:25 pm 4:29 PM 4:38 PM, 4:40 PM, 4:50 PM 4:53 PM. We matched this against page 1294, showing messages on “Huda Kademi”, also for 28 September 2020. The dates are given in the 24 hour clock, in contrast to page 618 - which could be consistent with using a different phone. At 14.00 hours he asks what time she wanted the meeting the following day, and her reply at 16:49 “2:00 PM” followed at 16:57 by “OK I'll send the confirmation e-mail”. This suggests the page 618 message at 4:35 PM “just to confirm my grievance meeting tomorrow at 2:00 PM “ is false, because a time had not yet been fixed then. It is also odd that Sam Yu apparently sent her a message at 4:53 pm on one phone, and switched to a different phone at 16:57, just four minutes later.

21 It was implausible that the early morning time stamp on the screenshot supposedly made in the office on Sam Yu’s own phone, then sent to an old and unreliable phone, was explained by making another screenshot on a different phone. It was easier to understand as a mocked up string, than Sam Yu having two phones(which he denies), both of which he is supposed to have been using on the day in question. It is also difficult that page 925, is a screenshot taken at a different time of day (mid morning), hard to understand if this is also a screenshot taken from the phone on his desk, which would then be (as explained) screenshotted again to another phone because the phone was unreliable.

22 We prefer the evidence of Sam Yu that he did not have a second phone or lend it to the second claimant. The WhatsApp log of all message between him and her shows he was ordering her a new simcard, and that she asked for a non-work phone number to be added to the WhatsApp chat. She would not have had to do this if using Sam Yu’s second phone. There is no mention in any of the chat of him giving her a spare phone.

23 We took the point that the content of the WhatsApp string said to be a fake is important evidence supporting the claimants case. If it is genuine, it should be admitted. If it is fake, it was worth doing because it considerably assists the claimant’s case on public interest disclosure, discrimination, detriment and dismissal. We heed the claimants’ point that this should be decided by an expert. However, the message from Miss Garcia makes no mention of the alleged discrepancies and is not useful. Having regard to the enlarged date, the line across the background, the additional explanation about screenshotting from one phone to the other to explain an early morning date, discrepancies from Ms Kadema about which phones she had and when to

make screenshots, and the discrepant timings of threads between pages 618 and1294, we concluded there were too many unexplained inconsistencies, and that on balance of probability this was not an authentic or contemporary string of messages.

24 Faking evidence is undoubtedly scandalous and an abuse of the tribunal process. It cannot be explained as something done in the heat of the moment without proper reflection. It requires some care to use two phones to set up a string of messages, paste in an earlier date, then screen shot them. It was deliberate. We considered whether there was a sanction less than striking out the claim by which we could achieve a fair trial. We did consider whether the document had been faked to bolster what the claimants believed had been said orally on some occasion, or even had been said on some occasion. Our conclusion that they were deliberately faked means that the second claimant's credibility, in our eyes, is badly damaged. Nevertheless, we concluded that there could be a hearing that was reasonably fair to both second claimant and the respondent by hearing the evidence, treating the second claimant's oral evidence with considerable suspicion, and considering whether there were facts from other documents, or other witnesses, or agreed by the respondent, which supported her claim. We should draw our conclusions from that. However, although not striking out the claim altogether, we do exclude the messages on pages 618 to 620 as unreliable. The respondent need not cross examine on those. We considered that this was a solution consistent with a fair hearing.

25 We considered separately the undated WhatsApp message on p. 925. It is some evidence that the second claimant complained to Sam Yu (as she later complained in the grievance meeting on 29 September) that she was not able to converse with Jinsoo Kim because he used Korean, which she does not speak. This too reverses the messages, purporting to come from Sam Yu's phone. There is no explanation why the screenshot is taken at a different time of day from pages 616-620. If she made the screenshot on the same day as the messages were sent (screenshots are timed but not dated) it does not make sense, as they would both have been in the office and would not need to message each other. Either the screenshot was made another day, coincidentally at a time that was a minute or two just after the last message, or the message was specially composed on an extra phone, and screenshotted after the last message. While this message lacks the colour, size and line anomalies of page 616, we concluded there are too many unexplained features (reversal of messages, screenshot time, negating the story of picking up Sam Yu's phone from his desk) for us to rely on it as evidence.

Additional Documents

26 We also had to consider an application by the first claimant to add additional documents disclosed late to the hearing bundle. The first claimant sent a bundle of 57 pages of additional documents to the respondent early in the morning of the 23rd of January. The first 11 pages consist of different certified translations of Korean messages. The respondent is not troubled if both sides' certified translations are in the bundle; the tribunal accepts that there may be differences in translation and we will consider both sets.

27 Concerned that without the recordings no one could know if the transcriptions were accurate, we asked the second claimant to produce them next day,

together with the emails she said she had sent with them to the first claimant and to her solicitor. As noted above, the respondent accepted, after listening to the recordings, that the transcriptions are accurate.

Sara Garcia's Evidence

28 The claimants had wanted to call Sara Garcia Ruiz to give evidence remotely. She is in Belgium. No one had asked whether the Belgian government would give permission for evidence to be taken from their territory. For Belgium a *note verbale* seeking permission has to be sent by the Foreign and Commonwealth Office. This can take several months. It was explained this is not a matter in the power of the English Tribunal. Either the respondent agreed the evidence, or Ms Garcia must travel to London so she could be questioned. Ms Garcia, who was in the remote hearing on 26 January, arranged to travel to London and back on Friday 27 January, but was not called, as the first claimant had withdrawn her claim that morning and did not respond to messages from the tribunal or the second claimant about Ms Garcia. The other claimants did not know how to contact Ms Garcia, nor did the tribunal. We read her statement.

Withdrawal by the First Claimant

29 The first claimant gave evidence and was cross examined on behalf of the respondent from 1.30 to 4.30 on 26 January. This included more questions about the disputed WhatsApp messages. The Korean interpreter was on standby to assist where she requested it. He had to translate a question that was grammatically difficult (two subjunctives about a hypothetical course of action, and a double negative), and another where she was asked to confirm that a message made no mention of discrimination. One topic of cross examination was left to one side so that the claimant could supply the full string of particular WhatsApp messages in the bundle. Next morning (third hearing day) she emailed the tribunal before the hearing started saying she wished to apply to withdraw her claim. She did not attend at 10am, and did not respond to a message asking if she would attend later to be questioned about the statements she had made in support of the second and third claimant's claims. There being nothing further heard from her, the claims have been dismissed under rule 52.

30 The second claimant was taken by surprise and unprepared to proceed to her own claim. She had not printed out the witness statements and documents, and only had a phone (besides her laptop) on which to view them. The tribunal therefore adjourned the hearing of her claim to 10 am on Monday 30 January, to allow her time to prepare. The third claimant was not at the hearing on 27 January, so we could not use the time to take her evidence.

31 On day four, Monday 30 January, the second claimant gave evidence about her own claim. She confirmed that the first claimant would not attend the tribunal to give evidence about the second claimant's claim, and also said that the third claimant was not planning to attend the tribunal on any date.

32 The third claimant emailed the tribunal part way through day four saying she was withdrawing her claim.

33 We then heard the respondent's witnesses, Sam Yu and Jinsoo Kim. On the afternoon of day 5 we considered a written submission from the respondent, after adjourning to allow time for the claimant to read it. The claimant made an oral submission.

Findings of Fact

34 The respondent is the London subsidiary of a business headquartered in South Korea which manufactures and supplies skincare pharmaceuticals and medical supplies for cosmetic treatments. Jinsoo Kim of the South Korean parent began the work of setting up a London branch from October 2019. He was asked to set up the UK company in December 2019 and hired Sam Yu as London office accounts manager in December 2019, The first claimant, Hye Lehtonen, who had interviewed for the accounts manager post and was taken on as operations manager, was initially employed by the Korean parent in December 2019, and by the UK company from the beginning of March.

35 The second claimant, Huda Kademi, started work on 9th of March 2020 as sales agent. She had sales experience for Lancome at Harrods. She worked with Suhyeon (Su) Park in sales. Thus for the first few months the respondent company had five employees, four of them Korean. Jinsoo Kim had some command of English, but not enough to converse. The other staff were fluent in English. Huda Kademi had no Korean. Her first language is Arabic. The respondent's case is that the director had to communicate with head office in South Korea, but middle manager shad to be fluent in both so as to mediate between London staff and business and Korean superiors.

36 The second claimant's contract of employment provides at clause 4.1 that she is employed as a "sales coordinator or on any such role as we consider appropriate". There was to be a period of probation. Her pay was £27,000 per annum, and there was provision for commission on sales.

37 It is evident from the internal manager group messages that her initial performance caused concern. On 27 March Hye Lehtonen said she was "going crazy because of Huda". Her computer skills were not good enough - she had been unable to open a file, she had inadvertently rebooked some patients from a clinic when asked to do another task. She also seemed unfamiliar with some of the company products, not useful in a sales person. Jinsu Kim suggested she had more training and they would review her at the end of April. He however commented that they needed for the job "a local who has perfect language", and it is evident that the second claimant was good on the phone.

38 The respondent's business model was to recruit doctors who would then carry out a clinic session on models to demonstrate and teach other doctors or qualified nurses in the cosmetic procedures that used the respondents products. They also sold products to other businesses (B2B). During her period of employment the second claimant succeeded in signing up two additional doctors who were prepared to demonstrate and teach. The intention was that enough doctors would be trained in the procedures to ensure adequate ordering and repeat ordering of the company's products.

39 Lockdown because of the Covid-19 pandemic began at the end of March 2020. We have not had any evidence about working arrangements during the first lockdown, but judging by some of the messages in July it looks as if staff were working from home.

Su Park's promotion

40 In June 2020 Su Park was made sales manager, with the second claimant and a new employee called Mohammed, working for her. Su Park had a background in marketing, and mainly focused on B2B sales. The discussion

in the management message group on 17 June gives some of the background to this decision. They decided that with more than two employees in sales, there would need to be a sales manager. The first claimant said that Huda had tried to act like a manager, but "doesn't even know the procedure to take orders. We're doing everything instead of Huda". Hye Lehtonen proposed that Su Park became the sales manager, and someone be appointed as her subordinate. One proposal was that her assistant, Patricia, supported sales, but Kim Jinsu overruled this, because she would burn out working for two people. There was no mention of the competence of Mohammed, who was due to start shortly. Hye Lehtonen added "I don't believe it will be simple for Su to convince Huda to work, and that Su must become sales manager, in order to "change Huda's attitude". In the course of discussion Sam Yu, looking at work allocation, asked: "should I consider it based on the average Korean work? Clarifying in response to a query from Kim Jinsu, he added: "employee's ability to work", understood as "for a foreign employee". We noted this as evidence of a stereotypical belief that Koreans work harder than others, though reading a chat qualified with emojis and LOL makes it hard to tell whether this was intended as tongue in cheek.

Working from Home

41 The claimant had been suffering chest pain. In December 2019 her father had been diagnosed with a cardiac myelopathy, which could be congenital. The claimant saw her GP, who recommended investigation. On 22nd June 2020 she asked for time off that week for a private appointment for a heart scan. It can be inferred from the chat that she was not coming to the office at that time, but she was travelling for work to see doctors and attend clinics.

42 On 7 July there is a conversation with Sam Yu which begins with a reference to Jinsu Kim wanting her to come to the office on Wednesday to meet the new term team and be in regular contact thereafter. The claimant asked if she could work from home because "my dad is very ill health issues and I take care of him at home. I'm very worried and in fear in coming to office regular basis, in contact with others. As you know coronavirus still ongoing". Next day she cancelled a zoom meeting because she had chest pain, and Sam Yu offered her a half day off but she refused saying she preferred to work. They then began a discussion of why and for how long she wanted to work from home. Sam Yu explained he had to had discussed it with Jinsoo Kim, that they tried to minimise the risk for staff, but had to work as a team, and wanted people to work in the office three days a week as a minimum. The claimant said that she was at high risk until she got the result of her heart scan, if she came into the office, as staff members could have had infection. Sam Yu asked if she meant to stay at home until COVID had completely resolved. The claimant said she had not said she was not willing not to come to the office at all - "even two days is fine with me a week",. Sam Yu replied: "if you are saying two days is fine, then is there any huge difference for three days?" He also checked when she was expecting her scan result.

43 On 15th of July she cancelled her visit to the office because she had chest pain. On 20th of July, after discussion about booking holiday and opting out of the pension, she was reminded that they wanted to get the scan result in order to make a future plan about working arrangements: "let me know once you get the result and we have extra two weeks to discuss about your work from home".

44 Then on 2nd August Sam Yu told the claimant: “please do not come to the office Monday as government announced the new rule come up we will discuss further and back to you soon”.

Probation Review and Offer of Alternative Role

45 The claimant’s probation was due for review on the 7th of August. Ahead of that review the respondent’s managers considered her performance. It was felt that her performance in sales was not adequate. The first claimant proposed, on 20 July, that Huda Kademi drop sales and take over PR, assuming the duties of Grace Lee (a Korean student-employee working 20 hours a week - we assume this was because of visa restrictions). Grace Lee managed social media for the company. Hye-Jung Lehtonen supplied a job description for a proposed PR manager, based on communication skills, so negotiating with new trainer doctors, and also HR - interviewing new employees and dealing with staff complaints. Jinsoo Kim commented that HR tasks should be kept separate from PR, and some of the tasks, such as attending KOL (key doctors) meetings, were a sales activity.

46 There was more discussion on 6th of August. Jinsoo Kim had considered keeping her in sales for another three months to see if she improved. Su Park did not want to keep the claimant in sales, For four out of the five months her reputation had been bad. “She might be performing well now, but we can't just ignore past conflicts of opinion and the possibility of more conflicts in the future”. He was concerned about the damage done by cutting the sales staff. The conclusion was that Huda Kademi should be offered a role in PR, at increased salary, but without commission, and if she did not take it, probation in the sales role would be extended by a further three months.

47 This proposal was discussed with the claimant in the probation meeting, of which there is no note. On 13th of August a formal offer was made to the second claimant of the role of PR manager, starting 17th of August, at a salary of £30,000, reporting to the first claimant as operations manager. Probation was to be reviewed at the end of November, based on a working plan, which she was to submit by 21st of August. The plan would be subject to “adjustment” between her and the company. If she did not accept, her current employment would be terminated on the basis that “various aspects of your performance and suitability for the (sales) role are unsatisfactory”.

48 The claimant accepted the offer. However, she was slow to submit a work plan. On 18th of August she asked for an extension. She was on holiday for the last week in August, and a flight cancellation delayed her return until 3rd September, when she stayed away from the office because of symptoms which might be Covid.

49 On 9th of September Sam Yu asked if she could add a number of tasks to her working plan, which included signing six people per month as D2D clients (doctors), and urged her to complete her actual plan so that they could adjust it. She and Sam Yu discussed it by telephone on 14th of September. The respondent agreed to delete all sales work, with the exception of signing six people a month, ongoing. She was not required to sell products. The claimant replied asking for another meeting.

50 Arranging the meeting was delayed, because the claimant was staying at home in case she had Covid. On 16th September the claimant emailed to say that as well as talking about her job title and responsibilities, she wanted to

talk about having to start all over again signing up doctors, because her existing clients had gone to Su and Muhammad. It would take up to 80% of the work in the department. “My main role is public relations mostly focussing on company exposure and connections with other consumers in industry. Which does not have target like sales division. My contract probation signed for and agreed upon is PR and not sales”.

51 On 17th of September Sam replied that Jinsu Kim wanted to have a face to face meeting, rather than on zoom, to discuss all this. A meeting was arranged for 23rd of September at the office, but the evening before, the claimant said that she had not yet recovered from her Covid symptoms, and wanted a zoom meeting later in the week. Sam Yu replied immediately that as long as she was in recovery they were not going to ask her to come to the office and do anything other than remote work, so she was to update him about the recovery process. Jinsoo Kim still wanted the meeting in person, “for better communication”, but if her recovery took longer than expected, they could arrange it by zoom.

52 In the event, it was arranged for 29th of September, by zoom.

53 It was not clear to the tribunal how much extra work was involved in this particular task. The second claimant told us it could take up 95% of her total working time. The respondent said that it involved making telephone calls from a list of names. We do not have the information to be able to decide exactly how much work was required.

The Meeting on 29 September

54 The meeting on the 29th of September has been referred to by both parties as a “grievance meeting”, but it was understood at the time to be a meeting to discuss what the claimant’s duties in the PR role should be, and in particular what her objectives should be for assessment in the new probation period. The claimant was accompanied to the meeting by her line manager Hye Lehtonen, who was by this time in conflict with the other managers. (The respondents defence to her claim is that she asked for a pay rise In September 2020, was turned down, and the relationship then became difficult). The meeting was for discussion with Jinsoo Kim, and Sam Yu translated for him when necessary. The claimant began with discussion of the switch from sales to PR, and complained about the past assessment of her performance in sales on the basis that no matter what she did in the company she had to prove herself and her skills, and she would always be excluded and treated unfavourably because they were likely to favour Korean candidates. She felt segregated, and that her voice was never heard, and her ideas and suggestions were not listened to. The only person who listened to her was Hye. She moved on to the sales manager position Su Park had got, at which point Sam Yu intervened to say that they were meeting to discuss her PR role, and there needs to be another meeting for “the, like, discrimination things”.

55 The claimant persisted. She felt awkward when people spoke Korean in the office. She was not listened to when she contributed to the morning zoom meetings. There was favouritism, as they had promoted people who are not qualified, presumably a reference to Su Park. It was difficult to get access to the director. Jinsoo Kim intervened that it was difficult because he did not speak English, and she was asked why she simply did not e-mail him direct. The claimant said she had sent an e-mail “maybe about three times” copying

Sam and Jin. She then described a number of ideas she had contributed, such as uniforms for sale staff, suggesting she was a better candidate than Su Park. Sam Yu pointed out that she had meetings with her line manager, as had Su Park before she was promoted. Sam and Hye Lehtonen had passed on her ideas to the company, and they were valued. The claimant said the probation result was unfair and she was upset about it. Sue Park was not qualified. Only Hye had seen her potential. She was good at pitching to clients. Jinsoo Kim responded through Sam Yu that the probation review meeting had been based on Su Park's opinion about sales. Sam Yu said that the respondent wanted people to go out to make sales, and if they hired new people, it would be unfair if the claimant only worked from home and they had to go on site. That was behind the change in role. He then steered the conversation back to her ongoing role in PR. The claimant said it was unfair that she should be set sales targets. It could not be her priority, adding that of course she would pass on potential clients she spoke to. She concluded that setting her sales targets was "breaching the work title contract". She repeated the "every person who's management head office management team are all Koreans in this company, even if they are not qualified for the position". She repeated her concern about exclusion. Discussion then focused on the contract, and whether she should be set sales targets. There are some references to whether unsuitable people were being hired: a suitable friend of hers (the third claimant) had not been hired.

Dismissal

56 On 1st October Hye Lehtonen summarised the content of the meeting in an email to Sam Yu on behalf of the claimant. It was headed: breach of contract, unfair promotion by favouritism and discrimination, unfair dismissal from account manager role, no chance to speak to the director and ideas being ignored. Her requests to the director were: (1) remove all sales targets from her To Do List. Remove any sales work as per PR contract, (2) more meetings and communications with the director of management team, (3) remove three months' probation from PR role. The director said he would reply by Friday.

57 Next day, 2 October 2020, the claimant met again with Sam Yu. This meeting was also recorded by the claimant. He explained that the company had considered her three requests and could now respond. "there's this like clear gap between what you really want to do with the company and what the company want you to do for the company right". They wanted her to do some sales as well, but she did not want that. She agreed, adding that sales were not originally in the PR work company contract. Sam Yu said they were still only a small company with seven people, "I know the PR role is quite essential to like every business in the world, but we are only seven … but it's not really essential to our stage at the moment". Therefore they had decided that she could not continue in employment with the company because she did not want to do the role. Her contract was ended with immediate effect. She was due one week's notice, but as a gesture of goodwill, she would be paid an extra month.

58 The written letter she received that day confirmed the stated reason: "there was a clear gap in expectations between you and the company and it became apparent that you were not capable of fulfilling the PR role to the standards required. As we are a start-up company, and surviving through the current COVID-19 pandemic, we are constantly reviewing costs within the business.

Unfortunately, the PR role is an overhead cost to the organisation and has been reviewed as a non-essential role."

Hiring New Staff

59 In August 2020 the respondent advertised for sales personnel Sara Gajzler was taken on. Her start date is not known, but she was at work in September. Her CV states her language competence as native Polish, fluent English, and basic Korean. She is a Polish national. According to Sam Yu she cannot speak Korean. We accept this evidence. If she could converse in Korean, she would have rated her competence more than "basic", job applicants being more likely to embellish their skills than underrate them. (We mention here that Ms Gopil, the third claimant was to be interviewed but did not join the zoom call on the day. The respondent reviewed those they had interviewed and appointed from them. This is their explanation why they did not hire a non-Korean speaker for the role. There seems to have been an internal dispute in mid-September between Hye Lehtonen and colleagues whether Ms Gopil's CV should be considered. We have too little information to treat this as useful evidence on non-Koreans being hired or not. Ms Gopil also alleged she was not hired because of her age).

60 The claimant asserts that Sara Lee was one of those who replaced her in sales. The respondent denies either interviewing or hiring a Sara Lee. Although the claimant did not say so, we wondered if this was meant to be Grace Lee, the Korean student who had been working part time, and from October 2020 conducted B2B sales, work done by Su Park.

Regulatory Concerns

61 While discussion about changes to the claimant's role after 7 August were going on, there was concern about regulatory requirements. It was understood that the procedures being carried out by doctors and nurses to demonstrate the respondent's products must take place in clinics that were registered with the CQC (Care Quality Commission).

62 There was also concern whether some practitioners were registered(which would be with the GMC or NM). On 13 September Su Park asked the claimant whether Brittaney (Rossi) had ever said she was a doctor, as Dr Mian didn't think she was qualified. The claimant said she had understood she was, but would try to find out. Next day Su Park added that she had been a nurse and to medical school but had no registration. She would discuss it with Jin and the managers.

63 On 24 September 2020 Su Park messaged the claimant: "Hi Huda, if anyone asks us where we took the procedure video please tell them it's at 104 Harley Street, Dr Mian says he no longer wants to do procedures at Dr Hala's clinic because its not CQC registered". The claimant replied: "basically was her clinic never registered in the first place". Su Park said: "she submitted her form and Dr Kam said its fine once its submitted". The conversation moved on to personal matters. On 28 September there is an exchange between the claimant and Hye Lehtonen at 16:47 in which she said she had just asked Dr Kam what Su had said about CQC and he said she had not mentioned Dr Hala's clinic. The claimant commented that Su Park must have lied about this. One of the messages that we have decided not to rely on is a long message from the claimant to Sam Yu about the clinic and CQC, at 4.23pm the same day (so before her conversation with Dr Kam), saying Jin had been informed

by Su Park and said training on 30 September could go ahead. The claimant did not feel comfortable, and Su had been given the sales manager position but was engaged in illegal activity. The purported reply is that they were looking for alternative premises for the 30 September procedure.

64 There was some discussion whether this procedure went ahead. There is an August invoice from the clinic for three treatments, on 21 August, the next on 30 September. We were told the 30 September had been cancelled. This is not covered in the claimant's or in Hye Lehtonen's statements.

65 The claimant said she had telephoned the CQC to find out if the clinic was registered. Her evidence on when or how many calls she made was not clear. The short account, included in the 57 page bundle sent two dates before the hearing, says she rang on 28 September and was told Dr Hala's clinic was not registered, she had expected a call back, but none came. She says she rang again on 12 October and understood it would be investigated, but has heard nothing.

Disability- Relevant Law, Facts and Discussion

66 Some of the claimant's claims are based on her disability.

67 Disability is defined in section 6 of the Equality Act 2010. A person is disabled if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on (his) ability to carry out normal day-to-day activities. Long term means more than 12 months. Employment tribunals should assess the evidence to make findings on whether at the relevant time: (1) the claimant had an impairment (2) the impairment has an adverse effect on his ability to carry out normal day-to-day activities and (3) whether it is substantial, meaning more than trivial - **Aderemi v London and South Eastern Railway Ltd (2013) ICR 591**. These questions are to be decided by the employment tribunal based on all the evidence – **Adeh v British Telecommunications plc (2001) I IRLR 23**, and "it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects."

68 In the bundle we have the claimant's witness statement about the impact of impairment on her ability to carry out normal day-to-day activities, and relevant extracts from her medical records. These show that she had had mental health difficulties from at least 2007, with depression and anxiety with panic attacks, but in these proceedings she has been clear both in writing and when directly questioned, that she relies only on a physical impairment, namely a heart problem.

69 The claimant reported chest pain to her doctor in or around May 2020, adding that there was a family history, her father being due for open heart surgery (this comes from the claimant's notes in December 2019). Tests were arranged at a private hospital. She was interviewed on the 1st June 2022 by a cardiologist, who recorded atypical chest pain, some of which she attributed to panic attacks, and reported to the GP that she being screened because of her father's diagnosis, as family work-up. The claimant had a CT coronary angiogram on 24th of June 2020, and an echocardiogram on 28th October 2022. On 7th of January 2021 she was advised by a cardiologist, confirmed in writing, that there was "no current evidence of hypertrophic cardiomyopathy" and the "chest pains are non-cardiac". It was suggested she be reviewed in

five years time. The claimant mentions the appointment on 7th of January in her witness statement, but not the diagnosis.

70 We concluded that the claimant was not impaired by a heart condition, though that may have been what she feared from May 2020 until January 2021. Perhaps her symptoms were caused by anxiety. In any case, even if there was impairment in these months related to her heart, it did not last 12 months, as in January 2021 it was confirmed there was no heart abnormality, and so was not "long term" as the Equality Act definition requires. The five year review is understood to be a precaution because of the family history, making it possible a condition might develop. We concluded the claimant was not disabled within the meaning of the Equality Act.

71 Consequently, the claim of failing to make reasonable adjustments for disability, which concerns the requirement to come to the office, fails.

Harassment related to Disability

67. By section 26 of the Equality Act 2010

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

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

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

(i)violating B's dignity, or

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

…..

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

(a)the perception of B;

(b)the other circumstances of the case;

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

72 A claim of harassment related to disability need not be the claimant's own disability, and can be broader.

73 The claimant relies on two episodes when "the respondent forced the second claimant to come into the office", although the list of issues phrases this as "numerous occasions", of which these episodes are examples.

74 The first is the chat on 14th of July 2020, when Sam Yu was considering the claimant's request to work from home, and when she volunteered two days, asked why, if she could work two days, she could not work three. Although the claimant experienced this as hostile (her perception), we considered that this was a reasonable question for a manager to ask. It was not immediately apparent why, if she could not be exposed to infection, she was able to work any days in the office. The probable logic was that the claimant wanted to minimise her time in the office, and this was a negotiation. As the conversation was conducted by Whatsapp, tone of voice does not enter into it. Reading the entire dialogue, we concluded the Sam Yu was acting thoughtfully and reasonably. He was putting the company's position, he was inviting her to explain whether she proposed not to work in the office at all during the pandemic, and concluded that she could work from home at least until she got her scan result. Other than asking the question why she could attend two days but not three, the respondent was in other respects accommodating – she could work from home while there was a possibility she

might have a weak heart. This cannot be conduct that can reasonably be viewed as having an intimidating or hostile effect.

75 The other episode relied on is 22nd of September 2020, in the discussion about when and how she and Jinsoo Kim were to have their meeting to discuss her role. It is clear that Jinsoo Kim preferred to meet in person, but it was immediately followed by the respondent saying they would wait until she had recovered from what was thought to be a COVID infection developed on her return from holiday, and when that was prolonged, they agreed to a zoom meeting. Again, the tone of the correspondence is courteous and reasonable. If the claimant perceived this as intimidatory, we do not think that was a reasonable conclusion in the circumstances.

76 As the claim is that these are but examples of numerous other episodes, we have read a great many messages and all the witness statements, whether or not the witnesses gave evidence to the tribunal, to look for this. We could not discern any other examples when the claimant could say she was harassed in a way related to disability, meaning her concern that she was vulnerable because she - or her father - was at risk of infection. With respect to her father, we do not know if she lived with him, or visited him to provide care, as we have only the information in the medical record and the chat, but we can accept that although she never said she was shielding, this was something that worried her, as well as worry about her own health. Whether it is reasonable to believe that being required to attend for one meeting was intimidation or hostility, is undermined by the fact that for at least some of the period before she went on holiday in August she was visiting clinics. We concluded that the disability harassment claim is not proved.

Direct Discrimination because of Race

77 The claimant says she was discriminated against because of race (not being Korean) by exclusion from Koran language chat group, by lack of access to the director, by Sam Yu and Su Park telling her that the the respondent wanted to dismiss her and replace her with a Korean employee, by failing to promote her to sales manager, and by dismissing her.

Relevant Law

78 Discrimination is defined in section 13 of the Equality Act:

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

79 Section 23 specifies the nature of the comparison:

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

80 Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

81 How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and

the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

82 **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

83 There are sometimes factors from which we can draw inferences, such as - **Rihal v London Borough of Ealing (2004)** ILRLR642 - where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this.

84 **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956,** reminded tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

85 Tribunals must look for the reasons why an employer acted as he did. A reason is a set of facts and beliefs known to the respondent - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.**

86 In assessing reasons, tribunals must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425 (**a victimisation claim). However, it is not necessary to show that the employer acted through conscious motivation – just that a protected disclosure was the reason for the dismissal (or grounds for detriment)– what caused the employer to act as he did - **Nagarajan v London Regional Transport (1999) ITLR 574**.

<u>Race Discrimination - Discussion and Conclusion</u>

Exclusion

87 On examination of the facts we did not conclude that the claimant was excluded from relevant employee message groups because she did not understand Korean. There were Korean chat groups, on Kakao. The members of these groups were all managers. All the managers were Korean. The director did not communicate comfortably in English, so they sent messages in Korean. We did not consider it a valid complaint that she was excluded from manager chats. She was not a manager. All-employee emails were sent out, usually by Sam Yu, in English on WhatsApp, and there were English language chat groups for staff on WhatsApp. There were occasions when Jinsoo Kim also sent email messages to all. As far as we can tell these were in English. There is one example in the documents September (not mentioned by the claimant) of Hye Lehtonen pointing out to Jinsoo Kim that he had sent a message in Korean, telling him she had corrected it to English. This demonstrates that it was the exception, not the rule. When asked in the grievance meeting by Jinsu Kim why she did not just send him an e-mail direct if she wanted to speak to him, the claimant said that she had sent a few messages to Jinsu Kim (and Sam Yu) and not received a reply, but we were taken to no examples of this. There was one example of Grace Lee, a non-manager Korean speaker, being admitted briefly to a group for a particular purpose and then excluded, but there was also a similar example of the claimant being invited into a manager chat for a particular purpose and then excluded. From this we conclude that Grace Lee was not normally included, and her inclusion for a particular purpose was something that was applied to the claimant as well. She was not less favourably treated in communications.

88 As for lack of access to the director, there is no evidence that any Korean speaking non-manager employee (at the time it would only have been Grace Lee; the non-Korean speaking non-managers were the claimant, from July Mohammed, and from September, Sara Gajzler) had better access. As can be seen, staff were not in the office much for casual contact. As can also be seen from the chats, Jinsu Kim relied on Su Park, Hye Lehtonen and Sam Yu to feed back to him. We did not consider it unusual for a director to rely on input from his line managers for information about particular employees. The claimant had a daily morning meeting with her manager when she could contribute ideas as well as report on progress toward targets. It is the case that if the line manager did not pass anything on, for example, the claimant's ideas about uniforms, there is no evidence Korean speakers had or would have had a better opportunity and direct access. Further, we note, a fact not disputed by the claimant, that Jinsu Kim had spent 4 hours hearing a pitch from graphic designer Sara Garcia, in English. We concluded there was no evidence the claimant was less favourably treated than other non-managers. Non-manager status was the reason for any difference, not national origin (for which Korean language, the basis of the complaint, is a proxy).

89 The second allegation of detriment concerns Sam Yu and Su Park telling the second claimant in July 2020 that the respondent was trying to dismiss her and replace her with a Korean employee. The witness statement reproduces what is in the list of issues, without detail, saying that it was "on different occasions", and adding Hye Lehtonen and Mohammed to those who told her. The allegation was not put to Sam Yu in the hearing. We could not find it in

Ms Lehtonen's statements. Even on the claimant's own evidence it is a bare allegation and we do not find it proved.

Promotion

90 On the decision to promote Su Park to sales manager, we have the benefit of the respondent's contemporary reasons in the chat, which they are unlikely to have thought would be read by others. It is clear that the managers were concerned, and had reasons to be concerned, about the adequacy of the claimant's performance in sales. The debate concerned not which of them to promote, but whether they needed a sales manager for a team of three. The claimant questions Su Park's qualifications, but we are told that she had experience in marketing and seems to have been efficient in the role, especially B2B; the claimant has not disclosed anything of her own qualifications, apart from some sales experience in Harrods, nor of Su Park's. We considered carefully the remark about Koreans working harder. This came from Sam Yu, and it seems to have been questioned by Jinsoo Kim, the director who had the final word. Jinsu Kim valued the usefulness of the claimant's competence in English, and also seems to have been prepared on more than one occasion to keep the claimant on for another chance. Su Park was preferred specifically as it would felt she would get the claimant to work harder, the view of Hye in particular. This could suggest a stereotypical view the work ethic of Koreans compared to foreigners. However there *is* evidence that the claimant required a lot of support in IT, that for three months out of four had not achieved much and had not yet demonstrated that improvement would continue, and that her lack of IT skill continued (for example in August she needed Sam Yu to explain how to book holiday). Also the claimant tacitly acknowledges shortcomings by pointing to a lack of any specific training until July as the reason for it. The claimant not in fact being very good at sales was a reason why Hye Lehtonen, in July, proposed creating a PR role to play to her strength. We concluded that the respondent's explanation, that Su Park's performance was more reliable, was the real reason. Su Park was not preferred because she is Korean. Had Su Park's sales performance been the same as the claimant, she would not have been promoted.

Koreans Sticking Together

91. With respect to the WhatsApp remark on 28th September 2020 about Koreans sticking together, in the context of a purported message from the claimant to him complaining of Su and Grace having higher responsibilities and that this was favouritism, we have already decided that this message is unreliable evidence.

Dismissal

92. Finally, we considered whether the claimant was dismissed because she was not Korean. The facts the claimant can establish are that she was not Korean, and that Sam Yu may have held a view that Koreans worked harder. She has not proved that non-mangers were excluded from work communications. Nor has she shown she was replaced (as a sales agent) by a Korean. Sara Gajzler is not Korean, and cannot speak the language. Jinsoo Kim thought it essential that sales personnel were fluent in English. He rated the claimant's ability to communicate. The root of the dismissal, shown by the timeline, lay in her failure to perform in sales. Thus was decided at the probation review. The respondent agreed that she should shift her focus to

PR, but wanting her to continue doing some sales, which, as became clear on 29 September, the claimant refused to do. There was indication in the August and September discussions that Hye was very persuasive, but the others were concerned about cutting the sales team; the new job was agreed in principle, but the precise duties – and targets by which success could be measured – were for the claimant to set out in her job plan and were subject to negotiation, or as Sam Yu put it, "adjustment". There is a business reason why the respondent, a small start-up, should want to build sales to achieve profit before devoting resources to an exclusive PR function which contributes only indirectly to sales. It was also reasonable as it was a new role, and the claimant's ability untested, to set a new probation period, and some targets by which to measure performance.

93. It was the claimant's refusal to continue to recruit doctors, a sales task, or to agree to any measurable performance objectives, or a new period of probation, which caused the dismissal. Had she agreed to the six signings a month requirement, she would not have been dismissed. Other than this decision, the respondent had wanted to keep her on, on more than one occasion, to see if she could succeed, and were prepared to be flexible to use her talent, suggesting that not being Korean was not a factor. Had a Korean refused in these circumstances, we concluded, she would also have been dismissed. The claimant was dismissed because the respondent could not afford a PR person who had no sales responsibility at all. They were otherwise ready to continue her employment. The claimant has not proved that dismissal was because of race.

Protected Public Interest Disclosures

94. The claimant says she was subjected to detriment, and also dismissed, because of making protected disclosures

95. Section 43B of the Employment Rights Act1996 defines disclosures qualifying for protection:

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

96. Tribunals must approach the question of whether there was a protected disclosure in structured way. They must consider whether there has been a disclosure of information, not a bare allegation - **Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325**, although an allegation may accompany information. **Kilraine v L.B. Wandsworth(2018) EWCA Civ 1436** makes clear that the disclosure must have "sufficient factual content" to make it a disclosure of information and not just an allegation. They must then consider whether the worker held a belief that the information tended to show a class of

wrongdoing set out in section 43B (the subjective element), and whether that belief was held on reasonable grounds (the objective element) – which is not to say that belief in wrongdoing must have been correct, as a belief *could* be held on reasonable grounds but still be mistaken - **Babula v Waltham Forest College (2007) ICR 1026, CA.** Then the tribunal must assess whether the claimant believed he was making the disclosure in the public interest, and finally, whether his belief that it was in the public interest was reasonable. The belief in wrongdoing or public interest need not be explicit. As was said by the EAT in **Bolton School v Evans**, "it would have been obvious to all that the concern was the private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to potential legal liability". **Chesterton Global Ltd v Nurmohamed (2017) IRLR 837** confirms that a claimant's genuine belief in wrongdoing, the reasonableness of that belief, and his belief in public interest, is to be assessed as at the time he was making it. Public interest need not be the predominant reason for making it. Public interest can be something that is in the "wider interest" than that of the whistleblower- **Ibrahim v HCA International**. The whistleblower may have a different motive for making the disclosure, but the test is whether at the time he believed there was a wider interest in what he was saying was wrong.

97. Each of these five questions must be answered for each disclosure in order to decide whether it was made and whether it qualified for protection.

98. A qualifying disclosure is protected if it is made to the employer (section 43C) or to a prescribed person (43F). The first two disclosures for which protection is claimed were made to the employer. The third was made to the CQC.

99. By section 47:

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

100. Detriment means being put at a disadvantage. The test of whether someone has been disadvantaged is set out in **Shamoon v Chief Constable of RUC (2003) UKHL 11,** and the test is whether a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment - **Jesudason v Alder Hay Children's NHS Foundation Trust (2020) EWCA Civ 73.**

101. The test of whether any detriment was "on the ground that" she had made protected disclosures is whether they were materially influenced by disclosures– **NHS Manchester v Fecitt (2012) ICR 372**. This is less stringent than the sole or principal reason required for claims about dismissal.

103.The causative role of any protected disclosure Is different for dismissal. By section 103A:

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

Protected Disclosure - Discussion and Conclusion

104. The first disclosure, the message to Su Park on 24 September 2020, fails at the first hurdle because it was not a disclosure of information. Plainly Su Park was disclosing information to the claimant, not the claimant to Su Park.

105. The second disclosure, on 28 September, is contained in an unreliable document which we had decided should not be accepted as evidence. The surrounding circumstances do not add up either. The claimant said she had just been on the phone to Dr Kam half an hour after her purported message to Sam. It is possible the call to Dr Kam was an afterthought, but this is unexplained. The claimant in her witness statement about 28 September only quotes the disputed message. There is nothing about her call to Dr Kam or arrangements for 30 September. These are only mentioned in a short account within the last minute 57 page bundle, which also contains a recording of a conversation with her colleague Mohammed, said to be on 28 September, in which she ask if the procedure on 30th is going ahead and she asks him to take photos, for publicity she says, but not tell Su. This could indicate she was concerned the clinic was going to be used, and that having a pending application was a story, but does not show she confronted Sam Yu about it in a text. Finally, if she had made this denunciation in a text the previous afternoon, it is odd she did not mention it to him next day in the lengthy grievance meeting, even though she made several other confrontational statements about exclusion and favouritism. These surrounding circumstances reinforced our decision to find that the text message was of no value as evidence. There was no disclosure of information to Sam Yu on 28 September.

106. The third disclosure was the phone call to the CQC on 25th (list of issues) or 28th (claimant's evidence) September. It appears the claimant first asked about the procedure for registration, then asked if Dr Hala's clinic was registered, or if she had applied for registration. There is no mention of the respondent, or their use of that clinic. The claimant does not say she stated that Dr Hala was practising at an unregistered clinic, but may well have done if it is true that they went on to tell her they were going to investigate, otherwise there would have been nothing to investigate. This could be a disclosure of information – that Dr Hala was using an unregistered clinic. The claimant had reason to believe there was breach of legal obligation: she had heard it from Su Park, and she knew the respondent was checking registration of practitioners and premises, to stay within the law. There is so little information about this conversation that it hard to know whether she considered it was in the public interest, save that most people would think that regulation of medical procedures was in the interests of the public at large. It qualifies for protection.

107. What we could not find is that this disclosure was either the sole or principal reason for dismissal, or that it materially influenced the failure to investigate what she said about discrimination in favour of Koreans at the grievance meeting (the detriment alleged). There is no evidence that the respondent knew anything about this phone call. The claimant did not tell them, at the meeting on 29 September, or at any time before she was dismissed on 2 October, that she had made the call. It is not even mentioned in her claim form presented on 15 January 2021. There is also no evidence before this tribunal that Dr Hala's clinic was investigated by CQC (which might have come to the respondent's attention), let alone before 2 October. Further, it is most unlikely that a regulator would reveal the source of their tip-off if they did investigate. The claim of detriment and disclosure because of making public interest disclosures does not succeed.

Health and Safety Detriment and Dismissal

108. There is a claim that the claimant was subjected to detriment by the respondent in respect of her health and safety. The episodes are the same two as those relied on as disability harassment, namely the remarks exchanged with

Sam Yu on the 14th July 2020 about working days in the office, and about Jinsu Kim wanting a face to face meeting, as expressed on the 22nd of September 2020. It is also claimed that she was dismissed for this reason

109. The relevant law on detriment is set out in section 44A.

> "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—
>
> (a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or
>
> (b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.
>
> (2) For the purposes of subsection whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available

110. Dismissal is covered by section 100:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
>
> ….
>
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
>
> (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

111. There is recent authority in relation to attendance at work during Covid-19 in **Rodgers v Leeds Laser Cutting Limited (2022) EWCA Civ 1659,** which considers whether the employee had a "reasonable belief" in the danger.

112.The respondent argues that concern about the claimant's own health condition is a matter for the disability provisions of the Equality Act, or of ordinary unfair dismissal, for which the claimant lacks the necessary two years' service. We are not clear however that this is right. A person might be at risk of Covid infection without being disabled, perhaps because the condition is shortlived, or because the claimant believed they were at risk but was mistaken.

113. We understand the claim could be about (d), refusing to return to the place of work, but could also be about (e), the measure in question being working from home.

114**.** We have very little evidence about the workplace. Sam Yu was shown a photograph of two people at facing desks. They may have been 2 metres apart, it may have been less. They are not wearing masks; we are unsure whether mask wearing was compulsory at the time (July 2020) except on public transport and in shops. We do not know if the claimant wore a mask at work. Presumably she had one to wear in shops and on public transport. We heard nothing about ventilation, or the size of the office or offices. We know there was a small staff, and some of them could be out from time to time at clinics or seeing clients. There is no reason to believe this office was more or less safe from Covid infection than any

other office. We were also shown undated photos of staff at a clinic procedure where no one is wearing a mask, not even the clinicians. There is no evidence of the claimant attending procedures at clinics during the period.

115. The claimant told Sam Yu she wanted to remain working from home when a return to working three days a week in the office was proposed because she had or might have a heart condition and because her father did have a heart condition. She did not tell him she was self-isolating because of the risk to his health or hers. We do not know if she lived with her father, but she told him she took care of him. She was coming to the office on occasions, and was prepared to come two days a week, though it may be that she never did, because in July she said (after cancelling a workplace meeting) she would remain at home while awaiting the scan result, in August she was told not to come to work because of a change in guidelines, and in September she said she had Covid symptoms (there was no test). It is not even clear when she could have been in the office to make to disputed screenshot- her evidence that she had dropped in briefly to leave something off was equivocal. We are prepared to accept, given the medical history of anxiety, that she was anxious about her heath, rather than avoiding supervision and being anxious about the job (reported chest pain was in May). Was the belief that she was at added risk (above the general population) reasonable? She had not been given medical advice on this, so far as we are aware. At the time no vaccine had been developed, deaths were high, and fear was more reasonable than it now seems. Viewed against conditions in the workplace, however, we did not find that this amounted to a reasonable belief in serious and imminent danger.

116. Even if we had done, we could not find that the respondent subjected her to detriment because she did not want to come to the office. As discussed in relation to harassment, on both of the occasions complained of (14 July, working 2 or 3 days) and 22 September (preference for grievance meeting to be held in person), neither the context of the conversation and the respondent's actions support a reasonable person's belief they had been disadvantaged. A manager is entitled to explore the logic of an employee's reasons for not attending the workplace on three days when they say they will attend on two. She was allowed to stay away until the scan result, though it was not conceded she could work from home until the end of the pandemic. She was not required to attend the office for the meeting when her recovery from the presumed Covid infection was prolonged. There were no threats. The language used was moderate. Neither occasion amounted to detriment.

117**.** Nor could we find this was a reason for dismissal. We know from our experience of, say, flexible working claims, or discussion during and following the pandemic, that many employers entertain suspicions that people working from home may not always be working. No doubt Sam Yu was keeping an eye on it. He could have thought it odd that the claimant could be too ill to join a remote meeting but was not too ill to continue at work (7 July). However, there is no sign that working from home was a factor in the respondent's decision to dismiss her. It is clear that what they wanted was an agreement to a limited amount of sales activity (signing up doctors, which had been and could be done while working from home) and a target they could measure, and she was clear she would not agree, and that was why they dismissed her.

Victimisation

118. Under the Equality Act 2010, workers are protected not just from discrimination and harassment because of a protected characteristic, but also from detriment if they complain of discrimination of themselves or others or assist in complaints procedures. Section 27 prohibits victimisation by A of B because – (a) B does a protected act, or (b) A believes that B has done or may do a protected act.

119. The respondent concedes that the claimants complaints in the course of the meeting on the 29th of September about Korean staff being favoured and herself excluded amount to a protected act. It is for the tribunal to conclude whether she was subjected to detriment cause of that, either in her dismissal, or in the failure to investigate or respond to the masses she raised as grievance in that meeting.

120. Detriment means that "a reasonable worker would take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work" -**De Souza v AA 1986 ICR 514.** An "unjustified sense of grievance" cannot amount to detriment - **Barclays Bank v Kapur no2 1995 IRLR.**

121. We did not conclude that the respondent dismissed the claimant cause she complained of Korean exclusivity and favouritism in the meeting on the 29th of September. The respondent's stated reason was but she would not agree to any sales role in her new job description. We accept that as a start-up they were concerned about revenue and so on the need to build sales before devoting one of their very small staff to PR tasks alone. The job role was based on the first claimants list of tasks, but was always subject to the claimant drafting some objectives, and "adjustment" by the respondent. They made clear that requirement to sign up new people from the beginning of September 2020. They deleted other tasks from their additions on 14 September. The claimant then said she wanted to another meeting. It was reasonable for the respondent to apprehend that she would not agree even to this, and clear from the conduct of the meeting but they understood it to be about what tasks she would perform in the PR role. Clearly, there was disagreement about whether she should do sales tasks at all from well before she made the allegations about Korean favouritism. In and following the meeting the claimant made clear that she would not do any sales tasks, would not agree to any objectives being set, and did not agree to further period of probation. This was the standoff that led the respondents to decide that there was no way forward in their assessment of the companies need, and hers. It was a reasonable business decision. It was also reasonable for managers to want objectives against performance, particularly with a new role, and an employee who had not performed as expected in her previous role.

Breach Of Contract

122. The last claim is that the respondent breached her contract by asking her to do sales activity as well as the PR role. Her written contract is clear that she could be required, as well as sales coordinator, to do "or on any such role as we consider appropriate". The letter offering her a PR role was based on an outline prepared by Hye Lehtonen, but she was asked to make a plan, and set objectives, which would then be subject to "adjustment". The addition required was within her capability and she had already signed up some doctors. It was not a loss in status or a demotion. It is for an employer to determine precisely what tasks an employee is required to do. There was no breach of contract.

123. Even if there was, the measure of damages is the notice required to terminate the contract. The claimant was entitled to one week and received one month. There is no loss.

124. In conclusion, none of the second claimant's claims succeed.

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Employment Judge - Goodman

Date: 3rd Feb 2023

JUDGMENT SENT TO THE PARTIES ON

03/02/2023

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX

LIST OF ISSUES FOR THE SECOND CLAIMANT

A. Jurisdiction

1. The 2nd Claimant initiated early conciliation on 5 October 2020 and ACAS issued her early conciliation certificate on 20 October 2020. The last act referred to in the 2nd Claimant's ET1 claim form was on 2 October 2020 (i.e. the date of dismissal). The latest date which the 2nd Claimant could therefore present a claim was 16 January 2021 (due to 15 days 'stop the clock' ACAS early conciliation time). A claim was issued on 15 January 2021 by the 2nd Claimant and therefore was issued within time.

2. Accordingly, any act or omission that took place before 1 October 2020 is prima facie out of time. In respect of any act prior to 1 October 2020

(a) Do those acts (or any of them) constitute a continuing course of conduct extending over a period (pursuant to s123(3)(a), EA 2010)?

(b) If so, was the was the last day of that continuing course of conduct on or after 1October 2020?

(c) If not, would it be just and equitable to extend time in respect of them?

B. Victimisation

3. Did the 2nd Claimant carry out a protected act? The act relied on is that the 2nd Claimant made a complaint in the grievance meeting that allegedly took place on 29 September 2020 about alleged discriminatory acts by the Respondent because of race.

4. Did the Respondent subject the 2nd Claimant to a detriment or dismiss the 2nd Claimant because the 2nd Claimant did a protected act? The detrimental treatment relied on is:

(a) The fact that her grievance was not investigated nor responded to; and

(b) the 2nd Claimant's dismissal.

C. Direct discrimination because of race

5. Did the Respondent subject the 2nd Claimant to the following treatment:

(a) Between 9th March 2020 – 2nd October 2020, excluding the 2nd Claimant from meetings, WhatsApp groups and emails. Using the app called 'Kakao' to chat in Korean which excluded the 2nd Claimant. Jinsoo Kim sending emails often in Korean to all members of staff. Not giving opportunities to the 2nd Claimant to speak to Jinsoo Kim. Ignoring the 2nd Claimant's opinions and ideas about business all the time;

(b) In July 2020, Sam Yu and Suhyeon Park telling the 2nd Claimant that the Respondent was trying to replace her with a Korean employee and it wanted to hire more Korean employees;

(c) Dismissing the 2nd Claimant on 2 October 2020 and being replaced by a Korean sales manager on 19th October 2020;

(d) Not promoting the 2nd Claimant to Sales Area Manager on 27th June 2020 and instead promoting a Korean colleague; and (e) Sam Yu saying on 28 September 2020 'we Koreans stick together no matter what' by text when the 2nd Claimant texted him that she felt discriminated because of race and that she wanted to discuss it at the grievance meeting on the following day.

6. Has the Respondent treated the 2nd Claimant less favourably than it treated or would have treated the comparators? The 2nd Claimant relies on the following comparators respectively (the numbering corresponds to the treatments listed above):

(a) All Korean speaking employees;

(b) Hypothetical comparator who is Korean with no material difference than the 2nd Claimant but their race;

(c) New Korean employees who replaced the 2nd Claimant (Sara Gajzler and Sara Lee);

(d) Suhyeon Park, a Korean colleague, who was promoted.

7. Was such less favourable treatment because of race?

D. Harassment

Harassment related to disability

8. Does the 2nd Claimant have a physical or mental impairment? The 2nd Claimant relies on a heart condition (further particulars are needed in relation to the 2nd Claimant's condition).

9. Does the impairment have a substantial adverse effect on the 2nd Claimant's ability to carry out normal day to day activities?

10. Is the effect of the impairment long term, meaning it has lasted for at least 12 months or is likely to do so?

11. If the 2nd Claimant is disabled, did the Respondent engage in unwanted conduct related to disability? The conduct relied on is that the Respondent forced the 2nd Claimant to come into the office on numerous occasions, for example on 14 July 2020 and 22 September 2020, despite knowing her vulnerability to coronavirus due to her health.

12. Did the conduct have the purpose or effect of violating the 2nd Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the 2nd Claimant?

13. In deciding whether the conduct complained of had the effect referred to above, the Tribunal must have regard to:

(i) The perception of the 2nd Claimant;

(ii) The other circumstances of the case; and

(iii) Whether it was reasonable for the conduct to have that effect

Harassment related to race

14. Did the Respondent engage in unwanted conduct related to race? The conduct relied on is:

(a) Other members of staff and the Director speaking in Korean, not English. The Respondent excluded the 2nd Claimant from meetings between 9th March 2020 to 2nd October 2020, and WhatsApp groups and emails. The Respondent often used the app called 'Kakao' to chat in Korean which excluded the 2nd Claimant. Jinsoo Kim sent emails often in Korean to all members of staff. The 2nd Claimant was not given opportunities to speak to Jinsoo Kim and her opinions and ideas about business were ignored all the time; and (b) Sam Yu said on 28 September 2020 'we Koreans stick together no matter what' by text when the 2nd Claimant texted him that she felt discriminated because of race and that she wanted to discuss it at the grievance meeting on the following day;

15. Did the conduct have the purpose or effect of violating the 2nd Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the 2nd Claimant?

16. In deciding whether the conduct complained of had the effect referred to above, the Tribunal must have regard to:

(i) The perception of the 2nd Claimant;

(ii) The other circumstances of the case; and

(iii) Whether it was reasonable for the conduct to have that effect

E. Protected disclosure

17. The disclosures relied on by the 2nd Claimant is that she raised that the Respondent failed to register with the Care Quality Commission ("CQC") on the following occasions:

(a) by text message on 24 September 2020 to Suhyeon Park. The 2nd Claimant alleges that she said that the Respondent was not registered with the CQC and that she was going to escalate the issue ;

(b) by text message to Sam Yu on 28 September 2020. The 2nd Claimant alleges that she said that the Respondent was not registered with the CQC and that she was going to escalate the issue;

(c) to the CQC by phone on 25 September 2020.

18. In this disclosure, did the 2nd Claimant disclose information which in her reasonable belief tended to show that a criminal offence had been committed / the Respondent had failed to comply with a legal obligation to which it was subject / the health or safety of any individual had been put at risk / the environment had been put at risk / that any of these matters were likely to happen / that any of these matters has been or is likely to be deliberately concealed?

19. Did the 2nd Claimant believe that the disclosure was made in the public interest? If so, was this belief reasonable?

20. If the alleged disclosures were qualifying disclosures, the Respondent agrees that that the disclosures to Suhyeon Park and Sam Yu were protected disclosures as they were made to the Respondent.

21. In respect of the disclosure to the CQC:

(a) Was the disclosure made to a prescribed person under s43F, ERA 1996?

22. Was the 2nd Claimant subject to a detriment by the Respondent or another worker on the ground that she had made a protected disclosure? The detriments relied on are:

(a) The Respondent did not investigate the 2nd Claimant's complaints of race discrimination raised at the grievance meeting on 29 September 2020; and

(b) The Respondent dismissed the 2nd Claimant.

23. Was the fact that the 2nd Claimant made a protected disclosure the sole or principal reason for dismissal?

F**. Automatically unfair dismissal**

24. Was the fact that the 2nd Claimant made a protected disclosure the principal reason for dismissal?

G. Health and Safety Detriment

25. Did the 2nd Claimant, in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she left (or proposed to leave) or (while the danger persisted) refused to return to her place of work or any dangerous part of her place or work?

26. Was the 2nd Claimant subject to a detriment by the Respondent on the ground that she left (or proposed to leave) or refused to return to her place or work or any dangerous part of her place of work in such circumstances? The detriments relied on are:

(a) Sam Yu told the 2nd Claimant on 14 July 2020 that she had to meet a minimum requirement of days worked in the office; and

(b) Sam Yu responded on 22 September 2020 to the 2nd Claimant's email asking to have the grievance meeting online, that Sam Yu and Jinsoo Kim wanted to have a face to face meeting.

H. Health and safety dismissal

27. Did the 2nd Claimant, in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, leave (or propose to leave) or (while the danger persisted) refuse to return to her place of work or any dangerous part of her place or work?

28. Was the 2nd Claimant dismissed on the ground that she left (or proposed to leave) or refused to return to her place or work or any dangerous part of her place of work in such circumstances?

I. Breach of contract

29. Does the claim arise out of or was it outstanding on termination of a contract of employment?

30. Was there a breach of contract by the Respondent on the basis of the 2nd Claimant being asked to do two roles rather than one as specified?

31. Has the 2nd Claimant suffered loss as a result of the breach of contract?

J. Failure to make reasonable adjustments

32. If the 2nd Claimant is disabled, did the Respondent apply a provision, criterion or practice ("PCP") to the 2nd Claimant? The PCP relied on is that the Respondent allegedly required all employees to work in the office.

33. Did the PCP put the 2nd Claimant at a substantial disadvantage when compared with persons who are not disabled? The substantial disadvantage relied upon is the Respondent disallowing the 2nd Claimant to work and/or attend meetings from home despite her being vulnerable; and making the 2nd Claimant anxious about her health as result.

34. Did the Respondent know or could it reasonably be expected to know that the 2nd Claimant had the disability?

35. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The 2nd Claimant avers that the adjustment the Respondent failed to implement was allowing her to work from home more often or full time.

K. Remedy

36. If any of the 2nd Claimant's complaints are well founded, what compensation is he/she entitled to receive in respect of:

(a) A basic award for unfair dismissal;

(b) A compensatory award for unfair dismissal;

(c) Compensation for unlawful discrimination, including any award for injury to feelings;

(d) Damages for breach of contract; and

(e) Interest at the appropriate rate.