EMPLOYMENT TRIBUNALS

Claimant: Ms K Zena

Respondent: Verifone UK Ltd

Heard at: Watford Employment Tribunal
(In person and by video)

On: **5 to 9 December 2022**

Before: Employment Judge Quill;
Mr A Wimbor and (by CVP) Ms M Harris

Appearances

For the claimant: Mr M Singh, counsel
For the respondent: Mr D Bayne, counsel

JUDGMENT

1. By a unanimous decision, the complaint of unfair dismissal is well-founded. Issues of remedy, including Polkey will be dealt with at the remedy hearing.

2. By a unanimous decision, in relation to the complaints of unauthorised deduction from wages and breach of contract, the Claimant has not discharged her burden of proof and so those complaints fail and are dismissed.

3. By a unanimous decision, the complaints of direct discrimination because of race all fail and are dismissed.

4. By a unanimous decision, the complaints of victimisation because of alleged detriments 13a and 13b (as per the item numbers in the list of issues) fail and are dismissed.

5. By a majority decision (Mr Wimbor and Ms Harris), the complaints of victimisation because of alleged detriments 13c and 13d (as per the item numbers in the list of issues) succeed. Issues of remedy, including arguments about ACAS uplift will be dealt with at the remedy hearing.

REASONS

Introduction

1. This was a 5 day hearing. It was conducted in person, save for the following:

1.1. One of the panel members attended by video throughout

1.2. On Day 2, the Claimant's witness, Ms Cuva, attended by video.

1.3. On Day 4, the Claimant attended by video (Mr Singh attended in person)

1.4. On Day 5, the hearing was conducted fully remotely

2. Page references in brackets below are to the pages in the main bundle, and references with square brackets, such as [SXXX] are to pages in the "supplementary" or "correspondence" bundle.

The Claims and The Issues

3. The list of issues (for liability) had previously been agreed as (page 49 of bundle):

1. The Claimant claims:
a. Unfair dismissal, pursuant to ss 94, 95 and 98 Employment Rights Act 1996 ("ERA").
b. Race discrimination, pursuant to ss 13 and 39 Equality Act 2010 ("EqA").
c. Victimisation, pursuant to ss 27 and 39 EqA.
d. Deduction of wages, pursuant to ss 13 and 23 ERA; alternatively breach of contract.

Jurisdiction
2. In relation to the Claimant's claims under the Equality Act 2010, did the Claimant present her claims to the Tribunal within three months of the date of the act complained about, plus any extension due to ACAS Early Conciliation, as required by section 123(1)(a) of the Equality Act 2010?

3. Did the allege conduct extend over a period so that it should be treated as being done at the end of that period?

4. If no to 2 and 3 above, would it be just and equitable for the Tribunal to extend the time limit in accordance with section 123(1)(a) of the Equality Act 2010?

Unfair dismissal
5. What was the reason for dismissal? The Respondent says redundancy or, in the alternative, some other substantial reason.

6. Was the reason a potential fair reason?

7. If the reason for dismissal was a potentially fair reason, in the circumstances (including the size and administrative resources of the Respondent's undertaking), did the Respondent

act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, having regard to equity and the substantial merits of the case?

Direct Race discrimination: s.13 EqA

8. The Claimant defines her race as black.

9. Did the following alleged occur:

a. The Claimant was singled out for the redundancy procedure.

b. The Claimant was dismissed.

c. Between 1 November and 13 November 2020, Mr Rebain informed the Claimant's colleagues, by conference call to her direct reports, that the Claimant would be leaving the company; that she was off sick; and had not taken the news of redundancy well, implying she was mentally ill.

d. The Claimant's termination payment was limited to her minimum statutory rights on redundancy.

10. If any or all of the allegations occurred, did it/they amount to less favourable treatment?

11. If the allegations do amount to less favourable treatment was it because of the Claimant's race?

a. As comparators:

i. In relation the allegations of being singled out for redundancy and being dismissed, the Claimant relies upon her team members and all others employed within the Respondent at her grade.

ii. In relation the allegations of being singled out for redundancy and being dismissed, white male Dawid Makowski, who was given her role.

iii. In relation to being dismissed, the white female and 2 (or 3) Asian females who had been offered alternative employment in similar circumstances as alleged at paragraph 13e of the Particulars of Claim.

iv. Further, or alternatively, hypothetical comparators. As to termination payments, the Claimant believes there are comparators but the Respondent failed to provide this information.

Victimisation: s.27 EqA

12. Did the Claimant carry out a protected act on 2 November 2020 (her appeal)?

13. If so, did she suffer detriment because of the protected act? The detriments alleged by the Claimant are:

a. The Claimant was not paid a circa £5000 cash bonus which was due for the three-month period from August to October 2020.

b. Between 2 November and 13 November 2020, Mr Rebain informed the Claimant's colleagues, by conference call to her direct reports, that the Claimant would be leaving the company; that she was off sick; and had not taken the news of redundancy well, implying she was mentally ill.

c. The Respondent failed to adequately investigate the Claimant's allegations of discrimination or provide a process of appeal.

d. The Respondent made superficial findings dismissing the allegations of discrimination.

Deduction of wages

14. The Claimant alleges that the Respondent failed to pay the Claimant a "cash bonus plan" (formally known as "Restricted Stock Units and Deferred Cash Awards") in relation to unvested shares being transferred to cash awards. The Claimant estimates this to be worth circa £5,000. The Respondent denies that this was payable and avers that the Claimant has been paid in full for all restricted stock units and deferred cash award entitlements.

15. The legal issues to be determined are:
(a) Was the "cash bonus plan" "wages" within s.27 ERA 1996
(b) Was any further amount properly payable to the Claimant under the "cash bonus scheme"?
(c) If so, what was the amount?

16. In the alternative the Claimant avers that this was a breach of contract.

4. It was clarified on Day 1, that the protected act was an email sent on Sunday 1 November 2020 (234-235). It was clarified during closing submissions that the Respondent conceded that this was a protected act, and so item 12 did not have to be decided.

5. It was also conceded during closing submissions that the "cash bonus plan" referred to in the first sentence of item 14 was within the definition of "wages" as per section 27 ERA, and therefore item 15(a) did not have to be decided.

The Hearing and The Evidence

6. We had a main bundle of 382 pages and another bundle (headed Separate Correspondence Bundle) of 118 pages. In addition:

6.1. During the hearing, while Mr Rebain was giving evidence, we received copies of email and attachment dated 31 August 2020 from Dawid Makowski to the Respondent.

6.2. After the evidence, we received:

6.2.1. Letter to Mr Makowski circa 1 December 2020

6.2.2. Print out from the Respondent's HR system relating to Mr Makowski

6.2.3. Payslips for the Claimant

7. We had written statements from the claimant's side from: (1) the Claimant; (2) Mr L Cuva; (3) Ms K Sutcliffe.

8. We had written statements from the respondent's side from: (1) Mr T Rebain and (2) Ms M Wiersma.

9. Ms Sutcliffe did not attend, and no explanation was offered. We have read her signed statement, and given it such weight as we saw fit. All of the others attended, swore to their statements, and answered questions.

10. The Claimant gave evidence starting on Day 1, and finishing shortly after lunch on Day 2, Ms Cuva having been interposed on the morning of Day 2.

11. Mr Rebain started on Day 2, and finished on the morning of Day 3. The tribunal was unable to sit on the afternoon of Day 3. Ms Wiersma started her evidence before lunch on Day 3, and finished on the morning of Day 4. We then had written and oral submissions, finishing shortly after 2pm of Day 4.

12. On Day 5, we informed the parties that we were reserving our decision and fixed a date for a remedy hearing on the basis that that hearing would be cancelled if the Claimant was not successful on at least one complaint.

13. On Day 1, prior to commencement of the evidence, but after the pre-reading, there was an application by the Claimant for the response to be struck out. This was based on an argument that the Respondent had failed to disclose relevant documents, and, therefore, had failed to comply with a tribunal order and had conducted the litigation unreasonably, and had made it impossible to have a fair trial within this hearing window. For the reasons we gave at the time, we declined to strike out, but told the parties that the Claimant remained free to pursue arguments about allegedly missing documents during the evidence phase of the hearing, and in submissions, and we would address those arguments in our fact finding.

The Findings of Fact

14. These findings are all unanimous, unless expressly stated otherwise.

<u>Alleged Failure to Disclose Documents</u>

15. Our findings of fact in relation to the arguments about alleged missing documents were made after taking account of the evidence as a whole. For clarity and ease of exposition, we are setting them out at the start of this written record of our findings. However, they were made after we had considered the documentary evidence that we actually did have, and after we had formed opinions about the credibility of the witnesses.

16. In making these findings, we reminded ourselves that the Claimant had the onus of establishing that documents actually existed which (a) were within the categories of documents which were supposed to be disclosed and (b) had not been disclosed. If the Claimant was unable to persuade us of that, then – of course – there would be no need for further analysis.

17. However, if such documents did exist, then we had to go on to decide why they had not been disclosed. If the Respondent had failed to disclose them because of honest mistake, then the non-disclosure would not tell us anything. It would not be a reason to draw adverse inferences against the Respondent (or any of its witnesses) and would be equally consistent with the contents of the document supporting the Respondent's case or supporting the Claimant's case.

18. On the other hand, if we were persuaded that the Respondent had deliberately decided not to disclose documents that it had found and that it knew were within the terms of the tribunal's disclosure orders, or else that it deliberately decided not to look for documents, which it knew to exist, and knew were within the terms of the tribunal's disclosure orders, then that might lead us to draw adverse inferences. It might lead us to conclude that the Respondent knew or believed that there were documents in existence which were harmful to its case, or helpful to the Claimant's case, that it did not want the Claimant to have, or the Tribunal to see.

19. The orders made at a preliminary hearing on 28 October 2021 included the following:

> 1.1 By 17 June 2022 the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents by 08 July 2022 if requested to do so.
> 1.2 The parties remain under a duty of disclosure even after exchanging the above lists. That means that if a party later finds an item which should been included in the list but wasn't, the item must be disclosed at once in accordance with the above procedure.

20. Following an application by the Claimant, an order dated 14 November 2022 was made which stated:

> The Respondent is by 25 November 2022 to send to the Claimant:
>
> 1. The policy prior to April 2020 pursuant to which redundancy payments were dated to the comparators,
> 2. Details of the date the policy at page 197 of the bundle was in force
> 3. Any documents evidencing point 2 above.
>
> If the parties are unable to agree the contents of the Bundle for final hearing, the Respondent is to provide a separate correspondence bundle.

21. The parties agree that the indexes to the bundles accurately confirm the dates on which certain documents were disclosed.

21.1. There is one document (a prescription for some medication dated 30 October 2020) disclosed by the Claimant on 28 November 2022; so this was 7 days before the hearing commenced on Monday 5 December 2022.

21.2. One document, related to RSU scheme, was disclosed by the Respondent on 15 September 2022.

21.3. Various documents (pages 319 to 361 of the bundle) were disclosed by the Respondent on 3 October 2022.

21.4. A couple of documents (relating to 2018 reorganisation, and the Respondent's polices) were disclosed on 10 November 2022.

21.5. The documents at [S77] to [S109] were disclosed on Thursday 1 December 2022.

21.6. The documents at [S110] to [S118] were disclosed on Friday 2 December 2022.

22. In relation to the items disclosed late (and especially those on the last couple of working days before the hearing), the Respondent does not concede that all of them were items which it was obliged to disclose by the orders and does not concede that they were all necessary for a fair hearing of the matter. However, it does accept that some of them were items which were within the terms of the original, October 2021 order. Its position is that (i) when preparing witness statements, some previously undisclosed documents came to its representatives' attention and were disclosed and that (ii) as a result of pre-trial discussions with counsel some previously undisclosed documents came to its representatives' attention and were disclosed. Its position was that, while not ideal, this was normal, and was not a reason for any adverse inferences to be drawn. Mr Bayne was not, of course, responsible for any of these delays; furthermore, his current instructing solicitor believed that everything had been done promptly once they took charge of the file. Furthermore, the Respondent's position was that there were no further documents within the terms of the tribunal orders which (a) had been found, and which (b) had not been disclosed. The Respondent was not necessarily able to say exactly what searches had been done, especially at the group companies in other countries, but its position was that the witnesses for the hearing had both carried out searches, which had not revealed anything other than the documents already (by the start of this hearing on 5 December 2022) been disclosed.

23. At paragraph 20 of his statement, Mr Rebain refers to a meeting on 14 August 2020. He says that this meeting was called "Preliminary Budget Review – Finance". He says that at this meeting it was decided "to evaluate each finance professional role that was not already part of the Warsaw SSC, and this was given the code name 'Project Bluebird'." He says that this was for financial reasons, and was with a view to reorganising the accounting and controllership (finance) group, and the EMEA part of it in particular. This is significant, if true, as Mr Rebain says that the subsequent decisions made in relation to the Claimant's role were as a direct result of the

decisions made at this 14 August meeting. The contents of this meeting would be relevant, amongst other things, to the allegations that the decisions about the Claimant's role were (at least partially) motivated by Mr Rebain's (alleged) bias. That is, the Respondent's assertions about what happened at this meeting were true, then it could support an argument that Mr Rebain was acting on decisions made by others, rather than acting to get rid of the Claimant because of any personal dislike of her.

23.1. Other than a meeting invitation at page 319, disclosed 3 October 2022, the Respondent has disclosed no other documents for this meeting. No agenda or minutes have been disclosed. No emails (or other documents) purporting to directly refer to what was said in the meeting have been disclosed.

23.2. It is the Respondent's case that the documents at 320 and 325 show that Mr Rebain wanted to discuss the reorganisation (proposed on 14 August, he says) with Ms Ellis. However, those documents do not specifically mention "Preliminary Budget Review – Finance" or "14 August". The Claimant has an alternative explanation for what prompted Mr Rebain's contact with Ms Ellis, namely discussions between Mr Makowski and Mr Rebain between around 31 August and 2 September.

23.3. It is our opinion that if documents about the 14 August 2022 meeting had been created, then their relevance was apparent to the Respondent and to Mr Rebain. That is why page 319 of the bundle was disclosed and referred to in his witness statement.

23.4. It is also our opinion that if there were such documents still existing (in October to December 2022) then it would be comparatively straightforward for Mr Rebain to locate them by searching his own email (and other) records, and by asking other attendees at the meeting to do so (including the assistants of those attendees, if any). If his claims about 14 August are true, he would have had good reason, in our opinion, to search for such documents from the date on which he received the Claimant's appeal, or, at the latest, the date on which he was questioned during the appeal process. We do not think it plausible that such documents could exist without Mr Rebain being able to find them.

23.5. It is not argued by the Respondent that such documents were created and were subsequently destroyed (and that there is an innocent explanation for such destruction). It is the Respondent's case that documents from the 14 August meeting were not created.

23.6. If the meeting did, as Mr Rebain claims, make a decision to reorganise a particular part of the business, for financial reasons, we find it implausible that there would have been no contemporaneous documentary evidence created. We believe it is inevitable that some documents showing the financial position would have been created, and very likely that some documents suggesting potential solutions would also have been created. It is also surprising that no documents containing the

agreed outcomes (eg that there would be a review to be completed by a particular date, or covering particular matters) was created.

23.7. The minutes / agenda of the 14 August meeting would be relevant (if they existed) regardless of whether they specifically mentioned a reorganisation or a review of whether posts could be moved to Warsaw. In any event, the Respondent does not claim that they existed but were not disclosed because they were considered irrelevant. The Respondent argues that they were not disclosed because they are presumed not to exist, a reasonable search having failed to locate them.

23.8. The lack of disclosure of these items is consistent with:

23.8.1. The 14 August meeting being a minor one, for which no notes were necessary. A reorganisation/review of accounting and controllership (finance) and moves to Warsaw SSC would not, on this view, have been matters which were discussed on 14 August, as they were not minor.

23.8.2. The 14 August meeting discussing important matters, for which minutes were kept, but not discussing the matters claimed by Mr Rebain in paragraph 22 of his statement.

23.9. We do not think that lack of disclosure of contemporaneous evidence of the contents of the 14 August meeting is consistent with Mr Rebain's assertions about the contents of that meeting.

23.10. Based on the totality of the evidence, we are satisfied that the 14 August meeting did not create a proposal to reorganise the EMEA controllership structure, and did not create "Project Bluebird". It is therefore not necessary for us to decide between the possibilities of (i) minutes existing, but not being disclosed, in breach of tribunal orders and (ii) minutes not existing.

24. Some time around 2 September 2020, there was a remote meeting between Mr Rebain and Mr Makowski. No contemporaneous documents of the specific contents have been disclosed, but [S113] to [S114] are an email exchange between Yong Chen (Mr Makowski's line manager) and Mr Rebain. The Claimant has not persuaded us that a contemporaneous documentary record of the contents of that meeting were created. There is, therefore, nothing for us to decide in relation to whether such a document was disclosable in accordance with the tribunal orders.

25. A document dated 27 September 2020 was in the bundle at 207 to 211. This was an extremely relevant document. Any emails (or other forms of communication) circulating this document were relevant. Any documents showing which persons had commented on this document, and when, were relevant documents and were disclosable in accordance with the tribunal orders. The Respondent's position is that there were no such documents (or, at least, that none could be found).

25.1. In his written statement, Mr Rebain suggested that this was a document produced as a direct result of the 14 August meeting. We will not repeat everything we said above, about documents connected to that meeting. However, in summary, if any documents were created circulating this 27 September document, or commenting on it, we think it implausible that (i) Mr Rebain would not have known at the time and/or (ii) would not be able to track such documents down in 2022 by making reasonable enquiries with colleagues, and searching his own records.

25.2. We do not, however, have enough specific evidence to infer that specific documents were actually created.

25.3. We comment on this 27 September 2020 document, and on the lack of any contemporaneous emails circulating it, or commenting on it in more detail below.

26. There is a lack of documents disclosed to support what Mr Rebain said about speaking to Deloitte in summer 2020. However, we do not think that is any reason to draw any adverse inference. If such documents existed then they were not sufficiently relevant to be disclosed.

27. In relation to documents relating to the appeal, no documents have been disclosed which show the Respondent supplying the appeal officer, Ms Wiersma, with (i) the dismissal letter (ii) the 1 November appeal email (iii) the 27 September 2020 document by the Respondent. We will comment on this in more detail below.

Commencement of employment

28. The Claimant qualified as a chartered management accountant in 1999. She commenced employment with the Respondent on 29 July 2015. Her contract of employment is at page 89 of the bundle.

29. The respondent is a UK based company. It is part of an international group of corporations that provides end to end payment facilities for various clients.

30. The claimant's job title on appointment, as shown in her contract, was Europe regional controller. Her remit on appointment Initially, was to create a European Accounting and Controllership function as well as lead the transfer of accounting to the Verifone Shared Service Centre (“SSC”) in Warsaw, Poland.

31. The contract stated that her place of work was the Respondent's office in Uxbridge. There was a clause which said that if business reasons demanded it, she might be “**asked** to transfer to another place of work within a reasonable distance on either a temporary or permanent basis” (our emphasis).

32. The UK handbook listed various policies, some of which were global policies and some which were UK specific.

33. The organisation had several offices against across Europe and the claimant had responsibility for around 30 or 40 people, some reporting to her some directly and some indirectly, across various sites. The claimant's work required her to travel from time to time to the various European offices.

34. The claimant was well thought of throughout her employment and received good appraisals. In 2017, she received an award in recognition of her contribution to the success of the organisation.

Restricted stock units ("RSU") award schemes

35. During her employment, the claimant became entitled to benefit from certain restricted stock units ("RSU") award schemes. There were three of these.

    35.1. The first of those is not directly relevant in that the Claimant is not alleging that she received less than her full entitlement under that scheme.

    35.2. The second scheme was dated 3 January 2017 and is at page 120 of the bundle.

    35.3. The third is dated 2 January 2018 and is at page 290 of the bundle.

    35.4. Each of the schemes sets out a number of RSUs to which the claimant is provisionally entitled, subject to the rules of the scheme. There were 3139 RSUs in the January 2017 scheme and 2147 in the January 2018 scheme.

    35.5. In each case, the claimant would become entitled to receive 25% of the total 12 months after the start date of the respective scheme.

    35.6. Thereafter, she would receive a further 6.25% of the total at the end of each subsequent three month period. These later awards would continue until either the claimant's employment ended, or else until she had received 100% of the RSUs for that scheme.

36. The stock to which the RSUs related was in the respondent's parent company, Verifone Systems Incorporated. In 2018, that corporation was privately acquired and ceased to be traded.

37. In relation to the RSUs to which the claimant had become entitled prior to the acquisition (in other words, those to which her entitlement had already accrued up to and including July 2018), insofar as the claimant still possessed them (and had not already voluntarily taken a cash replacement), she was compulsorily required to convert the remaining RSUs to a cash equivalent.

38. After the July 2018 acquisition - instead of receiving any further RSUs - on the relevant date to which she would have become entitled to RSUs, under the relevant scheme, she became entitled to receive a cash equivalent instead.

39. It is common ground between the parties that, after the end of employment, the Claimant would not have been entitled to accrue further RSUs under the January 2017 or January 2018 schemes, and that – therefore – she would not have accrued further entitlement to cash equivalents under those schemes, as varied following the acquisition. The dispute is that the Respondent alleges that, in the relevant month in which the RSU entitlement would have accrued (on the 3rd of that month for the 2017 scheme, and the 2nd of that month for the 2018 scheme), the cash equivalent was paid. Therefore, on its case, when the Claimant received a payment in October 2020, that was for the cash equivalent of the RSUs to which she became entitled on 2nd and 3rd of October 2020).

40. There is not a dispute that the sum of £5764.80, as shown on her payslip on page 281, was actually received by the Claimant in October 2020. However, whereas the Respondent alleges that is actually the amount which represents her aggregate entitlement under the two schemes, as accrued in the month of October 2020, the Claimant says it represents her entitlement the cash equivalents of the RSUs to which she became entitled in July 2018.

41. The Claimant's position – and the Respondent has not supplied any evidence to the contrary – was that she never received any notification of what payments would be made to her as cash equivalents of the RSUs, other than the notification in her payslip itself. She no longer had full access to all of her payslips, because they had been made available to her electronically, and she had not downloaded all of them prior to the end of employment. However, her opinion and belief was that every time she received such a payment, it was three months in arrears. This was in part based on the fact that she believed that was how RSUs had been allocated (and voluntary conversions to cash prior to the acquisition) and that she would have noticed and remembered if there had been (what she would have regarded as) a change after the acquisition. In particular, it was her opinion that for the Respondent's position at this hearing to be true, it would have had to have been the case that there would have been some past month in which she received two sets of entitlement: that is, one three months in arrears, and one for the month in question. She was sure that there was no such month. Furthermore, it was her opinion that the cash equivalents were not paid straight away (in the same month in which the RSU entitlement would have accrued), because the employer took some time to evaluate the actual cash payment, and that – amongst other things – it was only able to do this after there had been analysis of, and reporting of, its performance for the period in question.

<u>2018 changes</u>

42. In the period following the July 2018 acquisition, there were some changes. The claimant's line manager became the corporate controller in the US, Ms Suzanne Colvin.

43. There were a number of redundancies and the claimant was given responsibility of Middle East and Africa as well as Europe. One of the people who had been reporting

to the Claimant, and who had been responsible for the Nordic region, was made redundant and was not replaced.

44. An outside contractor Deloitte was brought in to take over some of the work and to assist with statutory filings.

45. The claimant had approximately 16 people reporting to after this restructuring and her title became "EMEA financial controller". The "EMEA" part referenced the geographical area for which she was the financial controller: Europe, Middle East and Africa.

46. Some information about the proposed 2018 restructure, as it affected the UK, is shown in the document in the bundle at pages 362 to 365.

46.1. This was known by the project name "Operation Sunrise.

46.2. According to the document, consultation was to begin on 11 October 2018. Due to the number of proposed redundancies, there was to be a collective consultation which was to run for at least 45 days from 11 October. There was also to be individual consultation which was potentially lasting until mid December.

46.3. The document proposed that there would be enhanced redundancy available. It was to be 2 1/4 weeks gross salary for each fully completed year of service. The document said that a requirement to receive this enhanced rate was that there had to be a settlement agreement waiving rights against the employer.

46.4. In the document (365), voluntary redundancy was described and it was said to be a means of mitigating the consequences of compulsory redundancy.

<u>Commencement of Mr Rebain's employment</u>

47. In around July 2019, Mr Thomas Rebain became employed by Verifone Inc. He became the Claimant's line manager. There was a six month handover period from Ms Colvin to him.

48. Mr Rebain learned that Verifone was in the process of transitioning its day-to-day transactional processing and the accounting and reporting functions into its two Shared Service Centres (SSCs). As well as the one in Warsaw, there was also one in Shanghai. As part of this process, the Latin America Controller and Asia-Pacific Controller roles (the regional equivalents of the Claimant's role) had both been made redundant shortly before Mr Rebain joined. One of those individuals had left Verifone, and the other had taken an alternative role as "Lead of the General Ledger for Global Verifone."

49. During the handover from Ms Colvin to Mr Rebain, there was a discussion between him and Ms Colvin about the possibility of a restructure in the EMEA controllership team; in other words, the team of which the Claimant was in charge.

50. The supplementary bundle [S111] shows that when the accounting controller for Denmark resigned, there was an email trail dated 30 July 2019. The claimant asked how to proceed. She sent this query to both Ms Colvin and Mr Rebain. There followed an exchange of emails, not copied to the claimant, in which Ms Colvin suggested there was a plan to reduce the number of EMEA controllers (which were employees reporting to the Claimant) and said that the claimant was not yet aware of this proposal. Mr Rebain's reply indicated that he had formed the impression that that might be the plan and that he thought the goal was potentially to move most of the function to Shanghai or Warsaw. Ms Colvin agreed in part; she said some would would go to Warsaw. She suggested that significant amount of the local controllers' work had been outsourced to Deloitte and she had some provisional plans to announce potential reorganisation proposals at convenient times in the future based on deadlines for the work in the various locations. She said she had mentioned this to Belinda Ellis (the chief financial officer for EMEA), but had not yet supplied firm details either to Ms Ellis or to HR. She said her plan was to have a discussion with Mr Rebain first so that he could supply his input.

51. Mr Rebain's decision was that he preferred to wait until he had a greater understanding of the various teams before moving forward with any EMEA restructure.

52. The Claimant's role was not specifically mentioned in the disclosed emails between Ms Colvin and Mr Rebain. According to his witness statement, Mr Rebain was aware that even had Ms Colvin's proposals been carried out in 2019, that would not have led to a deletion of the claimant's role in 2019, because there were various other matters to be dealt with first. In his witness statement (paragraph 20), he suggests that the "potential restructure in the EMEA Controllership" was "delayed until 2020". We have received no documents which suggest that there was a specific decision made in 2019 that a restructure in the EMEA Controllership would be carried out during 2020.

53. In her appeal document at page 257, the Claimant wrote

> *At the beginning of the year, I received an email from Tom informing me of project TK, which him and I will work through to streamline the EMEA controllership organisation structure, on the back of his predecessor's plans.*

54. This passage refers to an email (which is not in the bundle) which she received at the beginning of 2020. This shows that no later than early 2020, the claimant was aware that there was the possibility of reorganising the EMEA controllership and that (at least according to Mr Rebain), this was something which Ms Colvin had planned to do had she remained in that post.

55. In the same appeal document, written in December 2020, the Claimant also wrote:

In the meantime, since March there were rumours from SSC that Tom was going to make me & the controllers redundant and the roles will all go to Warsaw. I never raised this as an issue until in August, when the outgoing finance person at Dimebox asked me about my plans after I leave Verifone in December.

So, even though the discussions during the consultation process made it appear "the decision was due to reasons of the pandemic and not meeting business numbers", this was already pre-determined by March.

56. Paragraph 17 of the claimant's witness statement conveys similar information though she suggests that that August was the second time she had spoken to Mr Rebain about the issue, having first discussed it with him some time after hearing rumours in March. She also identifies in her statement that Dawid Makowski was the source of the rumours in March.

57. We accept that the claimant did hear - from Mr Makowski in around March 2020 and from the outgoing Dimebox employee in around August 2020 - that there were potential rumours of her redundancy. We also accept that she spoke to Mr Rebain about the rumours and that he assured her that at the time there were no plans to make her redundant. We also accept that, at the time he made these comments, Mr Rebain did not have firm plans to make the claimant redundant.

Discussions about Deloitte in Summer 2020

58. On 16 June 2020, the Claimant wrote to Mr Rebain stating, amongst other things:

> We cannot continue to work with Deloitte so I want to arrange a call with you and some of the controllers so you can hear first hand the problems they have been facing with regards to Deloitte.

59. He replied the same day, and the proposed meeting, between Mr Rebain and the Claimant's team, did take place on or around 29 June 2020.

60. Mr Rebain did not completely ignore the issues raised by the Claimant and her team. He had some discussions with his US based Deloitte contact. However, he had not specifically come back to the Claimant or her team prior to the meeting with Deloitte scheduled for around 28 August. In relation to that meeting, Mr Rebain wrote to the Claimant on 27 August (205) to say:

> For tomorrow's meeting with Deloitte, I'd like you to have an open mind for suggestions that Deloitte has …. But I'd also like you to raise where you've seen concerns/issues in the past year. It's a learning session for all parties.
> Tim and I particularly both want to ensure you and your team is supported in the relatively new Deloitte model and you feel good about their output/deliverables. We weren't the original architects behind the outsourcing arrangement …. But we want all the Verifone teams to be successful on the back-end of it.

61. The Claimant has not persuaded us, on the balance of probabilities, that Mr Rebain also phoned her and directly contradicted the invitation to her to raise concerns. We do not doubt her honesty on the issue. It was her recollection that by phone he placed more emphasis on the "keep an open mind" part and she had perceived that to be an instruction not to raise issues.

62. In any event, we are not persuaded that the discussions between the Claimant and Mr Rebain had any particular significance as far as the decisions to dismiss her are concerned.

14 August 2020

63. The emails in the bundle from Mr Rebain to the Claimant in Summer 2020 included various remarks which, on their face, were praise for the Claimant, and an indication that, while future changes for the EMEA controllership organisation were potentially being planned, the Claimant was to be part of (i) the planning of those changes and (ii) the business after those changes had been implemented. These comments represented Mr Rebain's genuine opinions at the time he wrote them.

64. As we have mentioned above, in August, after an outgoing Dimebox employee made some comments to the Claimant, in presence of Ms Cuva, the Claimant spoke to Mr Rebain about her future, and was assured that he had no plans to make her redundant. These comments represented Mr Rebain's genuine opinions at the time he made them to the Claimant.

65. We are not satisfied by the evidence that, on 14 August 2020, a decision was made, in a meeting attended by Mr Rebain's, that, because of a financial assessment that had been made (whether a reaction to the pandemic, or otherwise) there would be changes made in the near future which affected the Claimant's post.

Mr Makowski's potential departure

66. As of August/September 2020, there were around 9 posts reporting into Mr Rebain, one of which was the Claimant's. One of the other posts (therefore on a similar rung in the reporting structure to the Claimant's) was Director – Finance Controller, and was held by Yong Chen. Ms Chen had around 6 direct reports around the world, one of whom was Dawid Makowski who was based in Warsaw. So, in broad terms, Mr Makowski was on a rung in the reporting structure one below the Claimant's.

67. On 31 August 2020, Ms Chen notified Mr Rebain that Mr Makowski had handed in his resignation, and was planning, at the end of his 3 month notice period, to accept an offer to work elsewhere, for more money and with more responsibility.

68. After an exchange of emails, and in response to a direct question from Mr Rebain about whether Mr Makowski might be willing to stay in the business, Ms Chen replied on 1 September 2020 to say:

> From the information I gathered, he got an opportunity with expanded role and bigger compensation, I am thinking purely matching his new offer wouldn't be realistic for us within Verifone. However, it may be worthy a conversation with him and see if he would be interested in a new role at Verifone, though I am not quite sure what kind of new role we can offer at this moment. Anyway, I will have a call with him in depth as I didn't have time yesterday, and I will keep you updated after I talk to him today.

69. If she fed back further in writing, then that document has not been disclosed. In any event, Mr Rebain had a remote meeting with Mr Makowski shortly afterwards (some time between 2 and 4 September 2020). During the meeting, Mr Makowski commented that when he had joined the business, he had been expecting various financial functions to be transferred from being done locally elsewhere in Europe to be performed at the Warsaw SSC. He suggested that this process seemed to have halted, and that that was part of his reasons for handing in his resignation with the intention of leaving (in 3 months) and accepting the offer to work elsewhere.

70. No contemporaneous written record of what was discussed in this meeting have been disclosed, either in the form of minutes, or any exchange of emails. It was put to Mr Rebain that, during (or shortly after) this meeting, he made a firm promise to Mr Makowski that he would be promoted to a specific post (either a newly created one, or else the Claimant's existing post) provided he retracted the resignation. Mr Rebain denies that, and we accept his denials made under oath.

71. Mr Rebain's account was that hearing Mr Makowski's perspective helped him to realise, in conjunction with what had been discussed on 14 August, that a rapid reorganisation, and transfer of functions to Warsaw SSC was desirable. However, the panel does not accept that the contents of the 14 August meeting were as described by Mr Rebain.

72. Our finding is that, as a result of the discussions between Ms Chen and Mr Rebain, and Mr Makowski and Mr Rebain, at the very end of August, and the start of September 2020, Mr Rebain decided that he would like to retain Mr Makowski in the business. There was no existing vacancy in Warsaw that was likely to persuade Mr Makowski to stay.

73. At some point, it was agreed between Mr Makowski and Verifone that the resignation would be retracted. We have not been provided with documents about that, but it is highly unlikely that the written resignation was simply retracted orally. The Respondent has not proven the date on which this change happened.

74. The documents at pages 320 and 325 show an intention by Mr Rebain on 2 September 2020 to speak to Ms Ellis "to catch up on some European controllership matters" and that the meeting seemingly took place remotely on 3 September 2020. No contemporaneous documents have been provided to show what was discussed. Mr Rebain told her "This should be a quick convo". We find it implausible that a meeting to discuss the matters which Mr Rebain alleged had been agreed on 14 August (as set out in paragraph 22 of his witness statement) would have been "a

quick convo". It is far more plausible, that this was a "quick convo" was connected to Mr Makowski's situation.

27 September 2020 Document

75. In September 2020, Mr Rebain created a document called "Business Change Rationale & Benefits, United Kingdom, EMEA Controllership Re structure". He is not sure exactly how long it took him to prepare, but he is sure that the item in the bundle, which bears the date 27 September 2020, is the final version and not a draft.

76. The document includes the following heading, underneath the title:

> Business Unit: Finance (Controllership)
> EVP: John Tracy (Business Leader: Thomas Rebain)
> HRBP: Christine Blunnie

77. John Tracy was Mr Rebain's line manager. Christine Blunnie was the Human Resources Business Partner responsible for the area of the business in which Mr Rebain worked. Mr Rebain says that he prepared the document with the assistance of Ms Blunnie, and that the contents were discussed/approved by Mr Tracy. He had no explanation for why there emails about this document (going back and forth between him/Blunnie/Tracy or at all) have been disclosed. He says that he has looked and not found any. He cannot remember the method by which communications between him and Mr Tracy about this document took place and nor can he remember the specific dates. He has not found any diary appointments relating to meetings to discuss it. He worked in the same physical location as Mr Tracy and says it is possibly he printed a hard copy of the item and had a face to face discussion with Mr Tracy. There are no minutes of any such meeting.

78. The structure of the HR Department was that HR managers such Ms Wiersma reported to HR Business Partners such as Ms Blunnie. However, Ms Wiersma reported to a different HR Business Partner (not Ms Blunnie) as they were in different business areas. The HR Business Partners reported in turn to the Director of HR.

79. The 27 September document was never shown to the Claimant during her employment, or during the appeal process. The first time that the Claimant saw it was during this litigation.

80. We make the following observations about this document:

80.1. It contains no mention of the phrase "Project Bluebird".

80.2. Nothing about its contents give any hint or suggestion that there had been a discussion in August 2020 and that this document was produced in response to what had been discussed/agreed at such a meeting.

80.3. It does refer to "first phase". In particular, it says:

> The following plan is the first phase in an ongoing evaluation of the EMEA Region Controllership roles. This first phase includes the potential implementation of a new role which may impact the Europe Regional Controller, who is based in London, UK, and managed by Thomas Rebain (VP, Corporate Controller)

80.4. It asserts the proposals are for financial reasons. It proposes that one post only is at risk of redundancy. It identifies that post by using the title "Europe Regional Controller" and by using the Claimant's name. It says that termination date is to be decided by consultation process. It says the consultation is to start 6 October 2020.

80.5. As well as having said the proposals were for financial reasons, it said:

> In conjunction with Verifone's shared service strategy to streamline its back-office functions and centralize accounting into its Warsaw and Shanghai shared service centers, there may be the implementation of a regional accounting leadership role in Warsaw to maximize the effectiveness and efficiency of the Warsaw Shared Service Center (SSC) for accounting, reporting, controlling and general ledger management. This new role would be: EMEA Regional Controller and Warsaw SSC Accounting Manager. This role could be filled internally and given its broad coverage, may deem the current European Regional Controller role at risk for redundancy.

80.6. The bottom of page 2 of the document (208 of the bundle) contained information about the job description. The top of the following page itemised some duties in bullet points.

80.7. The following page showed parts of the existing structure. It showed both job titles and the postholder's name. All the posts reporting to Mr Rebain were shown, and the Claimant's was highlighted in red. This was because it was the only "impacted role". None of the posts reporting to the Claimant were shown (although the number was identified as 16). However, the document included a diagram of the posts reporting to Yong Chen, including that of Mr Makowski.

80.8. The following page showed the proposed new structure of the posts reporting to Mr Rebain. It was identical to the existing, except that the Claimant's name and post-title did not appear, and were replaced by a post called "Regional Controller and Warsaw SSC Accounting Manager". The diagram had Mr Makowski's name and photo shown as the postholder. This was in green, and was the only post in green, and shown as "new role".

80.9. The document said this was a "new and lower-cost position reporting to" Mr Rebain. It did not show what posts would be reporting to Yong Chen, but Mr Rebain told us, and we accept, that Mr Makowski's former post was not deleted, but rather a replacement was recruited to it.

80.10. The document said that *"as part of phase 2 to this plan, other Controllers reporting to Kidist may later be deemed redundant after all Controller role evaluations are complete*."

80.11. It asserted that implementation of the plan would achieve $36,808 in savings. It gave no details of the calculation. Mr Rebain told us that he had compared the Claimant's current salary to what he expected he might have to offer Mr Makowski in Poland. He claimed that, in fact, the Respondent had eventually offered the post to Mr Makowski at a lower salary, and so the saving was actually greater than stated in this document.

80.12. The document asserted the intention to proceed fairly, and in accordance with UK employment law, following an initial meeting with the Claimant on 6 October 2020.

2 October 2020 email

81. The Claimant wrote to Mr Rebain on 2 October, with the heading "Org structure". (212). She referred back to conversations they had previously had, and spoke about her own workload. One of her reports had left without being replaced, and she referred to the need for clarity about who would be doing that person's work going forward (and that she could not do it directly herself in the long term).

82. At the time, the Claimant believed that the 6 October meeting might have been triggered by this email. She now accepts, having seen the 27 September document, that the Respondent had already planned to start redundancy consultation on 6 October before Mr Rebain read this email.

6 October 2020

83. The meeting with the claimant on 6 October took place remotely via Teams.

84. It was stated in the meeting that Verifone had major global restructure plans in all business units due to reasons of the pandemic and not meeting business numbers.

85. While it might be correct that other parts of the business were restructuring for those reasons, it is our finding that that was not the reason for the proposals/decisions about the claimant's role. Rather, our finding is that the more specific trigger for the plans was Mr Rebain's meeting/discussions with Mr Makowski in early September 2020, as discussed above.

86. The claimant was told in the meeting that the redundancy process would begin and that there would be a further meeting which would be described as the first formal consultation meeting and the invitation for that would be sent to her shortly.

87. This was a short meeting. The notification that she was at risk of redundancy was a surprise to the claimant given that she had been told, as recently as August 2020, that there were no proposals to delete her role.

87.1. Page 239 of the bundle shows that an email (with time stamp 5.28pm) was sent on 6 October 2020. The contents of that email, which was sent after the meeting had taken place, accurately reflect the contents of the meeting.

87.2. We do not know (though it is not important) which time zone the 5.28pm refers to. The email was not sent to the Claimant. It was sent by Ms Blunnie to Mr Rebain. We consider it noteworthy that it was cc'ed to Ms Wiersma. We consider it noteworthy that there was nothing in the email to explain why it was being cc'ed to Ms Wiersma, and we infer that Ms Blunnie believed that Ms Wiersma would know what the email related to, and why it was sent to her. No document has been disclosed to show Ms Wiersma querying why this email was sent to her.

88. In the meeting on 6 October, the Claimant was told that her role was at risk of redundancy and that one potential restructure plan was to simplify the structure of the control ship and to reduce the size of team and put her at risk of redundancy. She was not told during the meeting whether hers was the only proposed redundancy or whether there were any others.

89. At page 213 of the bundle there is another email from Ms Blunnie to Mr Rebain and this was also on 6 October. It was sent at 2206 and cc'ed to Ms Wiersma. Again it is not clear which time zone, this refers to. We assume (though it is not important) that it is the same time zone as the one on page 213 and (therefore) that it was sent about four and a half hours later.

89.1. This email contains the phrase "Project Bluebird phase 1" in the subject line. Within the documents in the bundle, this was the earliest reference to the name Project Bluebird in the documents which have been disclosed by the Respondent.

89.2. To the extent that the respondent claims that the name for and the details of Project Bluebird were discussed and decided on 14 August 2020, the respondent has not proved that to our satisfaction. We find it inherently implausible that a project of that nature would have been created and named in August and yet no documents would have been created referring to the name of the project until 6 October. It is not mentioned, for example, in the 27 September email. It is our finding that the project name was probably created after 27 September 2020, and the project itself did not commence before Mr Rebain started drafting that particular document, which was in early September, after his discussions with Mr Makowski.

89.3. This 2206 email related to what was to be discussed in the 1st Consultation Meeting.

89.4. The body of the email contains some advice to Mr Rebain about what to say during the meeting. The attachments were called first consultation letter and individual consultation template.

89.5. The letter was in the bundle at page 216. Mr Rebain sent it to the claimant on 8 October by email (without changing the date of the letter, which remained from 6 October, as per Ms Blunnie's draft). The letter invited her to the First Consultation Meeting on Tuesday 13 October 2020.

89.5.1. The letter stated that Mr Rebain would discuss the specifics of the controllership reorganisation proposal and also said that Verifone would try to identify any alternative positions within the business.

89.5.2. It contained a link by which she could access current vacancies.

89.5.3. The letter told her that she could bring a trade union representative or colleague, as a companion.

89.5.4. It said that the aim of the meeting was to discuss the proposed redundancies and how this would affect the claimant role while also giving the claimant a chance to discuss. The letter referred to redundancies in the plural. It stated that the claimant could ask questions to either Mr Rebain or Ms Blunnie.

89.6. The other attachment to Ms Blunnie's 6 October 2020 email at 2206 was an individual consultation template document which was not separately in the bundle, but was accessible in the electronic version of the bundle as it was embedded.

89.7. The fact that it was accessible in this way only became apparent as the respondent's representative re-examined the final witness, Ms Wiersma. None of the other witnesses had been asked any questions about this document.

90. The reason the document came up in re-examination is that the panel had asked Ms Wiersma to comment on whether Ms Blunnie had sent her these two 6 October 2020 emails simply out of the blue, and without any other discussion or communication, either before the emails were sent to her, or on or soon after 6 October.

90.1. In relation to the email on 239 (timed at 5.28pm), Ms Wiersma did not necessarily accept that it had been sent to her at the time. She said that as far as she had been concerned, she had first received it on 3 November. However, the header information was drawn to her attention and she did not dispute that it was accurate. It is, therefore, the panel's unanimous decision that the 5.28pm email was cc'ed to Ms Wiersma on 6 October 2020.

90.2. In relation to the document on 213 (timed at 22:06, and with the attachments mentioned above), Ms Wiersma said that she had noticed that this had been sent to her. She stated that she did not believe that this contradicted paragraph 12 of her witness statement (which said that she had not been involved in the claimant's redundancy process, or the termination of the claimant's employment). Her opinion was that she had previously been asked by Ms Blunnie to supply standard template documents relating to UK redundancy processes and she had done so. She said that she assumed that was why Ms Blunnie had copied her into the email.

90.3. She does not claim to have asked Ms Blunnie why she, Ms Blunnie, had copied her into these items. She does claim that she did not think that she was being asked to provide advice, and that she saw no need to write back, or to respond or to comment on them at all.

First Consultation Meeting (20 October 2020)

91. In terms of the attachment "1st Individual Consultation Template", that this is more by way of a script for the manager to read rather than a document that was supposed to be supplied to the claimant. It was not, in fact, supplied to the claimant.

92. The meeting took place and the minutes appear at pages 238 and 239 of the bundle. While not a verbatim record, those minutes shows that the information conveyed to the claimant at the meeting on Tuesday 20 October 2020 matched the information contained in the template attached to Ms Blunnie's 22:06 13 October email.

93. It had been initially suggested that the first formal individual consultation meeting would be on 13 October. The claimant was not well on 13 October and was absent from work. The last day of her absence was 19 October.

94. The letter inviting her to the rearranged meeting was dated 16 October, because that was the date which Ms Blunnie drafted it and sent it to Mr Rebain. However, Mr Rebain's email sending it to the claimant was actually on 20 October (timed at around 3 AM; it is not clear which time zone that refers to, but regardless of whether it was 3AM for the Claimant or for Mr Rebain, the Claimant received the invitation letter on the same day as her return from sickness absence, and the same day as the meeting).

95. The updated invitation letter repeated the same information as the previous letter (the one inviting her to a 13 October meeting), including the fact that if the claimant had any questions she could contact either Mr Rebain or Ms Blunnie. The claimant did not request a postponement of the meeting and did not wish to be accompanied.

96. During the meeting on 20 October, Mr Rebain said the purpose of consultation was to discuss the proposals and whether there was any way that redundancies could be reduced or avoided. He asked if she had any questions or comments about the proposals process and the claimant asked him to repeat what he had said because she was trying to take notes.

97. The claimant referred back to the four bullet points from the agenda and noted that the respondent appeared to have moved onto item 3. She said she would like an explanation of why the work was going, details of who would manage the team that she had been managing, and what the new structure would be.

98. Mr Rebain's said that it was proposed to reconfigure the claimant's teams, reporting lines so that they would report into the Warsaw shared service centre. He said that the next step would be for the claimant's current team members to be evaluated. He

said that the proposal was cost-effective for the company and met criteria to address budget. The claimant asked for clarification that the manager of the team was to be Warsaw and Mr Rebain said that he expected that to be the case, but that was something that was still being evaluated.

99. The claimant asked if anybody had been recruited for the Warsaw post yet and Mr Rebain said no. He said that the respondent was to go through the full redundancy process and then ultimately present the plan to senior management. He said that depending on the outcome of the redundancy process that would trigger the next stages. In context, he meant that that would trigger what would happen in relation to Warsaw. He reiterated that this was preliminary research and that nothing was official. He said that in the meantime, the claimant's team would report to him. If the redundancy proposal went ahead.

100. There was a discussion about possible alternative work. The claimant had looked at the talent portal link and the only position available was Swedish controller. Mr Rebain said that that role was being re-evaluated given budget constraints. The Claimant correctly understood him to be informing her that he did not expect that role to be available as one that she might have available to her, as an alternative, if the redundancy proposals went ahead. The claimant was subsequently told that this post was not going to be filled. The information she was given about Swedish controller role was true.

101. The claimant queried whether it would in fact be plausible for Mr Rebain to manage the claimant's team of 16 people after she had been dismissed. Mr Rebain said that he would be able to do so and that this would be a short-term arrangement until further decisions were made.

102. There was a discussion about the next consultation meeting date and the parties agreed that the following Friday 23 October would be satisfactory.

103. In the covering email which Ms Blunnie had sent to Mr Rebain (copied to Ms Wiersma) on 6 October 2020 at 22:06, Ms Blunnie said:

> Points to keep in mind during the consultation process:
>
> - We will not open or offer the role to DM – we are thinking about moving the work to Poland because…. (make this the focus, why in Poland: build relationships, manage team better, native speaker needed, leader on the ground needed, etc.)
> - Because we are just **contemplating** this we want to hear her thoughts on it (she may say her piece, but we don't have to agree to it, i.e. if she says "I can do this remote" we can say it's cheaper in Poland and we need someone on the ground there)
> - I advise to not say DM will take role – though legal said it is okay if this is shared, i.e. if it's explicitly asked "who will take the role" we don't want to hide it
> - Steer from offering her the role – this is all still a **proposal** and not official, so more a simple casual ask if she has interest to move to Poland

104. The emboldening is as per the original.

105. Our finding is that it had been anticipated by Ms Blunnie and Mr Rebain that the claimant might potentially wish to do the role in Poland or, alternatively, she might make the alternative suggestion that she could do the role (even if it was technically based in Warsaw) by remaining in the UK and working remotely. The respondent was not willing to be receptive to the Claimant's views on either of those points, and was seeking arguments to try to refute them if she raised them. They were planning to head her off either way: if she wanted to stay in the UK and work remotely, they would say the post-holder needed to be in Poland; if she wanted to move to Poland, they would say that they needed someone who could speak Polish.

106. Furthermore, the reference to DM is a reference to Mr Makowski. Our finding is that both Ms Blunnie and Mr Rebain were aware that Mr Makowski was going to be doing the new job. That was the definite intention. It was not the case that the post was going to be advertised. Furthermore, it was not the intention to allow the Claimant to be considered for it. They were reluctant, however, to tell the Claimant that someone (Mr Makowski) had already been identified. The plan was to tell the Claimant on 6 October that the plans were in the early stages and her views would be taken into account. Ms Blunnie's suggestion was that if the Claimant asked outright if a new postholder had been identified, then the Claimant should be told that they had Mr Makowski in mind (and, we interpret her email to be saying, the Claimant should be told – regardless of whether it was true or not – that this was not yet decided, and could be changed as a result of consultation). However, Ms Blunnie's suggestion was also that, if possible, Mr Rebain should steer the conversation so as to avoid the Claimant asking outright if a new postholder was identified, and that the information should not be voluntarily disclosed by the Respondent to the Claimant.

107. There is a dispute between the parties about whether the role in Poland was exactly the same as the claimant's current role, except was to be moved to Warsaw (which is the claimant's case) or else whether the role in Poland was different in other ways too (which is the Respondent's case). The Respondent's position is that there was a new post being created and it would take on many of the claimant's duties, thereby making the claimant's post unnecessary.

108. Our inference is that the reason for the suggestion that there should be "a simple, casual ask" if the Claimant had any interest in move to Poland was that if the Claimant said "no", then the Respondent would have later been able to say that there had been genuine consultation and that the Claimant had either accepted the role was different to her current role, or else had refused to re-locate with the role. (For avoidance of doubt, we have no reason to think that the Respondent had any plan to try to avoid paying statutory redundancy pay). On the other hand, if the Claimant had expressed willingness to move to Poland, then the 0 Respondent was planning to claim to have considered the suggestion with an open mind, but was intending to say that she was not suitable for one reason or another, such as language skills. The advice from Ms Blunnie was to make sure that the question was phrased in such a way that the

Respondent could plausibly say "no" if the Claimant said she would agree to move to Poland, and that by saying "no", the Respondent could not be accused of having previously agreed that the Claimant had all the attributes needed to undertake the role in Poland.

109. In the actual meeting, Mr Rebain departed from the suggested script in two ways. Firstly, he did not ask the claimant even casually if she was interested in a move to Poland. Secondly, when he was explicitly asked who would take the role he did not answer that it would be Mr Makowski. Rather, he said that he, Mr Rebain, would take on the claimant's duties after the claimant was made redundant, and that the respondent had no plans for who would be appointed to the Warsaw post.

110. On the latter point, it was technically correct that Mr Makowski had not started in post as of 6 or 20 October 2020. We accept that his formal start date was 1 December 2020. We reject the claimant's submission that the document on page 331 of the bundle is sufficient evidence from which we could conclude that Mr Makowski had actually started in the new job on 1 October 2020. That document, apparently created by Mr Rebain around 12 January 2021, does indeed show a start date in the new post of 1 October 2020 for Mr Makowski, but we accept Mr Rebain's account that it was an internal document created for general illustration of the on-going plans for Project Bluebird, and that it contained an error because the exact start date for Mr Makowski had not been an essential part of the information the document was intended to convey.

111. However, our finding is that, while Mr Makowski was not formally in post as of 6 or 20 October 2020, Mr Rebain's plans as 6 and 20 October were firmly (as they had been since early September) that Mr Makowski would be appointed.

Second Consultation Meeting – 23 October 2020

112. After the 20 October meeting the claimant had some computer issues. We are not persuaded that the computer issues were caused deliberately by the Respondent or that they are evidence that the respondent was already treating the claimant as an ex-employee and ceasing/reducing her access to the systems.

113. However, the issues did mean that the Claimant did not have access to documents to which she might otherwise have wished to refer during the consultation.

114. By letter dated 22 October 2020, the Claimant was invited to a second consultation meeting to take place at 1.30pm UK time on 23 October 2020. Mr Rebain was aware of the computer problems, and so re-sent the letter to the Claimant's personal email account, and suggested a meeting platform that he was confident the Claimant would be able to access, even in light of the problems in using the Respondent's software applications.

115. Holding the second meeting on Friday 23 October 2020 was something which had been discussed in the first meeting, and which the Claimant had agreed to. The

respondent did not suggest postponing the second consultation meeting in light of the computer problems and nor did the claimant request a postponement.

116. The meeting went ahead at around 1:30 PM UK time. The meeting lasted around 10 minutes.

117. In the meeting, it was suggested that John Tracy had given feedback, and that, if the Claimant were to be made redundant, then the posts which had been her team would report via the post in Warsaw, rather than to Mr Rebain. It seems more likely to us that that had been the intention all along. The Claimant was never shown the 27 September document, and we have not been provided with any written communications between Mr Rebain and/or Ms Blunnie (on the one hand) and Mr Tracy (on the other hand) discussing the proposals. We find it implausible that there would have been no electronic history of the item having been circulated in some form or other, and been approved by Mr Tracy. Our inference is that the approval of the plan, in its final form, was between 27 September and 6 October, and there was no further discussion with Mr Tracy about it. Rather there was an effort by Mr Rebain (assisted by Ms Blunnie) to disguise the fact that the Respondent had already made up its mind, before 6 October, about the fact that it planned to terminate her employment, and to promote Mr Makowski.

118. Mr Rebain asked the claimant if she had any further comments or questions since the last meeting. She said that she wanted to know about the next stage, and in particular when her last day would be. He said he would have to check and get advice about UK law prior to confirming that and would supply her with the information in the next meeting. Ms Blunnie commented that finalising the last day was potentially part of the consultation process, but first there needed to be a decision about whether the plans would go forward or not, as (according to what the Respondent was telling the Claimant) they were provisional. Ms Blunnie stated that if the claimant wished to move things forward quickly, the respondent would potentially consider the plans finalised and try to move quickly. The claimant said she would want to hear from the respondent the following week.

119. In the minutes (pages 237-238), Ms Blunnie noted that the claimant had appeared to be confused when asked for further comments on the proposals. Ms Blunnie wrote that she did not think the claimant understood that the theory behind the consultation meetings was to give the claimant the opportunity to make counterproposals. Neither Ms Blunnie nor Mr Rebain sought to eliminate that confusion – either in the meeting or later - by expressly stating that the claimant had the opportunity to make other proposals on the organisational structure.

Third Consultation Meeting (28 October 2020)

120. The third formal consultation meeting took place on 28th October at 5 PM UK time. The invitation to it was sent on Monday, 27 October. The invitation letter repeated

similar information to the previous invitation letters, including the right for the claimant to be accompanied and the details of the link to access a list of current vacancies.

121. It is common ground that, prior to the start of this 28 October 2020 meeting, the decision to terminate the claimant's employment had been taken and that, during the meeting, the terms of the termination letter were discussed. It was made clear to the claimant that she was not required to sign anything by way of agreement.

122. The reasons that the consultation exercise ended by 28th of October are in dispute. On the respondent's case this was the attempt to accommodate what the claimant had requested the previous Friday; the Respondent says that, at the Claimant's request, it tried to speed things along and give her clarity about the termination date. On the claimant's case the process was rushed and predetermined and it was not a genuine consultation.

123. The information that the claimant's last day of employment would be 13 November 2020 was conveyed to her. After the meeting, the termination letter was emailed to her that same day, and the letter appears at pages 231 and 232 of the bundle.

Termination Letter

124. The claimant had a contractual entitlement to 5 weeks' notice. Although a payment was described in the letter as "pay for involuntary termination", our finding is that it was effectively a payment of five weeks in lieu of notice. This sum was £9099 gross and was subject to PAYE. Thus, although she was getting around 16 days' actual notice (29 October to 13 November), the respondent was willing to pay the full five weeks in lieu, subject to deductions.

125. The Claimant was also paid for unused holiday and no dispute arises out of that.

126. The letter also said that should get a statutory redundancy payment. The calculation of £4035 is agreed by the parties to be the claimant's correct entitlement to statutory redundancy based on age and length of service and salary. However, there is a dispute in that the claimant alleges she should have been entitled to an enhanced sum. It is not alleged that this was an express contractual entitlement, but it is the claimant's argument that comparable employees had received enhancements, and that there was an implied term that she would also get an advanced redundancy payment (and/or that it was discriminatory not to award one to her). The Claimant does not claim to have been aware of the exact amounts of the enhancements paid to others, but rather she was aware of the fact of enhancements being given. She has repeatedly asked the respondent for information about this, during the appeal process and the litigation.

Appeal Notification and the Protected Act

127. On Sunday, 1 November 2020, the claimant submitted an appeal by email and Mr Rebain acknowledge receipt on 2 November. The document is at pages 234 and

235 of the bundle and it is conceded that this email is a protected act. The text is as follows.

Tom,
I acknowledge receipt of the termination letter confirming my last day with the company is Friday 13th November and I
have the right to appeal.

My Appeal

I don't believe the decision to fire me is on the basis of cost. The overruns between GT and Deloitte alone cover my salary before even considering any other areas to cut costs.

I understand no one is indispensable, and the organisation is bigger than our individual egos. I am shocked and bitterly disappointed by the decision having supported you and the business wholeheartedly in the strategy to move accounting to shared service centre, improve cashflow, reduce costs and increase efficiency.

You never bothered to understand what I do. All our meetings were adhoc with no 1:1 conversation that would give you depth & insight to the range of responsibilities my role entails. You have absolutely no idea to what extent I support the team in delivering their work, and what might fall through the cracks as a result of my exit. It's only on 2nd October I wrote to you about my workload and your response was to fire me.

It was a sheer delight to hear from you that management appreciated my contribution, saving $12 million on covid tax deferrals, and supporting company initiatives throughout my tenure. I consulted you whenever I heard through the rumour mills that I was going to be made redundant, the most recent one being in August when I was told I will be gone by December to which I received an elaborate response from you.

It is clear given I am the only one being made redundant and not even my role, the decision is personal. It is personal due to the lack of appreciation of the value of diversity. Diversity of thought, approach, culture and personalities help organisations become more successful. If you focus on skills and put aside the unconscious bias about me, we wouldn't be talking about my exit. I am not afraid to share my thoughts and opinions while supporting business decisions and strategy. You have been uncomfortable with this mix of personality and have taken the opportunity to fire me with no plan how to manage continuity.

It is unfair to leave me out in the cold in the middle of the pandemic and recession. This has left me incredibly anxious, stressed and embarrassed in my industry and among my peers as it infers there was a problem which will impact other job opportunities.

Christine: In the event the decision is final, please let me know about the cash bonus query and send me a reference.

Thank you,
Kidist

128. The acknowledgement (copied to Ms Blunnie) said that the Respondent would "keep you posted on the next steps". It gave no further information.

129. The claimant had not been well enough to attend work on Friday 30 October 2020. In due course, submitted a fit note dated Friday 30 October 2020, which said that she would not be fit for work because of stress and anxiety in the period 30 October 2020 to 15 November 2020. In other words, the fit note covered the period up to and after the termination date. The exact time and date at which this was sent to the Respondent is unclear. However, the email from the Claimant to Mr Rebain at 13:56 on 3 November 2020 (241) shows that the Respondent received the fit note some time later than that. (We assume this is 13:56 UK time).

Discussions about the Claimant's absence

130. During the Claimant's absence, Mr Rebain informed her team that she had been made redundant. He also told her team that she was on sick leave. He also told her team that she was not expected back prior to her termination date (which was factually accurate, given what the Claimant had communicated to the Respondent).

131. He did not say that she was off sick because of the redundancy. We not have evidence of his exact words, but, on the balance of probabilities, he implied that he thought the absence was connected to the redundancy.

132. He did not state or imply that she was mentally ill.

Appointment of Ms Wiersma; lack of contact immediately after 2 November

133. The acknowledgement email from Mr Rebain was sent during the period in which the claimant was signed off sick that. The Respondent did not ask the Claimant whether she wanted the appeal to be progressed during her sickness absence.

134. Ms Wiersma's evidence to the Tribunal was that she was contacted "on or around 3 November 2020" (paragraph 13 of her witness statement) and asked to deal with the appeal. The person contacted her with Ms Blunnie. There is no documentary evidence in relation to this contact about the appeal "on or around 3 November 2020".

135. At pages 237-239 is an email dated 3 November 2020 from Ms Blunnie to Ms Wiersma and Mr Rebain.

135.1. The introduction simply said:

> Hi Both,
>
> Please review the Meeting Minutes, all consultation minutes are in this email. Tom, please let me know if anything should be added/edited.

135.2. The body of the email of 3 November included minutes for each of the meetings on 20, 23, 28 October 2020. From the introduction, it is clear that Mr Rebain has

not previously been asked to approve the minutes of those 3 meetings. The minutes were not sent by Ms Blunnie to Mr Rebain in any communication that was not simultaneously also sent to Ms Wiersma.

135.3. In addition, the email forwarded the email of 5:28pm on 6 October 2020, which contained the minutes for the 6 October meeting, and which had already been sent to Ms Wiersma and Mr Rebain, at the same time, as mentioned above.

136. There is no reference in this email to Ms Wiersma having been appointed to deal with an appeal. It is odd that it contains an invitation to "both" for them to "review" the minutes; the email does not seem to differentiate between Mr Rebain as decision-maker, and Ms Wiersma as (on the Respondent's case) the person who would be deciding an appeal against Mr Rebain's decision. There is a differentiation in that only Mr Rebain is asked whether he wishes to add or delete anything, but he was at the meetings, and Ms Wiersma was not. Notably, the email does not say, for example: "Tom, I am cc'ing Michelle because she will be handling appeal" or "Michelle, I will forward the other documents to you", etc. There is nothing on the face of the email of 3 November 2020 to show that it was being sent to Ms Wiersma for any different purpose to the emails of 6 October 2020 (5:28pm and 22:06).

137. The Respondent has not disclosed any communications showing how, or when, or if, the Claimant's appeal (of 1 November) or the Claimant's dismissal letter (of 28 October) or the 27 September 2020 memo were forwarded to Ms Wiersma. The Respondent has not disclosed any communications showing that Ms Wiersma was notified that the Claimant was off sick, or any documents which show who decided, or when, that the appeal process would be paused while the Claimant was off sick. Ms Wiersma's evidence is that she was told by Ms Blunnie about the Claimant's sick note; so this must have been after the Respondent received the note, but we do not have the exact time of that.

<u>Communications between the Claimant and Ms Wiersma</u>

138. Ms Wiersma sent an email to the claimant on 19 November 2020 at 9:57 (248). The explanation given to this tribunal for the delay from 3 November to 19 November is that this contact was made after the fit note had expired. The fit note is not mentioned in the 09:57 email, nor in Ms Wiersma's further email that day at 10:06, which was sent after the Claimant had expressed surprise at being contacted following the end of her employment. (The times quoted are South Africa time; the Claimant was two hours ahead).

139. Furthermore, after the Claimant emailed again querying why she was only being contacted about the appeal after her employment had ended, Ms Wiersma answered at 10:57 stating:

> The process is for an outside party (someone form VF not part of the initial consultation process) to review and investigate the process and the minutes.

> After your appeal was received an investigation had to be done, I had to work through your appeal information, the minutes of each consultation and get feedback from all parties, which takes time (an appeal process can take up to 28 days)
>
> I have to consult with you and get your feedback, and I prefer doing so on a call (better in person) but not possible
>
> So if you are feeling comfortable enough for me to continue with the process, please let me know.

140. In other words, there was, again, no mention of the Claimant's fit note.

141. No documents have been supplied in relation to what Ms Wiersma's refers to as "an investigation" which had to be done. As mentioned above, there is evidence that she was sent minutes by email on 3 November, but no evidence of Ms Wiersma asking for other documents, or being sent other documents, or sending lists of questions, or making appointments for (remote) meetings, etc.

142. No contemporaneous written records of any steps in any such investigation were kept by Ms Wiersma.

143. The claimant replied to say that she had not seen the consultation meeting notes and asked for them to be sent to her. The following day, 20th of November, Ms Wiersma said that she would need to speak to legal in relation to sending the minutes to the claimant.

144. On Sunday, 22 November, the claimant sent an email with further questions. A reply was supplied on 25 November. The claimant was told that she could be accompanied to the meeting. She was told that she could have the dismissal and redundancy policy and procedures.

145. The claimant asked for a copy of the calculations that had been used for redundancy within the last five years. What was provided in response - without any other explanation - was a link to the government website for calculating statutory redundancy pay as well as the information about the claimant's age, length of service and salary.

146. On 27 November 2020, the claimant asked for the consultation meeting notes as well as the company policy. She noted that Ms Wiersma had said she had been waiting to hear from the lawyers before providing them. Ms Wiersma sent the meeting notes on 27 November.

147. There were telephone calls between the Claimant and Ms Wiersma as well as these emails. Either Ms Wiersma kept no notes of these calls, or she kept them and did not supply them in accordance with the tribunal's orders for disclosure. On 30 November, Ms Wiersma asked the claimant if the claimant now agreed with the redundancy pay calculation. On 30 November, the claimant replied stating, amongst other things, that her question had not been about minimum payments under UK

legislation but had been about the payments made by the employer to other people who had been made redundant by it in the UK.

148. The same email queried why the claimant had not yet been paid the entitlements as per her termination letter. Ms Wiersma followed that up and there is no dispute that the amounts were eventually paid; they had been paid before the appeal meeting which eventually took place in January. Ms Wiersma did not reply in relation to the claimant's comments about redundancy payments or supply the information.

149. On 7 December, Ms Wiersma chased the claimant again in relation to fixing a date for the appeal hearing. On 22 December, at 14:10 (page 249), the claimant replied to say that she wanted to have the appeal meeting but pointed out that there were three things that she previously asked about and not yet received answers to, namely: the date on which a redundancy payment would be made; the details of the respondent's "employee termination and grievance policy and procedures"; and confirmation on the status of the cash bonus award that had, in the claimant's opinion, "vested on 31st October".

150. On 30 December at 17:47 (also page 249), the claimant sent two further documents to Ms Wiersma as email attachments. One was titled "formal grievance", and that appears at page 257 in the hearing bundle. The other was titled "discrimination case" and appears at page 259.

151. In the first of those document (page 257), there were 3 headings.

151.1. Redundancy was predetermined.

151.2. Contractors kept on board.

151.3. Not offered work in Warsaw.

152. In the document, she pointed out that she had asked to see redundancy payment for the last five years and had not been supplied with them. She said there was a "startling difference" between how her case was handled and how previous redundancies had been dealt with. In context, she was alleging that others had been offered the chance to transfer to an SSC rather than leaving employment. She stated that she believed there was a personal bias against given that the restructure had only involved her.

153. In the "discrimination case" document:

153.1. The Claimant wrote about how the finance team in San Jose had lost their jobs and their work had been transferred to Shanghai and asserted the matter had been handled with sensitivity and empathy.

153.2. She referred to the fact that there had been rumours previously that she was going to be made redundant, but she had been assured repeatedly that it was not accurate.

153.3. She also said:

> After being informed that I was in fact being made redundant and entering into the consultation process, my manager informed my team that I have not taken the news of my redundancy well and I was sick. I have not heard of a similar scenario with my white colleagues. Discretion should be a given rather than ill-informed gossip about my mental health

153.4. She also said that her replacement was a young white man. This is a reference to Mr Makowski because the claimant had learned that he had now taken up the role in Warsaw.

154. The appeal meeting took place remotely on page on 12 January 2021 and the notes are on page 267. The notes are not (and do not purport to be) a record of the actual words used during the meeting. Rather they are Ms Wiersma's brief summary of some of the topics which were discussed.

155. At the end of the meeting, Ms Wiersma said she would reply in due course once the information had been reviewed and discussed with the senior team. On 22 January, Ms Wiersma wrote to the claimant (page 269) to say that things were taking longer than she had expected and "we will have feedback soon".

156. According to her witness statement, Ms Wiersma had a video meeting with Ms Blunnie on 23 January 2021. Her witness statement is signed and dated 6 October 2022. Paragraphs 25 to 28 of the witness statement assert what was discussed in that video meeting. Seemingly the witness statement is drafted from memory, because no meeting notes have been disclosed. According to Ms Wiersma, Ms Blunnie did not email documents to her so that Ms Wiersma could read them in her own time, but shared her screen so that, during the meeting, Ms Wiersma could read the business case document (page 207). The entirety of paragraph 27 and the first sentence of paragraph 28 read:

> 28. I asked Ms. Blunnie for her comments on the Claimant's discrimination complaint [page 259], and she referred me to the business case showing that there was a legitimate business reason for this restructuring which did not relate to the Claimant's race or gender.
>
> 29. Following my review of the documents, I was surprised by the Claimant's discrimination complaint.

157. According to her witness statement, Ms Wiersma had a video meeting with Ms Blunnie and Mr Rebain on 25 January 2021. She describes her recollection of this meeting in the remainder of paragraph 29 of the witness statement. Again, no contemporaneous notes of what was said have been disclosed.

158. On 27 January 2021, at 14:20, (page 265), Ms Wiersma sent an email to the claimant attaching the respondent's policies and procedures and minutes of the meeting of 12 January. In the email, she also stated:

> There seem to be two points first raised in your appeal that you did not raise during the consultation meeting process, which you include in your appeal supplementation document dated 22 December 2020 but not sent until 30 December 2020 ("Appeal Supplement"). Namely, those under the headings, "Contractors Kept on Board" and "Not Offered to Work in Warsaw." Please let me know if you disagree with this understanding of these points not being raised by you previously. Also, as to the first point, please clarify to which contractors you are referring. And as to the second point, please clarify both whether you would be interested in relocating to Warsaw at a market-adjusted salary and whether you believe you would be qualified to lead a team in Poland.

159. The Claimant replied the same day, at 14:57, (page 347). Amongst other things, she said: "*Yes, I would have considered working in Warsaw at a market adjusted salary if it was offered*."

160. Ms Wiersma wrote to Michael Dupree, a senior employee in charge of rewards, for information about the claimant's stock unit cash equivalent payments. We do not have a reply in the bundle. In her witness statement, Ms Wiersma states that she referred this matter to Ms Blunnie to investigate.

161. On 29 January 2021 at 14:45 (page 271), Ms Wiersma emailed the appeal outcome (pages 272 to 275). The letter stated that it would comment on each of the following, and it did so.

1. That the decision to make your role redundant was predetermined;
2. That contractors were not terminated as an alternative to your redundancy;
3. That you were not offered the new role of EMEA Regional Controller and Warsaw SSC Accounting Manager; and
4. That the Company decided to terminate your employment for reasons that were discriminatory on grounds of race.

162. For the first of these, the appeal letter made no mention of the 27 September document. It asserted that the matter had not been pre-determined, that the Claimant had not suggested alternatives during the October meetings, and: "*The reason for making your role redundant was based on budgetary constraints in 2020 and the 2021 financial plans, leading to a proposal to reorganise the workflow in accounting and controlling, and therefore reducing the size of the team in the UK*".

163. For the second, the appeal letter said, in effect, that the existence of the work which the contractors had been doing was not something that would have prevented the Claimant's redundancy. It is clear from the letter that the implication is that – had the Claimant hypothetically taken over the work – she would have been redundant some time sooner rather than later. The letter does not make clear whether Ms Wiersma

had reached a conclusion as to whether or not the work was suitable for the Claimant in principle. Ms Wiersma's stated reasons for these conclusions are "*I accepted Ms. Blunnie's verbal assurance that the contractors were fulfilling defined tasks on a temporary basis for the Company and that their contracts were not going to be renewed once they expired.*" (Witness statement paragraph 35).

164. For the third, the appeal letter stated that the Claimant had not said, in October, that she would be willing to move to Poland. It said that, had she raised the matter, then Polish language skills and other matters would have been considered. It states that a candidate has "now" been appointed, but makes no reference to the date. For example, it makes no reference to whether this was before or after the Claimant's appeal was lodged.

165. Furthermore, under this heading, the letter asserted that "as a matter of law" the Respondent was only required to consider "other roles that are in the same location where you are based".

166. The full text under heading number 4 was:

> I was very sorry to read your statement saying that you felt discriminated against. This is a grave accusation which I, and the Company, take very seriously.
>
> The Equal Opportunities Policy in the UK Employee Handbook and Verifone's Anti-Harassment Policy set out quite clearly that Verifone does not discriminate against employees on any protected grounds, including race, and will not tolerate any employee doing so. It is not true to say, as you did, that Verifone does not provide training to managers on matters of diversity. As recently as 3 December 2020, the Global Head of HR sent out a reminder to People Managers within Verifone reminding them to undertake their online Workplace Harassment Prevention Training by the end of the year.
>
> I understand that you felt very unhappy when your position was at risk, and it has clearly been a difficult time for you being made redundant. However, I have found no evidence to support your allegation that the decision to make your role redundant was, in any way whatsoever, motivated by race discrimination of any kind, including at the level of unconscious bias. The decision to make your role redundant was purely a business decision made for structural and financial reasons alone and was not a reflection on you or any characteristic that you have.

167. The letter stated the appeal was rejected, and that there was no further right of appeal.

The Law

168. The burden of proof provisions are codified in s.136 Equality Act 2010 ("EQA") and s.136 is applicable to all of the contraventions of EQA which are alleged in these proceedings.

> **136 Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

169. It is a two stage approach.

169.1. At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

169.2. At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

169.3. If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

170. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

171. The burden of proof does not shift simply because, for example,

171.1. the claimant proves that there was a difference in race between her and a comparator, and a difference in treatment. Nor does it shift simply because, for example, she proves that she has been treated less favourably than her comparator.

171.2. Nor does it shift simply because the Claimant proves that there was a protected act and that, at some point in time after the protected act, she was subjected to a detriment.

Those things potentially indicate the possibility that there was discrimination or victimisation. They are not sufficient in themselves to shift the burden of proof, something more is needed.

172. It does not necessarily have to be a great deal more. Depending on the circumstances, it could - in an appropriate case - be a non-response from a respondent or an evasive or untruthful answer from an important witness.

173. In terms of assessing the burden of proof provisions as per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering any one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA

174. Section 123 of EQA 2010 states (in part)

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

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

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

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) For the purposes of this section—

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

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

175. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

176. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. However, that does not mean that the lack of a good reason

for presenting the claim in time is fatal to the extension request. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

177. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to: the length of, and the reasons for, the delay on the part of the claimant; the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123; the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents and whether it contributed to the time limit being missed; any specific reasons that, because of the delay, the Respondent is less able to defend itself.

178. Ultimately it is a balancing exercise, balancing the prejudice to the claimant if the extension is refused against the prejudice to the respondent if the extension is granted.

Direct Discrimination

179. Direct discrimination is defined in s.13 EQA.

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

180. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

181. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been

treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

182. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

Victimisation

183. Victimisation definition is in s.27 EQA.

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

184. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

185. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

186. A person subjected to a detriment if they are placed at a disadvantage and there is no need for a claimant to prove that their treatment was less favourable than a comparator's treatment.

187. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

188. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for

the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

189. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

190. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

191. S.136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

Unfair Dismissal

192. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

193. Section 98 ERA states, in part:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

194. Usually, provided the respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which (usually) means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, taking into account the respondent's size and administrative resources. Typically, the tribunal's analysis includes the question of whether the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, the tribunal decides whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA). In carrying out the analysis, it is important for the tribunal to make sure that it does not substitute its own decisions for those of the employer. In particular, it is not relevant whether the tribunal members would have applied a sanction short of dismissal, or carried out a further stage of investigation, etc, so long as the employer's decisions were not outside the band of reasonable responses.

Employer's "reason" for dismissal

195. As mentioned, (what is now) section 98(1) ERA requires the Respondent to show the "reason" (or "principal reason") for the dismissal. The Court of Appeal discussed the meaning of the word "reason" in this context in Abernethy v Mott, Hay and Anderson [1974] I.C.R. 323

A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law. In particular in these days, when the word "redundancy" has a specific statutory meaning, it is very easy for an employer to think that the facts which have led him to dismiss constitute a redundancy situation whereas in law they do not; and in my opinion the industrial tribunal was entitled to take the view that that was what happened here: the employers honestly thought that the facts constituted redundancy, but in law they did not.

So the reason for the dismissal was not redundancy but something else. The tribunal found that the principal reason for the dismissal related to the capability of the applicant for work of the kind which he was employed to do

196. It is the actual thought processes of the person (or group) taking the decision to dismiss that have to be analysed, and the tribunal must make findings of fact about what set of facts/beliefs caused that person (or those persons) to decide to dismiss the Claimant. This is the analysis required by section 98(1)(a), and it is separate and distinct from what is required by section 98(1)(b).

197. As per subsection (1), the dismissal will be unfair if the employer fails to show the (principal) reason for the dismissal [s98(1)(a)] and, alternatively, the dismissal will be unfair if the employer shows the (principal) reason for the dismissal, but fails to demonstrate that that reason either falls into one of the categories in subsection (2) or falls into the category "SOSR" (as discussed in more detail below) [s98(1)(b)]

198. Once the findings of fact have been made, as required by section 98(1)(a), if the "reason" is not the one which the employer claimed, then the dismissal is unfair. If it is the "reason" which the employer claimed, then section 98(1)(b) requires the tribunal to decide what "label" should be placed on the "reason".

Redundancy

199. Section 139 ERA states in part

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.
>
> (2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
>
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

200. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation. In an unfair dismissal case, where the employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence. If there was such a state of affairs, then, as made clear by the House of Lords in Murray v Foyle Meats Ltd [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "wholly or mainly attributable to" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

201. The latter step is a crucial part of the reasoning. It is not merely sufficient for the tribunal to be satisfied that a redundancy situation existed. The reason in the Abernethy sense must be determined. See, for example, Kellog Brown and Root (UK) Ltd v Fitton & Ewer UKEAT/0205/16/BA UKEAT/0206/16 at para 24. In that case, the reason was found to be not the closure of a work location (though that would have been a redundancy situation) but the employees refusal to move to a new work location. Thus, the dismissal was not "wholly or mainly attributable" to the redundancy situation, and the correct label for the dismissal reason was not "redundancy".

202. If the reason for the dismissal, it is entirely irrelevant why the redundancy situation existed, and whether the employer could have done anything to avoid it. If those points come into the unfair dismissal considerations at all, then they might be considered as part of section 98(4).

203. More generally, as regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunal must remember that it is guidance, and does not replace the wording of section 98(4). where Browne-Wilkinson J

203.1. The employer should give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment, either with the Respondent, with an associated employer, or elsewhere.

203.2. The employer should consult (usually with representatives) as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer should seek to agree the selection criteria with the representatives, and be willing to continue to engage about the processes for applying those selection criteria

203.3. The employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

203.4. The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations representatives as to errors or unfairness in the selection.

203.5. The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

204. In Elkouil v Coney Island Ltd [2002] IRLR 174 at [14]:

> The warning, the giving notice of risk, that is spoken of there is an essential prerequisite of the consultation process, because without it the representatives of the employee will not be able to formulate a strategy or consider what suggestions they can put to the employer. In this case it is true that a single person was being made redundant and no union was involved, but the principles are exactly the same.

205. The nature of fair consultation was considered in R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [1994] IRLR 72 at [24]:

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
>
> *Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation*.

206. In Compair Maxam, it was emphasised that

> The purpose of having, so far as possible, objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for quite other reasons, e.g. for union activities or by reason of personal dislike.

207. In Teixeira v Zaika Restaurant Limited Neutral Citation Number: [2022] EAT 171, having referred to that passage of Compair Maxam, the EAT added (paragraph 21) that as well as the risk of the lack of objective criteria being used to get rid of an

employee, a pool of one could be used that way as well, and therefore tribunals should examine a decision to choose a pool of one with worldly-wise care.

208. In the same case, the EAT pointed out that it was established by Capita Hartshead Ltd v Byard [2012] ICR 1256 that the tribunal must not substitute its own views, for that of the employer, on the issue of the appropriate pool from which the employee to be dismissed might be selected. That applies even if the pool consists of just one person.

209. The importance of consultation where there is a potentially going to be a pool of one was recently discussed in Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2022] EAT 139. There should generally be consultation before the pool is finalised in any event, but that is potentially even more important in circumstances in which the selection of the pool means that the claimant is effectively certain to be dismissed as redundant.

210. When deciding on whether the dismissal was fair or unfair, the tribunal's analysis might include, as well as the size and resources of the employer; whether it has relevant policies and procedures, and if so have they been followed; has it followed the same method and processes as in previous similar exercises, and, if not, what was there a reason for acting differently this time; was there an urgent need to act quickly to save the business. There is no single uniform process for redundancies that must be followed by every single employer. It is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant.

SOSR – "some other substantial reason".

211. The second part of section 98(1)(b) refers to "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". We will use the shorthand SOSR, as did each counsel in their submissions.

212. The use of the word "other" is significant. A dismissal reason does not fall within the category SOSR if, in fact, it actually falls within one of the specific definitions in section 98(2). That being said, there is nothing whatsoever wrong with a respondent relying on SOSR as an alternative label, in addition to one or more of the specific reasons set out in section 98(2).

213. Potentially, the reorganisation of the staffing of a business, in circumstances which do not lead to a redundancy situation, might fall into this category.

Unauthorised Deduction From Wages

214. Part II of the Employment Rights Act 1996 deals with Protection of Wages. The right not to suffer unauthorised deductions is described in section 13. Wages are defined

by section 27. Employees (and other workers) have the right to receive the wages properly payable on each pay date.

215. Deciding what wages are actually properly payable (on a particular occasion) may require the Tribunal to analyse the meaning of the contract, and to find facts. The payment in question must be capable of quantification in order to constitute wages properly payable under S.13(3) ERA. There may be complex disputes as to the correct quantification; however, the mere fact alone that quantification might require further findings of fact (or further disclosure/evidence) at the remedy stage does not necessarily mean that a claim is outside the jurisdiction granted by Part II ERA provided that the Claimant can show that she has not been paid quantified or quantifiable sums properly due under the contract.

Breach of Contract

216. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") gives employment tribunal the jurisdiction to deal with claims for breach of contract brought by an employee, where that claim arises, or was outstanding, on the termination of the employee's employment. Such a claim might seek damages for breach of a contract of employment or any other contract connected with employment and/or the recovery of a sum due under such a contract. There are certain restrictions and procedural requirements as set out in the Order.

Analysis and Conclusions

Unauthorised Deduction From Wages / Breach of Contract

217. We deal first with the matters set out at paragraphs 14 to 16 of the list of issues.

218. In principle, a claim based on the theory that "my contract was varied so that wages properly payable on 31 October / 31 January (for example) included a sum payable by quantifying the number of RSUs which would become vested – but for the variation - and multiplying by an ascertainable amount for the value of 1 RSU" would fall within the jurisdiction granted by Part II ERA.

219. A similar argument could be based on breach of contract. That is, that a cash sum had become payable as a result of the variation of contract. Further, this would have been within the employment tribunal granted by the Order, the Claimant's case being that an entitlement to a particular payment had arisen, and had not been paid (as it should have been, on her case) during employment, or as a result of the termination.

220. Furthermore, from the documents in the bundle, there was no particular difficulty in calculating the number of RSUs which would become vested on particular dates under the three schemes. The evidence about the precise nature of the variation was somewhat vague, but the general gist was that there was an agreed cash replacement option based on an assessment of the value of shares. Had we found

in the Claimant's favour in terms of liability (in principle) then quantifying the claim might have required further evidence about how the evaluation was done.

221. The payslips disclosed immediately before submissions, in response to the orders we had made, were for:

    28 September 2018

    26 October 2018 (* - SOV)

    21 December 2018

    28 November 2019

    28 January 2020 (* - SOV)

    27 March 2020

    28 April 2020 (* - SOV)

    28 May 2020

    26 June 2020

    20 July 2020 (* - SOV)

222. We received several of these multiple times. There were, as the list shows, several payslips of which we received no copies at all (eg for 11 months of 2019).

223. In the list above, the ones we have marked (*-SOV) showed a payment described as "Share Option Value" and the others did not.

224. The payslip for 28 October 2020 (page 281) of the bundle also included Share Option Value. Further, that item showed a running total of £20,199.07 for Share Option Value. That is consistent with the aggregate of the amounts shown for the tax year starting April 2020 (£7018.88 + £7415.39 + £5764.80).

225. On that basis, we infer we can rely on the running total in the January 2020 payslip (which is £28712.17) as showing the sums paid for SOV in the tax year 2019/2020.

226. The October 2018 payslip shows that the payment in the current month was £4644.88, and the running total was £12117.79. Thus, the amount for SOV paid in that tax year, in prior months, was £7,472.91. This is not inconsistent with the document produced by the Respondent in the course of this litigation (page 283 of the bundle) which purports to show that the cash equivalents attributable to October 2018 vesting of RSUs (that is, what would have vested in October 2018) but for the variation was £1,170.08 under the first scheme, and £3,474.79.

226.1. Since £1,170.08 plus £3,474.79 sums to £4644.88, that makes the document on page 283 consistent with the Respondent's argument. What is shown on 283, for the first scheme, is the timetable for the vesting of all 1065 shares in that scheme, in thirteen instalments (one for 25%, and twelve for 6.25% each).

226.2. The October 2018 payment is said to represent the sixth instalment. In other words, according to the Respondent's document prepared for this litigation, the previous five were, as per the pre-variation situation, awarded as RSUs, but the sixth and seven later instalments were paid as cash equivalents.

226.3. Contrary to the Claimant's case, there is not shown to be a fifth instalment, awarded as RSUs in July, followed by a gap in October, before the sixth instalment was paid in cash, 3 months in arrears, in January 2019.

227. According to the Respondent's schedule (page 283), the only occasions on which there was a payment of cash equivalent under all three schemes were January 2019, April 2019, July 2019, October 2019, January 2020, April 2020 and July 2020, after which the entitlement under the first of the three schemes was exhausted.

228. The schedules alleges the payment made in January 2019 for cash equivalent of SOV was £1,205.34 + £3,544.06 + £9,660.72 = £14,410.12. The third of the 3 payments listed is the large payment said to be equivalent to 25% of the full entitlement under the third scheme. We have no contemporaneous document which directly verifies that payment having been made in that month.

229. However, for the tax year 19/20, the schedule shows:

April 2019:	£1,148.17 + £3,409.73 + £2,331.14	= £6889.04
July 2019:	£1,220.30 + £3,569.83 + £2,440.60	= £7230.73
October 2019:	£1,242.96 + £3,692.22 + £2,523.59	= £7458.77

230. Those three together aggregate to £21578.54. This does not exactly match the running total on the November 2019 payslip, which was £21577.55. However, significantly, for each of the 3 months, there is a consistency in the document in the amount shown, and the cash equivalent for 1 RSU (eg £17.39 for April 2019).

231. For the Claimant's case (that the cash equivalent to be paid 3 months in arrears from the vesting date) to be correct, the sum for 25% of the entitlement under the third scheme would have been paid in April 2019. In other words, it would have been paid in April 2019, and have been part of the aggregate running total for tax year 19/20 shown on the November 2019 payslip. However, the schedule on 283 and the November 2019 payslip are consistent with each other (apart from the £0.99 difference) and with the Respondent's position that the (larger) first instalment under the third scheme was paid in the preceding tax year (in January 2019).

232. The Respondent has not proved beyond reasonable doubt that it has made all the appropriate payments. However, even taking account of the missing payslips, the Claimant has failed to prove that her recollection / understanding of the way the scheme operated is sufficient for a liability finding in her favour. She has not proven that, as of the termination of her employment, there were RSUs which would have (but for the variation) have vested in October 2020, such that a payment of the cash equivalent of those RSUs would (but for the termination of contract) have become due in 2021.

233. The available documentation is incomplete, but is consistent with the Respondent's case that (i) the July 2020 RSUs contained components under all 3 schemes, and the cash equivalent was paid in July; (ii) no payment under the first scheme was due in October 2020, the thirteenth and final instalment having been paid in July 2020; (iii) the RSUs which vested (under the second and third schemes only) in October 2020 had the cash equivalent paid in October 2020.

234. No further RSUs, under any of the schemes, vested after October 2020 and prior to the cessation of the Claimant's employment in November 2020.

235. Furthermore, even had the Claimant been given (5 weeks) notice, rather than payment in lieu of notice, by the termination letter dated 28 October 2020, no further RSUs would have vested prior to the end of her employment.

236. The schemes make clear that RSUs would only vest during employment. Although we have not seen a document showing the variation, there is no reason to think that the parties agreed that the cash equivalent for the RSUs were going to be paid even after the entitlement to the RSUs would have ceased under the original schemes.

237. The unauthorised deduction and breach of contract claims each fail because the Claimant has failed to show that there was any underpayment of the entitlement in connection with the RSUs.

238. In saying this, we have taken account of the fact that there should have been disclosure of the payslips at any earlier date. However, the Claimant would have had contemporaneous access to the payslips (even if she had not downloaded copies for her personal use contemporaneously, or prior to the computer problems which immediately preceded the end of her employment). She had the opportunity to study the August 2022 schedule (page 283 of the bundle) and to seek to find inconsistencies between that and the payslips and P60s to which she did have access. She has failed to prove inconsistencies or cast doubt on the Respondent's explanation of the payments made.

<u>Unfair Dismissal</u>

239. It is the unanimous finding of the Tribunal that Mr Rebain decided, in early September 2020, that he wished to retain the services of Mr Makowski and that, in order to achieve that, he formulated a plan to take the duties of the Claimant's post and

transfer those duties from Uxbridge to Warsaw, and to allocate those duties to Mr Makowski, so that the consequent increase in responsibilities and increase in pay would persuade Mr Makowski to retract his resignation and agree to stay with Verifone.

240. Furthermore, it is our unanimous finding that the duties which were to be allocated to Mr Makowski were more or less exactly the same as those which the Claimant had been performing. Mr Rebain was unable to highlight any particular aspects of the roles which were different. The post was to be performed from Poland, rather than Uxbridge. However, the driving motivation had been to retain Mr Makowski, rather than to impose a requirement that the postholder had to live in Poland.

241. We do accept that the Respondent had had a longer term plan to transfer the activities of the Claimant's team to the Warsaw SSC. However, that plan had been on hold, and would not have been implemented in September 2020 were it not for the fact of Mr Makowski's resignation (in order to take up employment elsewhere), and Mr Rebain's decision to take steps to avoid his departure.

242. A decision by an employer that it did not require a EMEA financial controller in Uxbridge is potentially a redundancy situation within the definition in section 139(1)(b)(ii) ERA. In this case, the employer decided that it wanted to retain Mr Makowski, and it was that fact which led it to decide that the Claimant's job duties should be moved to Mr Makowski's location. Since it did not need two EMEA financial controllers, moving the duties to Warsaw meant that it no longer required anyone in Uxbridge to perform those duties.

243. So, it was not the redundancy situation which led to a decision to dismiss the Claimant. It was the desire to retain Mr Makowski (which led to a decision to allocate the EMEA financial controller duties to him - albeit with the job title "Regional Controller and Warsaw SSC Accounting Manager") which led to the redundancy situation. Put another way, contrary to what was stated to the Claimant on 6 October 2020, the redundancy situation did not arise at that time because "Verifone has major global restructure plans occurring in all business units, due to reasons of the pandemic and not meeting business numbers." Nor did it arise, as claimed in the tribunal hearing, because of the mid-Year financial review in August 2020.

244. The inform/consult meetings that took place in October were not part of a genuine consultation exercise which was genuinely intended to give the Claimant all the relevant information and to give her a chance, before decisions were made final, to influence the outcome.

245. It is clear to us that, on the contrary, there was a pre-determined outcome, which was shown in the 27 September 2020 memo, to terminate the Claimant's employment and to put Mr Makowski in as her replacement in the structure (with a different job title, and based in Poland, but otherwise doing the same job).

246. Ms Blunnie and Mr Rebain conferred about how best to avoid anything which the Claimant might raise becoming a problem that might get in the way of the intended outcome. The plan was to avoid telling her that she could take the job in Warsaw, but Ms Blunnie's suggestion was to find out if she was potentially willing to specify that she did not wish to go there. If the Claimant had expressly said that she did not wish to go to Warsaw, then it is clear to us from the documents that this express answer would have been used to try to justify that there had been reasonable consultation. Whereas, had she expressly said that she was willing to go to Warsaw (or asked to remain living in the UK, and to commute and/or do the job remotely) then the Respondent had objections lined up. In fact, Mr Rebain did not expressly ask the Claimant if she was interested in a potential move to Warsaw; the Respondent has sought to assert that the Claimant failed to tell them that she was interested in that move, and therefore they inferred that she was not. That is simply an attempt to justify the fact that they made no attempt to explore with her whether she might be suitable to occupy the post after it had been moved to Poland; their reasons for not expressly exploring that with her is that they did not want her to put forward arguments about why she was suitable.

247. Ms Blunnie and Mr Rebain also had discussions about being guarded about what to say about Mr Makowski. It seemed to be Ms Blunnie's advice (based in part, it seems, on her understanding of the legal advice) that telling the Claimant that Mr Makowski had been identified (as potentially suitable) was legitimate, provided it was made clear that nothing was final. In fact, our decision is that this would have been false, because the decision was already made, and the consultation was a sham. Mr Rebain did not even go as far as Ms Blunnie had recommended; he avoided saying anything at all about Mr Makowski, despite (a) the 27 September 2020 document, which was not shown to the Claimant making clear that the Respondent had plans for him and (b) the Claimant asking specific questions that would – had the Respondent not being evasive – led to frank disclosure about the fact that the Respondent anticipated appointing Mr Makowski (rather than having a recruitment exercise). For example, the 20 October 2020 minutes record:

> KZ asked if we've recruited someone in WAW yet – Tom's response was no, and that we will go through full redundancy process and then ultimately present this plan to senior mgmt. What the final outcome of the redundancy process is would trigger next stages. Everything is preliminary research and nothing's official as of yet.

It was technically correct that no-one had been recruited, but the decision had already been made that Mr Makowski was going to have an internal promotion, and the answer was deliberately misleading. Furthermore, we are not persuaded that anything was going back to Mr Tracy. He had already approved the plan, as per the 27 September 2020 memo.

248. Although it is true that the Claimant did not make specific counter-proposals during the October meetings, Ms Blunnie noticed that the Claimant did not seem to understand that she could do so.

249. Thus the process up to and including the termination letter was unfair.

250. The appeal process did not cure the unfairness of the process up to the dismissal letter. The Respondent took no action to liaise with the Claimant about the appeal until after the after the termination date and we are not persuaded (given the lack of contemporaneous mention of it) by the assertion that this was because the Claimant was signed off sick. We not satisfied that Ms Wiersma was someone who was completely separate from the original decision. We have not been given a satisfactory explanation for the fact that she was copied in on the 6 October emails if she was not involved in the original process, or of why she did not query, around 6 October, why those emails were being sent to her, if she was not involved in the decisions (about what to tell the Claimant and when) being made around that time.

251. Ms Wiersma was more junior than Ms Blunnie and worked in the same department (HR) albeit not directly reporting to Ms Blunnie. We accept that Mr Rebain, rather than Ms Blunnie, was the decision maker. However, Ms Wiersma was more junior than him too.

252. Furthermore, we have seen no contemporaneous documents instructing Ms Wiersma that she was to be the appeal officer, or on what terms. She has not disclosed any contemporaneous notes of what questions she asked, or what answers she received.

253. We are unanimously of the view that Ms Wiersma did not conduct an appeal investigation with a genuinely open mind. The fact that her decision was going to be to reject the appeal was pre-determined. Had she felt otherwise, she would have approached the matter entirely differently, and would be able to show us (for example) emails requesting documents from Rebain and Blunnie which she could peruse in her own time (rather than simply be shown them on a shared screen during a video meeting, which is her account of what happened) and would be able to show that she had prepared lists of questions that needed to be answered, and that she had taken a careful note of what she had been told.

254. To specifically answer the questions at 5, 6 and 7 of the list of issues:

254.1. The reason for the dismissal was that the Respondent had decided that the duties which the Claimant had been performing would be performed, henceforth by Mr Makowski in Warsaw. The reason that the Respondent decided that was that Mr Makowsi had handed in his resignation and was going to leave. In order to persuade him to stay, it was decided to promote him and give him a pay rise. In order to achieve that promotion and pay rise, it was decided to move the Claimant's duties to his location. The Respondent benefited because it paid Mr Makowski less than it had paid the Claimant, but that was not the reason that it made the decision, in September 2020, to go ahead with this reorganisation.

254.2. The decision was not by reason of redundancy, because the decision that the duties would not be performed by an EMEA Controller in Uxbridge flowed from the fact that the Respondent wanted to retain Mr Makowski.

254.3. During the hearing, the Respondent did not seek to persuade us that the desirability of retaining Mr Makowski was such that the need to do so could be "some other substantial reason" which was a fair reason to dismiss the Claimant. In theory, the need to retain Employee A could amount to an SOSR reason for dismissing Employee B. However, the pleaded SOSR reason (being "namely, a business reorganisation carried out in the interests of economy and efficiency") was different to that.

254.4. On the facts of facts of this case, we do not find either potential SOSR reason to be a fair one:

254.4.1. The Respondent has not shown that Mr Makowski's retention was so important to the business that it justified dismissing the Claimant. Further, it did not tell the Claimant at the time that that was the reason, and nor did it allege that in the response to the claim. It is our decision that – contrary to the arguments made to us by the Respondent – the desire for Mr Makowski's retention was the reason for the dismissal.

254.4.2. The Respondent has not shown us that the reason was "in the interests of economy and efficiency". While it was true that there had been a longer term plan – under his predecessor – to move functions to the Warsaw SSC, Mr Rebain had placed those plans on hold. As we said when rejecting redundancy as the reason, his primary motivation for the decisions made in September 2020 was a desire to retain Mr Makowski specifically, rather than a more general plan to have the duties performed by someone in Warsaw.

254.5. The procedure followed by the Respondent was one which no reasonable employer would have followed. This would have been an unreasonable process even had it been carried out by a small employer. In fact, this was a large employer with an in-house HR function.

255. The dismissal was not fair. Even had we accepted that the reason had been redundancy or "some other substantial reason" then we would have still decided that the dismissal was unfair because the process followed was so unreasonable.

<u>Race Discrimination</u>

256. In terms of the reason why the Claimant was dismissed, we have already addressed that when dealing with unfair dismissal.

257. We are unanimously of the view that the Claimant's race was not the conscious reason for the dismissal. However, we still have to consider whether race played any part (consciously or unconsciously) in the process.

258. As per paragraph 8 of the list of issues, the Claimant defines her race as black for the purposes of the section 13 EQA complaint. Mr Makowski is not black.

259. The list of issues at paragraph 9 contains four allegations, (a) to (d), of direct race discrimination.

(a) The Claimant was singled out for the redundancy procedure

260. This is factually accurate in the sense that the Claimant's post was the only one which was affected.

260.1. Prior to the Claimant's dismissal, there had been other redundancy exercises. However, on the Respondent's own case (as discussed below), those were separate and different to the events of September and October 2020 which led to the Claimant's dismissal.

260.2. Following the Claimant's dismissal, there was a wider reorganisation. That wider reorganisation was termed "Project Bluebird Phase 2" and what the Respondent did in relation to the Claimant was termed "Project Bluebird Phase 1". However, our decision is that they were separate processes. The Claimant was not consulted in relation to the so-called "Phase 2" as she had already been dismissed. None of those affected by the so-called "Phase 2" were consulted during September and October 2020 as it was only the Claimant's post which was (according to the 27 September 2020 memo) at risk. The memo and the information given to the Claimant in the October meetings were to the effect that the Respondent would look, in due course, to review the other posts, but had not done so.

260.3. In other words, it was clear even at the time that only the Claimant's post was affected as of September to November 2020.

260.4. As discussed under the unfair dismissal heading, our decision is that the reason for that is that Mr Rebain had decided that he wanted Mr Makowski to be promoted and had decided that, to achieve that, he would transfer the duties of the Claimant's post to Mr Makowski.

261. There is a difference in race between the Claimant and Mr Makowski and a difference in treatment. Taking into account section 23 EQA, we do not find at Mr Makowski is an actual comparator. His circumstances were different to the Claimant's. He was in a different job to her (during September and October 2020) and he was based in Poland. He had handed in his resignation.

262. There is a difference in race between the Claimant and some of her team members and a difference in treatment. Taking into account section 23 EQA, we do not find any of them is an actual comparator. They were more junior than her and in different jobs.

263. There is a difference in race between the Claimant and some people at her grade and a difference in treatment. Taking into account section 23 EQA, we do not find any of them is an actual comparator. None of them was EMEA financial controller based in Uxbridge.

264. The correct hypothetical comparator is someone who was a different race to the Claimant (for example, white) who was "EMEA financial controller" based in Uxbridge at the time (early September 2020) that Mr Makowsi handed in his resignation. In other words, the question for this tribunal panel to answer is whether, had the EMEA financial controller been a different race to the Claimant (for example, white) then would the Respondent have reached the same decision? Would it have put that person (and only that person) at risk of redundancy.

265. We have considered all the facts which we have found, including that, in some respects we have rejected the Respondent's account of what happened (for example that the decision directly flowed from a financial review meeting in August 2020, or that the consultation commenced with an open mind as to the outcome). We have taken into account that the highly relevant 27 September document was produced and not shown to the Claimant at the time.

266. However, our analysis, having considered section 136 EQA, and the cases mentioned in the legal section above, is that the burden of proof has not shifted. Although we have found the Respondent's actions to have been unreasonable, it is our decision that there are no facts from which we could conclude (in the absence of any other explanation) that the Respondent would have made different decisions in relation to a hypothetical comparator of a different race.

(b) The Claimant was dismissed

267. It is factually accurate that the Claimant was dismissed.

268. For the same reasons discussed in relation to item (a), the correct hypothetical comparator is someone who was a different race to the Claimant (for example, white) who was "EMEA financial controller" based in Uxbridge at the time (early September 2020) that Mr Makowsi handed in his resignation. In other words, the question for this tribunal panel to answer is whether, had the EMEA financial controller been a different race to the Claimant (for example, white) then would the Respondent have reached the same decision? Would it have dismissed that person (purportedly by reason of redundancy) by letter dated 28 October 2020, with termination date 13 November.

269. To a large extent, the analysis overlaps with that for the decision to inform the Claimant that she was at risk of redundancy. The fact that the Respondent was going to remove her duties from her and allocate them to Mr Makowski was pre-determined by no later than 27 September 2020.

270. An additional factor, in relation to dismissal, is whether the hypothetical comparator, would have been offered work which was alternative to that EMEA controller, as an alternative to being dismissed from the Respondent's employment. The list of issues refers to comparators for that (being white female based in Ireland; and 2 to 3 Asian females in the UK team). Although we accept that more junior employees had obtained alternative work in the past, rather than being made redundant, the specific circumstances of the Claimant's more senior position, and the forthcoming review of the junior posts, was a distinguishing feature. They are not actual comparators.

271. Our decision is that the burden of proof has not shifted. Although we have found the Respondent's actions to have been unreasonable, it is our decision that there are no facts from which we could conclude (in the absence of any other explanation) that the Respondent would have made different decisions in relation to a hypothetical comparator.

272. Further, we are satisfied that the reason why the Claimant was not offered the work of a contractor is that those contracts were due to come to an end, and the reason she was not offered any vacant position from those that had previously been reporting into her was that the Respondent was planning to review and reduce (and potentially relocate to Warsaw) those posts in the near future.

(c) Between 1 November and 13 November 2020, Mr Rebain informed the Claimant's colleagues, by conference call to her direct reports, that the Claimant would be leaving the company; that she was off sick; and had not taken the news of redundancy well, implying she was mentally ill.

273. It is not our finding that Mr Rebain implied that the Claimant was mentally ill. He did, however, imply that her sickness absence was connected to her redundancy.

274. It is not inherently suspicious that he would tell the Claimant's colleagues that she was (i) leaving the company and (ii) was not going to be attending work before the termination date. It is not inherently suspicious that he would tell the Claimant's colleagues that the reason for the absence was sickness or that the reason for the termination of employment was redundancy.

275. The burden of proof has not shifted. There are no facts from which we could conclude that he would have made different announcements (or in different words) in relation to a hypothetical comparator. We are satisfied that the reasons he made the announcements is that he thought the colleagues should have information about the changes in management structure, and that those changes would be immediate, and that the Claimant remained an employee (albeit off sick) as opposed to someone whose employment had terminated without notice.

(d) The Claimant's termination payment was limited to her minimum statutory rights on redundancy.

276. There is a difference in treatment between the Claimant's treatment, and other employees who had left on redundancy terms.

277. The exact nature of the job roles of those other employees does not prevent them being actual comparators. Those within the alleged comparator group had a large array of different jobs.

278. There are facts from which we could conclude – in the absence of any other explanation – that the difference in the Claimant's treatment was because of race. This is because the facts show that a significant number of people were offered enhanced voluntary redundancy and the Claimant was not. The Respondent says that this was because circumstances were different in September to November 2020 than for those earlier redundancies; however, that is not something which prevents the burden of proof shifting, but rather is a matter to take into account when we decide whether the Respondent has shown that race played no part of the decision.

279. The explanations given by the Respondent have been:

280. On 15 September 2022, the Respondent's response to a document request from the Claimant had been

> *[**the Claimant's request**] Any documents relating to the comparators in particularly regarding redundancy payments beyond the statutory minimum, for the past 3 year prior to my termination. Prior to litigation I repeatedly requested documents relating to the redundancy payments of colleagues and as pleaded at para 22d of my claim, I believe white colleagues were given enhanced redundancy payments whilst I was paid statutory minimum due to my race.*
>
> *[**response**] I have not been able to locate any documents that relate to white colleagues receiving enhanced redundancy payments due to their race. A redundancy exercise was undertaken in 2018. However, any enhanced redundancy packages paid at that time were related to that particular restructuring exercise. Under the Company policy that exists at the time of your complaint, only contractual and statutory redundancy payments are paid. Everyone is treated the same under that policy.*
>
> *Any previous enhanced redundancy packages were specific to those circumstances in connection with the acquisition of the Company by a private equity firm in 2018, and for that reason the Company was under no obligation to provide you with the same package. For example, a white male was not paid an enhanced redundancy package in 2020 either – he was treated the same as you.*

281. On 6 October 2022, in correspondence, the Respondent's representative offered the following explanation.

> *Until April 2020, the respondent's policy was to offer enhanced redundancy payments in exchange for releases of any potential claims, generally using a multiplier of 2.25 x a week's pay for each complete year of service. After April 2020, this policy changed: the respondent stopped making such offers and since May 2020 pays only statutory (not enhanced) redundancy payments.*

282. The Claimant alleged that was inconsistent with paragraph 42 of Ms Wiersma statement which read:

> *The UK redundancy policy is very clear [page 197] under the heading "Severance (Global Policy, modified)" that "eligible permanent employees based in the UK will be entitled to the statutory redundancy payment". The only exception to that policy is if the employee has a specific contractual entitlement to an enhanced payment which is very rare and unusual (the Claimant did not have a contractual entitlement) or as part of a specific business reason. For example, certain enhanced redundancy payments were made in connection with a restructuring exercise following the acquisition of the Company by a private equity firm in 2018. For that reason, the Company was under no obligation to provide the Claimant with the same enhanced package in 2020 long after that particular restructuring exercise was completed. The Company did not treat the Claimant less favourably in relation to her statutory redundancy payment as other UK employees have also been made redundant around the same time.*

283. On 10 November 2022, the Respondent's representative replied by saying:

> *(1) There is no formal written policy related to enhanced redundancy payments prior to April 2020 – we do not have any further policy documents we can provide to you in that regard. We have, however, located the attached document related to Project Sunrise which is consistent with the Respondent's position as outlined in our email to you dated 6 October 2022. The attached document will be added to the Tribunal bundle.*
>
> *(2) The "exemptions" referred to in Michelle Wiersma's witness statement are unwritten and (as above) are not contained in any formal written policy – it applied prior to April 2020. …*

284. For completeness, the policy, as per page 197 of the bundle, does not specify that UK employees will get no more than statutory minimum. It confirms (unsurprisingly) that they will not receive less than statutory minimum. It is silent about whether there will be any discretionary enhancements to redundancy pay or about whether there exists a separate policy which might deal with when, if ever, discretionary enhancements to redundancy might be offered.

285. However, the Respondent has proven to our satisfaction that the document on page 362 of the bundle was a consultation document in relation to a specific reorganisation. It was for the consultation which started in October 2018. It did discuss enhanced redundancies, but far from stating or implying that this was in accordance with an over-arching and/or pre-existing policy about enhancements, it expressly said that terminations would be (i) by way of statutory redundancy pay but that (ii) employees could enter into without prejudice discussions which might lead to "enhanced redundancy package." In our view, the comment about exiting employees on statutory redundancy terms could not have been made if the employees had any right to an enhanced package. A formula for the enhanced package was set out, but the document made clear that signing a settlement agreement was required.

286. The Respondent's explanation in the correspondence of 6 October 2022 is not accurate. However, the 15 September explanation is accurate. Paragraph 42 of Ms Wiersma's witness statement is generally accurate, save for the comment about the 2018 exercise having long since been completed. Decisions/terminations continued to take effect until 2020.

287. However, in 2020, there were several employees, not just the Claimant, who were (i) not covered by that 2018 consultation document and (ii) made redundant and (iii) with no enhancement, and no offer of enhancement in return for signing a settlement agreement. For the employees placed at risk the following year (as part of Phase 2 of Project Bluebird), there was no enhancement.

288. The Respondent has proved that the reason that the Claimant was not offered an enhancement is that the Respondent had already decided that it would not replicate the terms which were on offer for the reorganisation in 2018 for redundancies which were part of reorganisations starting in 2020 or 2021, etc.

289. The Respondent has proved that the decision not to offer the Claimant the opportunity to have without prejudice discussion about an enhanced package (in return for a settlement agreement) was in no way whatsoever because of race.

290. For these reasons, the Tribunal's unanimous decision is that all the complaints of direct discrimination are unsuccessful.

Victimisation

291. There are four alleged detriments set out in paragraph 13 of the list of issues. The protected act (paragraph 12 of the list of issues) is the same for all four and is conceded to be a protected act.

> *a. The Claimant was not paid a circa £5000 cash bonus which was due for the three-month period from August to October 2020*

292. Item 13(a) fails on the facts. The Claimant was not due a further payment. The reason why the Respondent did not make a payment was that it believed that no payment was due. Its belief was (as far as the panel is aware) correct.

> *b. Between 2 November and 13 November 2020, Mr Rebain informed the Claimant's colleagues, by conference call to her direct reports, that the Claimant would be leaving the company; that she was off sick; and had not taken the news of redundancy well, implying she was mentally ill.*

293. This allegation of victimisation fails for similar reasons that the corresponding claim of direct discrimination fails.

294. Mr Rebain did not imply, or seek to imply, that the Claimant was mentally ill. He did imply that her sickness absence was connected to her redundancy.

295. The burden of proof has not shifted. There are no facts from which we could conclude that he would have made different announcements and/or in different words if the protected act had not occurred. We are satisfied that his motivation for the announcements was nothing to do with the protected act, and was that he thought the colleagues should have information about the changes in management structure, and that those changes would be immediate, and that the Claimant remained an employee (albeit off sick) as opposed to someone whose employment had terminated without notice.

c. The Respondent failed to adequately investigate the Claimant's allegations of discrimination or provide a process of appeal.

d. The Respondent made superficial findings dismissing the allegations of discrimination.

296. Both the majority and the minority deal with items c and d at the same time in giving the reasons for their decisions.

297. Unanimously for items 13c and 13d:

297.1. It is accurate to say that the Respondent failed to adequately investigate the allegations of discrimination;

297.2. It is accurate (but not suspicious) that no right of appeal against Ms Wiersma's decision on the discrimination was offered. This allegation was dealt with (whether rightly or wrongly) as part and parcel of the appeal against termination and Ms Wiersma did not believe that offering a further appeal against dismissal (or a first appeal against the part of her decision that dealt with discrimination) was necessary or appropriate.

297.3. It is accurate to say that the Respondent made superficial findings in relation to discrimination.

<u>Majority Decision (Non-Legal Members Harris and Wimbor)</u>

298. The burden of proof has shifted.

299. The fact that the Claimant would be offered a right of appeal was always clear. Ms Blunnie reminded Mr Rebain of that when providing the script for the dismissal meeting (228-229). Further, the right was mentioned in the termination letter itself.

300. Furthermore, the Respondent purports to have an anti-harassment policy. This includes (page 11 of the policy; page 165 of the bundle) the information that:

5.1 Conducting Investigations

Investigations are handled by qualified and specially trained individuals who serve under confidentiality obligations. Reported complaints or allegations will be reviewed by the Legal Department and relevant information will be passed on to the appropriate

department for an impartial and timely investigation and follow-up. Investigations will be customized depending on the nature and circumstances of the complaint.

While the process may vary from case to case, investigations will generally be completed in accordance with the following steps:

- Upon receipt of a complaint, [person or office designated] or its designee (hereinafter referred to as the "Investigator") will conduct an immediate review of the allegations and may take any interim actions as deemed appropriate.
- The Investigator will request and review relevant documents, including electronic communications and phone records, and will take appropriate steps to preserve such information relevant to the investigation.
- The Investigator will interview necessary and relevant parties involved, including any relevant witnesses.
- The Investigator will create written documentation memorializing the investigation and the basis for the decision, together with any corrective action(s).
- The Investigator will take appropriate steps to store written documentation and associated documents in a secure and confidential manner.

Upon completion of the investigation, a determination will be made as to whether the conduct at issue violates this Policy, and/or the nature of the disciplinary action or other corrective measures, if any, to be imposed. The Investigator will notify the reporting individual and the individual(s) about whom the complaint was made, and any corrective actions will be implemented promptly.

301. The investigation in this case bore no resemblance to that stated guidance. Notably, there was no documentation created memorialising the investigation (other than the outcome letter, and the email exchanges with the Claimant).

302. The Claimant was subjected to a detriment both by the inadequate investigation, and the failure to supply findings which were more than superficial. The outcome was pre-determined.

303. There are facts from which we could conclude, in the absence of another explanation, that the Respondent (acting through) Ms Wiersma, subjected the Claimant to the detriment because of the protected act. The relevant facts include: prior to the protected act, the Claimant had been given information which stated she could appeal, and gave her a time limit to do so; after the protected act, there was delay in contacting the Claimant about the appeal; failing to keep notes; failing to disclose internal correspondence about the appeal.

304. The majority do not believe that there was no internal correspondence about the appeal, and find the lack of disclosure suspicious.

305. There was no engagement with the particular points the Claimant raised, and Ms Wiersma was willing to just take Ms Blunnie's and/or Mr Rebain's word for certain points (eg that the contractors contracts were shortly due to end). There is no evidence that she asked any probing questions or asked to be given documents.

She failed to look into the fact that the 27 September document showed Mr Makowski in post after the reorganisation, and compare that to the information given to the Claimant.

306. The majority decision is that the Respondent has failed to discharge its burden of proof. It has failed to show that the allegation of discrimination played no part whatsoever in the Respondent's actions in failing to investigate adequately or make findings that were more than superficial. For example, in the witness statement, Ms Wiersma suggests (paragraph 38):

> I was not aware that Dawid Makowski, a white male Polish national (no longer with the Company) based in the Warsaw SSC at the time, had been offered this new position until the Claimant informed me of this in the Appeal Meeting [page 267]. However, I was satisfied that the role change was purely part of a wider business strategy to move functions to the Warsaw SSC and that Mr. Makowski was the internal candidate referred to in the business case [page 207].

307. Whereas in the outcome letter, she says:

> After careful review of the business case and the minutes of your consultation meetings, I did not find any evidence that the decision to make your role redundant was predetermined weeks or even months ahead of the consultation period, as you claim. The business case with the proposal that you be placed at risk of redundancy, subject to consultation, was finalized approximately one week before the first consultation meeting with you. Therefore, I believe the Company consulted with you as soon as reasonably practicable once the proposals were finalized.

308. In other words, there is no mention that, following being informed by the Claimant of Mr Makowski's appointment, she saw the 27 September document, which she refers to as "business case" (for the first time, she says, and on Ms Blunnie's shared screen) and noted that Mr Makowski was shown as being in the post after reorganisation. It has not been proven that the claim about not finding any evidence of pre-determined outcome would have been made if the Claimant had not done the protected act (that is, if the Claimant had appealed against dismissal, but without including the suggestion of discrimination).

309. The full section of the outcome letter which dealt with discrimination is quoted in the findings of fact. The first two paragraphs of it simply assert that the Respondent is not the type of employer which allows discrimination, and the third simply asserts there was no evidence of discrimination that race played a part. The timing of, and contents of, Mr Rebain's discussions with Mr Makowski is not touched upon.

309.1. Either there was a failure to take simple and obvious investigatory steps (to piece together the chronology of who decided to put the Claimant at risk of redundancy, and when, and for what reasons) was not taken, and – therefore – Ms Wiersma failed to uncover the information we have set out above (that the reason for the

situation was Mr Rebain's desire to persuade Mr Makowski to retract his resignation)

309.2. OR Ms Wiersma did uncover information about Mr Rebain's discussions with Mr Makowski and decided to avoid mentioning it in her findings that there was no discrimination (and that the appeal against dismissal be rejected).

310. Further, Ms Wiersma fails to engage at all with the comments the Claimant had made during the correspondence about how the Claimant had information that other people got enhanced redundancy, and she, the Claimant, did not.

311. We are not persuaded that the Respondent would have carried out such a poor investigation, and written such an inadequate outcome letter, if it had been simply dealing with an appeal against dismissal. It was the allegation of discrimination which motivated Ms Wiersma to simply deny any wrongdoing by the Respondent whatsoever, without any considered analysis.

312. Thus the majority finds in the Claimant's favour for the victimisation complaints based on items 13c and 13d in the list of issues.

Minority Decision (EJ Quill)

313. I agree with the majority in relation to their comments about how inadequate the investigation was. I agree with the majority about how the outcome letter offers little more than a bare denial of discrimination, and that this is unsatisfactory, and at odds with the Respondent's policies, including the section cited by the majority about the way in which harassment allegations are supposed to be investigated.

314. However, I am fully satisfied that the overall outcome was pre-determined long before the protected act on 1 November (receipt of which was acknowledged on 2 November).

315. None of the facts which we have found could lead me to conclude that the appeal against dismissal would have been dealt with by means of a more thorough investigation or would have resulted in more detailed findings of fact, had the appeal not contained the sentences implying that there had been a contravention of EQA.

316. The alleged detriments themselves – on a narrow reading, at least – specifically refer to the parts of the investigation/ outcome letter which were about the discrimination allegations. My comments in the preceding paragraph are my reasons for finding that the burden of proof has not shifted, even if the alleged detriments relate to the whole of the investigation/ outcome letter. The narrower reading does not, in any event, assist the Claimant. The argument that the Respondent was motivated to make inadequate findings about the race discrimination allegation by the fact that the Claimant had made a race discrimination allegation is not one which I find persuasive.

317. My minority opinion, therefore, is that all the victimisation claim (so items 13c and 13d too) would fail, not just items 13a and 13b.

Next steps

318. There will be a remedy hearing. The date of, and orders for, will be sent separately.

Employment Judge Quill

Date: 6 March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

9/3/2023

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FOR EMPLOYMENT TRIBUNALS