EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Harding	**v**	**Bright Horizons Family Solutions Limited**

Heard at: Reading (hybrid hearing) **On**: 25 and 28 to 30 March 2022, in chambers 4 May 202 and 14 June 2022

Before: Employment Judge George
Members: Mr B McSweeney (remotely, by CVP)
Ms S Blunden (remotely, by CVP)

Appearances

For the Claimant: Mr D Gray-Jones, Counsel
For the Respondent: Ms K Williams, Solicitor

RESERVED JUDGMENT

1. The claimant was wrongfully dismissed.

2. The claimant was unfairly dismissed.

3. The respondent victimised the claimant by subjecting him to a performance improvement plan with effect on 4 March 2020.

4. The respondent directly discriminated against the claimant on grounds of sex when it concluded that certain disciplinary allegations against him were substantiated and should be considered at a disciplinary hearing.

5. The respondent directly discriminated against the claimant on grounds of sex when it dismissed the claimant on 16 October 2020.

6. The respondent directly discriminated against the claimant on grounds of sex when it dismissed the claimant's appeal.

7. The act of victimisation is not part of course of conduct when taken together with the acts of sex discrimination and therefore should be taken to have happened on 4 March 2020.

8. The Employment Tribunal does have jurisdiction to consider the successful allegation of victimisation despite the claim in relation to it not having been presented within three months because it is just & equitable to extend time for presentation of that claim.

9. The remaining issues are to be determined at remedy hearing on 9 & 10 August 2022.

REASONS

1. Following a period of conciliation which lasted between 10 November 2020 and 10 December 2020 the claimant presented a claim form on 21 December 2020 by which he complained of unfair dismissal, sex discrimination, wrongful dismissal and victimisation. The claims arise out of his employment by the respondent as a Chef; his continuous employment started on 30 July 2013 with a previous employer under a contract at page 73, which employment was transferred to the respondent in 2014 and ended with the claimant's dismissal on 16 October 2020. Page numbers in this reserved judgment refer to the page numbers in the joint bundle for the final hearing.

2. The case was case managed by Employment Judge Green at a telephone hearing on 28 January 2022 when the provisional listing of three days was extended to four and the issues to be decided were agreed to be those set out in that record of hearing which appears at page 62. The parties confirmed that the issues to be decided remained those which are set out in the case summary from page 66 onwards which are replicated in these reasons. It was also agreed between the representatives that we should, in the first instance, only decide those issues relevant to liability which were those in paragraphs 1 and to and paragraphs 4 through to paragraph 6.5 on pages 66 to 71.

3. We heard from four witnesses: the claimant, Kathryn Lumsden-Earle – Safeguarding Consultant, who carried out the investigation; Sherralyn Egan – Regional Director, who decided to dismiss the claimant; and Jacqueline Kendall – Operations Director, who conducted his appeal.

4. The witnesses all confirmed the truth of witness statements upon which they were cross examined and referred in evidence to a number of documents in the bundle. That bundle contained the documents referred to in its index, the last of which (excluding the chronology and cast list) was numbered page 1,009. Not all of the documents in the bundle were put in evidence. Some documents were originally disclosed in redacted form (in other words, the claimant and his representatives were unable to read the document in full). The process by which this happened is discussed further below, but when disclosure was subsequently made of unredacted documents, it is not necessarily the case that the whole of that document was then adduced in evidence.

5. At the start of the four day hearing there were a number of preliminaries which the Tribunal was required to deal with. The respondent argued that two pages had been inserted into the bundle in error and were covered by legal

professional privilege. In respect of page 839 it was accepted by Mr Gray-Jones that an email at the top of the page was covered by legal professional privilege and a redacted copy of that page was substituted. It was also accepted that page 840 should be removed. In the end, the tribunal did not have to rule on this argument. Further, a legible copy of page 103 was provided.

6. The background to the allegations against the claimant was that, early in the first national lockdown imposed in response to the coronavirus pandemic, disclosures were made to the respondent's whistleblowing hotline. Such disclosures are referred to in the documents, and in these reasons, as being Convercent Reports. By these disclosures, serious allegations were made in relation to the nursery where the claimant worked but it is common ground that none of the disclosures concerned the conduct of the claimant. They did concern the alleged conduct of the management staff of the nursery. It is sufficient for the purposes of understanding our decision in the claimant's case to say that the allegations were very serious and, at least in relation to OH, sufficiently serious potentially to amount to criminal behaviour and potentially to be career ending. GH was the Deputy Manager at the relevant time and is OH's sister. CL was the Nursery Manager at the relevant time. OH was the "Third in Charge" and a room leader. It was common ground that they were, collectively, the management team.

7. There was a dispute between the parties about whether the respondent had sufficiently complied with their disclosure obligations in relation to documents created during the investigation into the Convercent Reports. This was something which had been raised at the hearing before Judge Green (see paragraph 34 of the case summary). At the hearing before us, we pointed out to the parties that there was a distinction between the obligations to disclose relevant material and whether it was necessary for the determination of the issues for the whole of a document to be adduced in evidence. Disclosure is of documents which term includes audio recordings and videos. If a document contains relevant material which is necessary for a fair hearing then the whole of the document needs to be disclosed but that does not mean that the whole document has to be adduced in evidence.

8. It appeared that the respondent had unilaterally decided upon redactions of documents both within the disciplinary process and within the litigation. For example, at page 217, there were meeting notes of an investigation meeting conducted by KLE when she interviewed OH on 6 July 2020. These were patently an incomplete version of the meeting notes because the meeting had lasted 1 hour and 45 minutes and the notes did not represent 1 hour 45 minutes worth of conversation. A copy was sent to the claimant prior to the appeal outcome which was described as redacted. The word redacted was used there to mean that only part of the meeting was noted in the version of the minutes as first sent to the claimant and this was made plain to him at the time. Similarly redacted meeting notes in relation to other co-workers of the claimant had been relied on by KLE in her management report.

9. The day before the final hearing the respondent disclosed the full versions of KLE's interview with OH in which KLE had investigated allegations against the

claimant as well as other matters. It was necessary for determination of the issues in the case to understand how the allegations against the claimant had arisen and the claimant argued that it was necessary to see the whole of the interviews during the course of which, according to the respondent, allegations against the claimant which were not the subject of the Convercent allegations came to their attention. Those were added to the bundle.

10. Also the day before the hearing, respondent had disclosed further documents in a heavily redacted form which had been inserted into the bundle. There was then further voluntary disclosure by the respondent to the claimant during the course of the hearing of the unredacted version of those documents with a result that the tribunal did not have to rule upon any specific disclosure application. Those additional documents were letters suspending OH, GH and CL, a document entitled HR Sessions dated 11 to 12 June 2018 and a document headed Private and Confidential Investigation Plan. They were added to the bundle. As we say, the Convercent allegations, which we did not have to consider in substance, were extremely sensitive in nature.

11. On day 1 the respondent made an application for anonymisation and restricted reported orders, ultimately limited to anonymising the identity of BS. This application was rejected for reasons given at the time and which are not now repeated. Should written reasons for that decision be required they should be requested within 14 days of the date on which this reserved judgment is sent to the parties. FOR EASE OF REFERENCE, THE INITIALS OF THE FOLLOWING INDIVIDUALS, MENTIONED IN THE COURSE OF THE EVIDENCE, ARE USED IN THIS JUDGMENT: SCARLET BUTLER (SB); MARIA CAPRARU (MA); JEMMA DOVE (JD); GEORGIA HILLS (GH); OLIVIA HILLS (OH); BETH LAKE (BL); CHARLOTTE LINSELL (CL); SAMANTHA SHAW (SS); BETH **SIMMONDS** (BS); AND ESTELLE ZAMMIT (EZ).

12. As a consequence of the above matters, and also because it was necessary for the claimant's representative to take instructions upon the additional documentation that had been disclosed, there was some loss of time. When the representatives outlined their time estimates for cross examination it was apparent to the tribunal, even before time was required for counsel to take instructions on the additional documentation, that the time agreed as being sufficient for the hearing would not be sufficient to allow the tribunal to deliberate and deliver judgment.

13. Although this was a time estimate which had been agreed by the parties as recently as January 2022 to be sufficient, the tribunal considered that it was proportionate to the importance of the allegations raised and the issues involved for both parties that we should allow the representatives the time that they considered appropriate for cross examination. The subsequent need for instructions to be taken meant that there was further slippage of the timetable and it was only possible to complete the evidence in the four day allocation.

14. The representatives agreed that it was a suitable case for submissions to be made in writing and case management orders were made for submissions to be exchanged and responded to prior to the tribunal meeting for a discussion day. We gave due consideration to whether this was a suitable case for written

submissions and reminded ourselves about the words of caution in the Court of Appeal in Pimlico Plumbers Ltd v Smith [2017] ICR 657 para.119 that written submissions do not give the tribunal the same opportunity to test the arguments in the light of the evidence and question the advocates as oral submissions do. Taking into account that both parties were represented, that the legal and factual issues to be decided were clear and both representatives were confident that all matters could be aired through exchange of written submissions, the tribunal was willing to pursue this course and considered that it did provide a fair opportunity to the parties to express their arguments. Written submissions were exchanged and responded to. When forward to the Tribunal, the respondent combined both sets of submissions in one document which is referred to in these reasons as the RSA. The claimant provided initial submissions (referred to as the CSA1) and submissions in response (referred to as the CSA2). We take full account of them all.

15. Prior to adjourning at the end of day four, the tribunal drew certain authorities to the attention of the representatives which we considered to be of potential importance to the decision making. Mr Gray-Jones mentioned authorities upon which he would be relying. The authorities mentioned by Mr Gray-Jones and the Tribunal were: Royal Mail v Jhuti [2020] ICR 731, UKSC, Uddin v The London Borough of Ealing [2020] IRLR 332 EAT, Bennett v MiTAC Europe Limited [2022] IRLR 25, Reynolds v CLFIS [2015] EWCA Civ 439 CA, B v A [2010] IRLR 400, The Law Society v Bahl [2004] IRLR 799 CA, and Olalekan v Serco Limited [2019] IRLR 314. In this manner further steps were taken to ensure that the submissions were able to address all relevant arguments.

The issues

16. **"1 Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 August 2020 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

2.1 The respondent admits that the claimant was dismissed.

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct. The misconduct relied upon is:

2.2.1 On 07 February 2020 the children and staff of the Baby Room made a birthday cake for [OH]. The cake batter was provided to the claimant a chef to be placed in the oven. The claimant stated he would bake the cake. The claimant failed to adequately check the cake to prevent it from burning whilst baking and the other than and not being fit for consumption. Upon enquiry from the staff in the Baby Room, the claimant informed them he had thrown the cake away as it had been burnt. The claimant deliberately allowed the cake to burn/failed to adopt an adequate level of care in checking the baking of the cake as it is been made for [OH].

2.2.2 On 14 February 2020, Valentine's Day the claimant made a decision to make heart-shaped shortbread biscuits for the staff team on his own volition. When he had made them, he had the map to the staff team, deliberately leaving out to staff members, [OH] and [SB] due to not liking them.

2.2.3 During 2015 – 2016 the Claimant was alleged to have followed a member of staff, [BS], into the downstairs staff toilet, locking the door once he and [BS] were in the toilet cubicle and positioning himself in a way which meant that [ES] was unable to leave on at least three occasions.

2.2.4 Around 22 March 2019 the Claimant was alleged to have obstructed the outside of the toilet door stopping staff members from exiting the toilet when they tried to open the door, causing them distress.

2.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 there were reasonable grounds for that belief;

2.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.3.3 the respondent otherwise acted in a procedurally fair manner;

2.3.4 dismissal was within the range of reasonable responses.

3. **Remedy for unfair dismissal**

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Wrongful dismissal / Notice pay**

   4.1 What was the claimant's notice period?

   4.2 Was the claimant paid for that notice period?

   4.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. **Direct sex discrimination (Equality Act 2010 section 13)**

   5.1 Did the respondent do the following things:

      5.1.1 Require the claimant to attend every staff meeting from 21 January 2020.

      5.1.2 Subject the claimant to a Performance Improvement Plan on 04 March 2020.

      5.1.3 Suspend the claimant and commence a disciplinary investigation on 03 July 2020.

      5.1.4 By the disciplinary investigation conclude that four of the allegations which were investigated were substantiated and should be considered at a disciplinary hearing on or around 09 September 2020.

      5.1.5 Dismiss the claimant on 16 October 2020.

      5.1.6 Dismiss the claimant's appeal against dismissal on 11 December 2020.

   5.2 Was that less favourable treatment?

      The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

      If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

      The claimant says s/he was treated worse than [SB] and [BS].

   5.3 If so, was it because of sex.

   5.4 Did the respondent's treatment amount to a detriment?

6. **Victimisation (Equality Act 2010 section 27)**

   6.1 The respondent admits that the grievance submitted by the claimant about [SB] 8 January 2020 was a protected act.

6.2 Did the respondent do the following things:

6.2.1 Require the claimant to attend every staff meeting from 21 January 2020.

6.2.2 Subject the claimant to a Performance Improvement Plan on 04 March 2020.

6.2.3 Suspend the claimant and commence a disciplinary investigation on 03 July 2020.

6.2.4 By the disciplinary investigation conclude that four of the allegations which were investigated were substantiated and should be considered at a disciplinary hearing on or around 09 September 2020.

6.2.5 Dismiss the claimant on 16 October 2020.

6.2.6 Dismiss the claimant's appeal against dismissal on 11 December 2020.

6.3 By doing so, did it subject the claimant to detriment?

6.4 If so, was it because the claimant did a protected act?

6.5 Was it because the respondent believed the claimant had done, or might do, a protected act?"

The law

17. Law applicable to the issues in dispute

17.1 Sections of the Equality Act 2010 (hereafter the EQA) relevant to the issues include the following,

"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.

…

23 Comparison by reference to circumstances

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

…

S.39(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment."

s.39(4) forbids an employer to victimise an employee

> "(a) as to [their] terms of employment;
> (b) in the way [they] afford [them] access … to opportunities for promotion, transfer or training …;
> (c) by dismissing [them];
> (d) by subjecting [them] to any other detriment"

18. The time limits within which a claim under Part 5 of the EQA must be presented are set out in s.123. The tribunal may not consider a complaint under ss.39 or 40 of the Equality Act 2010 which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so. The discretion to extend time for presentation of the claim is a broad discretion and the factors which are relevant for us to take into account depend on the facts of the particular case. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done. The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so.

19. The discretion in s.123 to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

20. Direct sex discrimination, for these purposes, is where the employer treats the male employee less favourably than they treat, or would treat, a female employee in comparable circumstances because of the male employee's sex.

21. When deciding whether or not the claimant has been the victim of sex discrimination, the employment tribunal must consider whether we are satisfied that the claimant has shown facts from which we could decide, in the absence of any other explanation, that the respondent has discriminated against him in the way alleged: s.136 EQA. If we are so satisfied, we must find that discrimination has occurred unless the employer shows that the reason for their action was not that of sex. Igen Ltd v Wong [2005] I.R.L.R. 258 CA – the "so-called" two-stage Igen test.

22. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made. We also bear in mind that discrimination can be unconscious. However, the fact that the employer's behaviour calls for explanation does not automatically get the

employee past the first stage of the Igen test: B v A [2010] I.R.L.R.400 EAT where it was held by the EAT, as recorded in the headnote,

> "Although tribunals must be alive to the fact that stereotypical views of male (and female) behaviour remain common, there must still be in any given case sufficient reason to find that the putative discriminator has been motivated by such a stereotype (or in cases which turn on the burden of proof, that there is sufficient reason to believe that he could have been so motivated)."

23. It is not unusual, as in the present case, that the tribunal has to consider a submission that the employer has behaved unreasonably and therefore that an inference of discrimination can be made. The approach of Elias J in Law Society v Bahl [2003] IRLR 640 cited by Mr Gray-Jones in his written submissions was approved by the Court of Appeal when the case was consider by them ([2004] IRLR 799); see para.101 where they said,

> "In our judgment, the answer to this submission is that contained in the judgment of Elias J in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, … It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J observed (paragraph 97):
> 'Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case.'
>
> Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added (ibid):
>
> 'The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason.'

24. The Tribunal is concerned with the mental processes of the decision maker themselves, with the reason why they acted, whether consciously or subconsciously: Reynolds v CLFIS (UK) Ltd [2015] EWCA Civ 439. Where a decision maker is themselves innocent of any discriminatory motivation but has been influenced by information provided by another employee whose motivation is or is said to be discriminatory that does not mean that liability attaches to the decision maker.

25. Although the law anticipates a two stage test, it is not necessary artificially to separate the evidence when considering those two stages. We should consider the whole of the evidence and decide whether or not the claimant has satisfied us to the required standard, not only that there is a difference in sex and a difference in treatment, but that there is sufficient material from which we

might conclude, on the balance of probability, that the respondent has committed an unlawful act of discrimination.

26. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment than a woman in comparable circumstances, and also whether that treatment was because of sex, those two issues are often factually and evidentially linked. If we find that the reason for the treatment complained of was not that of sex but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL.

27. However, it is important that the appropriate comparator is chosen to meet that the requirement in s.23 EQA that there be no material difference in circumstances save that of the sex of the comparator. Whether considering an individual put forward as an actual comparator or a hypothetical comparator, the Tribunal has to consider what are the relevant circumstances which have to be the same when comparing their case with that of the claimant. An argument that the fact that there had been a different decision maker in the complaint's case and the comparator's case necessarily meant that there was a material difference was rejected by the EAT in Olalekan v Serco Ltd [2019] I.R.L.R. 314, CA.

28. Victimisation is defined in s.27 to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. In this case it is accepted by the respondent that the claimant did a protected act. The question for us to decide is whether the acts complained of were done because the claimant brought that grievance which alleged harassment related to sex.

29. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

30. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases as well as to discrimination cases. If we find facts proved that are sufficient that the tribunal could decide, in the absence of any other explanation, that the respondents acted as alleged by the claimant and did so

because he had done a protected act then we must hold that the contravention occurred. As with a sex discrimination claim, a person's subjective reasons for doing an act must be judged from all the surrounding circumstances including direct oral evidence and from such inferences as it is proper to draw from supporting evidence and documentary evidence.

31. The unlawful motivation, whether (in the case of discrimination) that of sex or (in the case of victimisation) the protected act does not have to be the sole or even the principal cause of the act complained of, so long as it was a more than trivial part of the respondent's reasons. However, dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires Solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

32. In order to find that an act complained of was to the detriment of an employee, both for the purposes of a s.13 direct discrimination claim and a s.27 victimisation claim, the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

33. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

34. The relevant statutory provisions in complaints of unfair dismissal where the respondent alleges that dismissal was because of the claimant's conduct are s.98(1), (2)(b) and (4) of the Employment Rights Act 1996 (hereafter referred to as the ERA). It is for the respondent to show the reason for the dismissal and that it is a reason falling within s.98(2). In this case the respondent relies on conduct which is a potentially fair reason within s.98(2).

35. If the tribunal is satisfied that the respondent has proved a potentially fair reason for dismissal then they must go on to consider whether the decision to dismiss the employee was fair or unfair. That depends on whether in all the circumstances the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee.

36. When the employee's conduct is said to be the reason for dismissal then guidance for the approach we should take to that task is found in the case of British Homes Stores v Burchall [1980] ICR 303 EAT and other subsequent cases which built upon the test which has become known as the "Burchall test". We need to be satisfied that before deciding to dismiss the employer had formed a genuine belief in the employee's guilt. However, in order for it to be reasonable for the employer to treat the conduct as sufficient reason to dismiss

the employer must have had in mind reasonable grounds for that belief and at the stage that the belief was formed the employer must have carried out as much investigation as was reasonable in the circumstances.

37. We must ask myself whether the conduct of the respondent fell within what has been described as the "range of reasonable responses". It is not whether we would have reached the same conclusion as the employers in question, but whether their conclusion or decision was one within the range of reasonable responses to the employee's conduct. The same is true of the employer's conduct of their investigation into the claimant's alleged misconduct. The question for us is whether the investigation was within the range of reasonable responses which a reasonable employment might have adopted: J Sainsbury plc v Hitt [2003] ICR 111, CA.

38. The employer does not need to carry out an investigation of such thoroughness that it could be compared with a police investigation. On the other hand as the ACAS Guide to Discipline and Grievance at Work (2015) says at paragraph 4.12

> "The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against."

39. When considering a wrongful dismissal claim the situation is different in that the tribunal must actually consider whether or not the claimant was in fundamental breach of contract. We must therefore consider whether or not the claimant was guilty of gross misconduct in order to decide the wrongful dismissal claim. If the claimant was in fundamental breach of contract, if she had committed gross misconduct then that would justify the respondent in terminating her contract of employment without notice and the claimant's complaint of wrongful dismissal would fail. Otherwise the respondent would be in breach of contract in failing to give notice of termination of employment.

Findings of fact

40. We make our findings of fact on the balance of probability taking into account all of the relevant evidence which was adduced before us. Where it has been necessary to reach a conclusion preferring one witness's evidence over another, we have done so by comparing their accounts and oral evidence with previous accounts to see whether they are consistent and by comparing them with contemporaneous documents where those exist.

41. We have been shown redacted notes of an HR session at the nursery which took place on 11 to 12 June 2018 and appears to be a composite record of a number of sessions between HR and staff. There are non-specific references to concerns expressed about the claimant by individuals who are the subsequent complainants in the investigation with which we are concerned. There are references to "practice concerns" but almost nothing to say what they were, beyond that he left toast outside the nursery room, which may have been irritating but is not, on the face of it, a disciplinary matter or performance matter requiring formal action – at least as an isolated event. None of the respondent's

witnesses gave oral evidence about anything arising out of that. The claimant denied that management had spoken to him about practise and behaviour prior to his grievance.

42. On 12 December 2019 the claimant was told by one of the nursery nurses that she had been present in the staffroom when SB, in conversation with ES had, according to what the claimant was told, referred to him as a "fucking dick". He reported the incident which he considered to be sex related harassment "as she had refers to me as a male sex organ, and I didn't think that she would refer to a female colleague as a female sexual organ" (para 8 of the claimant's witness statement).

43. He reported it to the nursery manager CL, who told him that she had spoken to SB who apologised in person and left a note (page 104) then that was a sufficient way of dealing with the complaint. The claimant was not satisfied so raised a formal grievance the following day (page 103). It is clear from the terms of the formal grievance that the claimant's understanding was that the context of SB's comments was that the claimant had not prepared a meal which was suitable for a child attending that day who had a dietary preference. His version was that this was because the dietary sheet had been filled in in a way that indicated that the child was not present that day. The claimant said that he would like formal disciplinary action to be taken "Due to the nature of the offence, and because I don't think this is the first (or last if not challenged) time that [SB] has spoken negatively about colleagues." He asked for the investigation to be treated with confidentiality including with the management team. A further copy of the grievance is at page 124. When it was resubmitted on 8 January 2020. In that version of the grievance he says, "I think it is wrong that nothing is being done and think disciplinary action should be taken". He also said that he thinks it is less favourable treatment of him not to take formal action and that had a male member of staff referred to a female member of staff by a sexually specific derogatory term "I think much more would have been made of it".

44. It appears from a supervision record between the claimant and CL of 18 December 2019 (page 116), that she was of the view that if mistakes were made and children were not catered for a full meal must be remade. A note is made that CL was going to check the relevant policy. SB's account given to CL on 31 December suggests that there was a difference of view between her and the claimant about whether the form had communicated sufficient information to him. It also appears that CL told her about a comment apparently made by the claimant that appears to have caused SB to think that the claimant had deliberately not made the meal because he thought the mistake had been made by SB.

45. The grievance was investigated at a hearing on 9 January 2020 (page 132) and SB was interviewed by the grievance decision maker, JD, on the same day (page 127).

46. The grievance outcome in writing is at page 160 dated 21 January 2020. It upholds the grievance on the basis that SB had discussed the claimant in an inappropriate manner when in the staffroom with other colleagues. JD made

some recommendations (page 161). The first was that SB should review and adhere to the Code of Conduct, although she does not specify which part of the Code of Conduct SB needed to be reminded of. She also made recommendations for training to be delivered and the staff to review the "Company Food Safety and Mealtimes Policy and Procedure". She made recommendations which appear to be designed to prevent a child not receiving a hot meal in a like situation should it occur again. She also recommends that the Chef must attend every staff meeting because they "are a valuable opportunity to discuss, review, and share policies and procedures, identify future learning and discuss any troubleshooting in a professional and collaborative forum".

47. It does not appear to be the case that the other individuals said to have been present in the staffroom were spoken to in relation to this grievance in order to reach a conclusion about whether, as was alleged, SB had called the claimant "fucking dick" or whether, as SB said, she had not used the expletive. The reasonable manager would have done so. JD did not engage with the question of whether the comment would be more or less offensive if had it included that expletive. We are mindful that the claimant said that his wish was to remain confidential but an option would have been to recommend a disciplinary investigation to consider whether there was a case to answer for a conduct issue.

48. It was common ground that staff meetings were outside the claimant's normal working hours. Indeed, they were outside the nursery opening hours and therefore they were outside the normal working hours of other staff as well. The respondent's evidence, which we have no reason to doubt, was that throughout the company as a whole, all sites in general expect the nursery chef to attend staff meetings even though that may be outside their working hours. We note that the claimant's contract of employment at page 81, clause 6.2, says that he is required to work during normal working hours and in addition, there may be occasions when he is required to work additional hours "as reasonably required for the proper performance of your duties". We can understand that staff meetings have to take place outside the opening hours of the nursery. There was no evidence that it was explored whether it was possible to communicate the information without requiring all the staff in the nursery to be present. The evidence of the claimant was that the practice in this nursery was not to require all staff to attend until after the outcome of his grievance.

49. Where, in the course of investigating a grievance, it comes to a manager's attention that policies or procedures are not being followed (for example, in relation to cooking a hot meal if there has been a miscommunication in relation to dietary needs) then there is nothing wrong in them picking that up and addressing it, provided it does not cause them to lose sight of the subject matter of the grievance. In the present case, the subject of the grievance was that SB's reaction to the failure to provide a hot meal was not only to blame the claimant but to do so in terms which he complained were offensive and sex specific.

50. JD's outcome has the consequence that the recommendations impacted more on the claimant who brought the grievance than they did on SB against who the grievance was upheld.

51. The claimant had a one-to-one meeting with CL on 4 March 2020 details of which appear in a meeting record at page 137. He told her in that meeting that he felt as though he had been differently treated since making the formal grievance and the specific complaint he made was that he rarely had one-to-ones before making the grievance and now had them regularly.

52. It appears that a Performance Improvement Plan was notified to him and instigated on the same day. The written document starts at page 140. The area of performance to be addressed are three: to attend all staff meetings; to ensure foods are prepared to the correct standards before delivering to the room; and to follow instructions from senior management. CL has recorded that there had been several conversations about some rooms not having their food delivered to a safe standard of eating and staff expressing concerns that they cannot meet the parent's requirements for baking on special occasions, which we take to mean when the nursery is asked to make a cake for a child on its birthday.

53. The claimant's comments recorded on page 141, are that so far as he is concerned there was only one incident of food not being mashed and one conversation about relationships with staff (taking issue with there being "several conversations"). He further comments that the performance plan is drastic and "trying to force me out". He says, "Dropping what I am doing to make cakes for children is unreasonable and unfair." We comment that we have not been shown a job description for the claimant.

54. The claimant also appears to have added to the record of the one-to-one (see page 164) a list of matters that he said he would not do for the staff and standards that he said he wished the staff to adhere to in terms of returning the trolley and collecting food. To judge by the email of CL to the HR Department at page 169 on 5 March 2020, she agreed that the staff should take the trolley back to the kitchen but said that she would expect him to take the food to each room.

55. It is alleged by the respondent that page 169 sets out CL's rationale for the PIP. It certainly appears from that email that CL sent the PIP to HR. To the extent that it is possible for us to make a finding on this point, it there appears that the PIP was instigated by CL from whom we have not heard.

56. The claimant's additions to the record of the one-to-one, see page 162 for example, also addressed a note that CL had expressed concerns about some feedback that she had heard that there were two people in the nursery that he did not get along with and that he had agreed with that. The claimant appears to have substituted "like" for "get along with" – in other words he is saying that he agrees that there are two people he doesn't like but not agreeing that there are two people he doesn't get along with. The next bullet point records that the claimant said that he treats everybody in the nursery the same and he gives

examples of behaviour which are a rational reason to be wary of the particular individuals he says he does not like.

57. As amended, we do not consider there to be anything particularly remarkable in this feedback on his relationship with co-workers. One does not always *like* everyone in one's workplace but the claimant has reasonably identified that this does not have to affect the way that you *treat* people. He gives reasons why he doesn't like them: that OH is making his life more difficult and that SB is still filling out the dietary sheet incorrectly. He appears to have reported that SB was filling out the dietary sheet weekly rather than daily which is contrary to the recommendation of JD. The claimant stated that he thought it was unreasonable to be making birthday cakes for the children. If his allegation about the completion of the dietary forms were true then that would, we consider, make his job more difficult. The claimant appears to have had a discussion in which he set out matters that he did not consider to be part of his job description which, as we say we have not seen.

58. We have not been taken to no specific concerns of substance about the claimant's performance in his role, by which we do not include relationship with co-workers, which pre-date the grievance. We remind ourselves about what was in the June 2018 record of the HR Session (see paragraph 41 above) but that was 18 months before the grievance and there are no records of one-to-one meetings or formal expressions of concern in the meantime beyond a supervision record (page 68) dated 5 July 2018. This records a conversation with the then nursery manager about some staff feeling that the way he communicated with them made them feel uncomfortable. We heard no oral evidence about this part of the chronology and it also records that "all parties feel they have moved forward". In the absence of more evidence, we accept the claimant's denial that management were actively managing his performance.

59. In about December 2018 there had been an investigation in which the claimant was spoken to because he had put a raw egg in a co-worker's bag as part of what he described as part of an on-going joke. The egg had smashed and damaged her bag. He had apologised at the time and no action was taken against him (page 102). He was asked to read and sign the Code of Conduct. The supervision record suggests that the manager accepted that there was no malice involved, that the claimant had shown contrition and had admitted what had happened quickly. Again, this does not concern the performance of his role as chef.

60. The grievance arose in the context of a specific incident where dietary appropriate food had not been prepared and where was a difference of information provided to management from SB and the claimant about whether the fault lay with the chef or the nursery staff. However, it seems to us that the worst that could be said about the claimant was that he made a mistake. It does appear to be the case that SB thought that he was targeting her by not providing appropriate food to the children in her care but there is no evidence before us to substantiate that. There is no evidence to compare his performance in relation to delivery of food to SB's room with that to any other room in the nursery.

61. We consider it to be unreasonable for the respondent to appear to have gone straight to a Performance Improvement Plan in these circumstances. Normal good practice would be to start by informally managing the situation. The email at page 169 does not provide much in the way of an explanation as to why the claimant was placed on a PIP nor is that self-evident from the PIP itself. This is particularly so given the extent to which the claimant takes issue with the account of the number of previous discussions he is said to have had with CL about performance matters; as he made clear in his amendments to the record of the meeting at the time.

62. He did accept that there was one incident where it was said that he had failed to mash food sufficiently to deliver it to the baby room but that does not justify moving to the formality of a PIP on any view. It is not clear why attendance at the staff meetings needed to be on the PIP. It had been a recommendation of JD in the grievance and was apparently something the claimant was unhappy about. However, it does not appear to be said in evidence that he had refused to go despite this instruction and so it is not clear why it was necessary to be included on the PIP. Similarly in relation to the requirement that he follow management instruction; we have not been provided with evidence that suggests that he was not following management instructions and therefore needed to be performance managed to help him to achieve that. The stated actions which he is required to do in order to meet the standard is to bake cakes for children on special days and take food to the rooms. Both of these matters appear to have been bones of contention with the claimant but we have heard no evidence of occasions when he was asked to do either of these things and refused or failed to do so. All in all, it does not seem to us that the respondent has provided a full explanation as to what led to the imposition of the PIP.

63. We move on to consider how the investigation into the claimant came to arise, who took the decision to suspend him and why. This took place when many of the staff were on furlough during the first national lockdown.

64. It seems likely that the Convercent allegations to the whistleblowing hotline were received in March or April 2020, after the nursery closed on 28 March 2020. CH, the respondent's head of safeguarding emailed the generic HR email inbox on 29 April 2020 asking staff to review whether there was "any conduct or PIP information" for the claimant (page 836). On 11 June 2020 CH wrote again to the HR email inbox and said that she was "reviewing" the claimant and asked HR to share with her any investigations involving him, specifically about placing the egg in a handbag (page 842). The response suggests that the advisor did not find the details of the incident set out in paragraph 59 above but they forwarded details of the grievance and investigation to CH. At this point the claimant was on furlough.

65. KLE was on furlough herself when she was contacted and asked to come off furlough leave to carry out an investigation into the Convercent reports. CH, as Head of Safeguarding emailed KLE on 29 June 2020 with the Investigation Plan. This document include allegations which arose out of the Convercent reports but, as we have said, it is common ground that no allegations in those reports were against the claimant. Although the reports were sometimes referred to as whistleblowing or protected disclosures at the final hearing and

may be referred to as such in these reasons, it was not necessary when determining the issues which the Tribunal had to decide to reach a conclusion on whether or not they met the technical definition in ss.43B & 43C ERA. Use of those phrases in these reasons should not be taken to be a conclusion in this regard.

66. KLE's first day back at work off furlough leave was on 29 June 2020 having had a week's notice that she was to return (see page 233 in her interview with the claimant when she explained how her involvement had arisen). It is fair to say that her independent recollection of her instructions was minimal and she relied very heavily upon the documents which she had apparently not seen in some time.

67. To judge by the colour coded and redacted investigation plan, KLE seems to have been directed to question witnesses by highlighting which was colour coded green. Matters which KLE appears to have already been told about were colour coded yellow. Some of those highlighted sections related to matters which were critical of the claimant.

68. Something which stands out from this document is that the allegations or incidents which are not redacted, which can be traced through into the first investigation meeting between KLE and the claimant when she asks him about them. Those which concerned the claimant's alleged behaviour appear to come to the respondent's attention from the police interview with OH (page 3 of the redacted Investigation Plan. There are four bullet points said to arise out of her police interview,

    68.1 She has mentioned the egg incident but described it in terms which suggest she is alleging it was retribution which is contrary to what the manager accepted at the time of the incident more than a year previously (page 102).

    68.2 She alleged that the claimant prepared incorrect food for children at the nursery and that she challenged him on that.

    68.3 She alleged that the claimant had asked a number of female staff out on dates and behaved unprofessionally when they refused.

    68.4 There is the statement that there is a "pattern in the nursey (sic) of convercent being used to drive the management team out".

69. The first communication to the claimant was on 1 July 2020 (page171) which asked him to attend an investigatory meeting to "investigate concerns raised in order to ensure we can deem you safe and suitable for work prior to returning to the nursery." As he was on furlough leave the meeting was to take place via video call. It strikes us that the only allegation mentioned in the Investigation Plan which potentially affects whether he is safe and suitable for work is that he had prepared incorrect food for children at the nursery. We also note that the invitation does not say that he is being investigated under the disciplinary policy or what the possible outcomes are but KLE is described as a safeguarding consultant which implies that there is a safeguarding

concern. Further, the chronology shows that not only has the concern about the claimant been escalated from a PIP to whether he is safe or suitable to be at work when he was placed on furlough leave on 25 March 2020, within about three weeks of the start of the PIP process.

70. However, by 3 July 2020, there had been a change and KLE wrote to the claimant to say that she had tried unsuccessfully to contact him a number of times and that, on reflection, the respondent had decided to "end your furlough leave and place you on suspension with effect from Monday 6 July 2020" pending an investigation into allegations which were not any more particularised than they were in the 1 July 2020 letter. He was told that the suspension was to be on full pay. CL, OH, and GH were all suspended by letters in materially identical terms. Their email accounts were suspended and they were warned not to communicate with any employees, contractors or customers unless authorised by their line manager.

71. KLE appeared to accept that the decision to suspend the claimant was made solely on the basis of the allegations made by OH in the police interview. When this was put to her in cross examination she said "I believe so". This was contrary to her statement evidence (KLE para.16) that she was aware that the furlough rules meant that the claimant could not work and she thought that there was a possibility that the claimant considered that participating in an investigation was "work" for the purposes of the rules of the Coronavirus Job Retention Scheme (hereafter the CJRS). The witness statement essentially gives the explanation that suspension was a tool to make the investigation happen. This was not the explanation given at the time in the letter of 3 July.

72. When the claimant asked for the specific reason that he had been suspended (see KLE's response to his queries on 23 July 2020 at page 187) she said that the reason for the suspension is on the 3 July letter and that the respondent has a legal obligation to ensure that staff are suitable to fulfil their roles and responsibilities suggesting that she has information which potentially puts his suitability for his role into question and the early years foundation stage statutory requirements mean that the respondent has a duty to investigate even if the information does not include specifics. This contemporaneous email therefore also points to suspension being because of the investigation into such allegations which had been made as at 3 July and we are aware of none other than those in the Wokingham Investigation Plan which are stated to have arisen from OH's police interview.

73. There potentially was confusion in the employment world about what could be required of an employee on furlough. However KLE's statement evidence suggests that she thought that the claimant might be concerned that he was unable to attend a meeting when it was apparent from KLE's oral evidence that she has no meaningful recollection of the decision to suspend; she certainly did not come across as remembering making that decision herself. In some of her answers to questions about who decided to suspend and why she gave a circular explanation. The fact that she had confirmed as true the written statement which contained positive information about the decision to

suspend which she then appeared to have no recollection of did not reflect well on her credibility generally.

74. JK said that it would normally be the investigating officer who made the decision to suspend, which would have been KLE but we find, based upon her oral evidence that she was told that he was to be suspended, that it was not KLE who made that decision. We do not know who made that decision.

75. It may be that the claimant and the three members of the management team were suspended in order to facilitate the investigation but it is also fair to say that they were suspended because of the investigation. Whoever decided that they needed to be suspended must have done so because they considered it to be a necessary part of the process by which the investigation was to be undertaken and it is therefore impossible to separate the reasons for the investigation and the fact of the investigation from the reasons for the suspension.

76. We consider the evidence about why the investigation into the claimant was undertaken when the Convercent allegations were not about his behaviour. No evidence has been adduced which predates the letter of 1 July 2020 from KLE to the claimant other than the Wokingham investigation plan. None of the allegations in that investigation plan were, in the end, pursued against him in disciplinary proceedings. KLE merely says that she was instructed to undertake the investigation (KLE para.2) and that on 7 July 2020 she covered a number of aspects which related allegations against the claimant (KLE para.3) and that during the course of her investigation into the wider concerns raised through Convercent she obtained information relating to a number of allegations against the claimant which she detailed in the invitation to the second meeting she held with the claimant on 12 July. She does not explain in that witness statement what the origin of the specific allegations against the claimant was.

77. It is clear from what we have seen that the allegations which trigger the involvement of the claimant in the investigation as potential suspect of misconduct all come from OH – who was interviewed in the context of potential criminal activity. In the context of child safety allegations they are inappropriate behaviour allegations, performance matters (see para.68 above). It's a safeguarding investigation and yet only the second allegation against the claimant – questioning whether he was preparing the right food for children - is a potentially a child safety matter.

78. Another difference between the 1 July 2020 letter and that sent on 3 July is that the latter refers to the potential for the matter to go to a hearing under the respondent's disciplinary procedure. The claimant would therefore clearly know that he was a suspect but is not provided with any specific details about what he is suspected of. If the reason for suspension had been to bring the claimant off furlough leave because the respondent did not wish to risked falling foul of the CJRS then a bespoke letter would have been needed to reassure the claimant (and the members of the Management Team) of that fact. What then happened between 1 and 3 July 2020 which meant that it was necessary to suspend the claimant?

79. It does appear to us as though someone, possibly the Head of Safeguarding, directed KLE to investigate the claimant despite him not being the subject of Convercent allegations. Of the three allegations included in the Wokingham Investigation Plan which are specifically about the claimant, one had already been investigated and dealt with (see para.42 above) although that may not have been known to CH (see page 841-842). The concern about preparing incorrect food appears to fall within the scope of the PIP and there had only been 3 weeks between the imposition of the PIP and furlough. In the absence of evidence from the person who decided that the allegations against the claimant merited investigation alongside those against the management team, it is hard for us to understand why the initial allegations were sufficiently serious to merit that investigation in all the circumstances.

80. When considering the allegations against the claimant which were pursued we adopt the descriptors used by Mr Gray-Jones to identify the specific allegations against the claimant:

    80.1 The Birthday Cake Allegation;

    80.2 The Valentine's Day Biscuits Allegation;

    80.3 The Toilet Cubicle Allegation;

    80.4 The Trolley Allegation;

    80.5 The Toast Allegation.

81. In the 7 July 2020 investigation meeting KLE asked the claimant about methods of food preparation; his understanding of his rights to report any concerns; his relationship with management teams; what to do if anything inappropriate happens; whether there had been anything which had made him feel uncomfortable. She asked him what conversations he had had during lockdown with fellow employees. We bear in mind that KLE was, in part, investigating anonymous Convercent reports and may have hoped that through interviewing sufficient numbers of people she would encourage the witness to come forward.

82. However, she also asked the claimant about the egg incident which had been among those listed in the Wokingham Investigation Plan as having arisen from OH's police interview (page 227), about the Valentine's Day Biscuits (page.228), about the Birthday Cake incident (page.229), about asking OH out on the date (page.230), about the PIP and about the statements on the PIP about relationships with people. The claimant covertly recorded the meeting of 7 July 2020 and has produced a transcript (page 234) which KLE told us she accepted. The claimant had disclosed the audio file during the course of litigation but did not, therefore, seek to play any part of it or of the corresponding audio from 12 August 2020 meeting.

83. The additional matters in para.81 above either come from the PIP itself or from OH's interview with KLE which took place on 6 July 2020 (page 217 is

the part interview record as originally disclosed to the claimant before the appeal). The first question which is recorded within this interview is KLE saying "Who do you think said it?" and OH replying that she thought it was the claimant. It is apparent from the balance of the interview that OH believes that the Convercent reports come from the claimant because he doesn't get on with her. The full interview record was disclosed shortly before the start of the final hearing before us and the document at page 217 is extracts from the full record; it is not always easy to see the logic behind what has been included and what not – in particular an answer from OH which disclosed the What's App groups she was in with colleagues from the nursery (and therefore the opportunity which she had to correspond with those colleagues during lockdown) was excluded from the disclosed portions.

84. One of the causes of confusion is that by KLE carrying out all of the different elements of the investigation, the respondent has muddled up child safeguarding issues with employee against employee allegations. In evaluating the case against the claimant, KLE seems to have lost sight of the fact that all of allegations specifically against the claimant, apart from concerns which were already part of a PIP, start with these allegations by OH who openly stated she believed him to be the whistle-blower.

85. Although some of the interview records are misdescribed in the bundle index or bear incorrect dates on their face, it appears that GH and CL were also interviewed on 6 July 2020 (page 901 and page 916 respectively).

86. The interview with the claimant took place over the Zoom video platform where the interviews with witnesses who were not the subject of investigations against themselves took place over the telephone. We think that this shows lack of parity of treatment the significance of which is that KLE was judging the credibility of those who have given telephone interviews compared with that of the claimant who was interviewed by Zoom. She risked being unable to assess the weight to be given to their respective accounts in the same way by choosing to interview them in different circumstances. The most serious allegations were, in essence, one person's word against that of another and it was particularly important in those circumstances that they should given their evidence to her in as near the same circumstances as possible.

87. The claimant's case is that cliques within the workplace are also relevant to the weight to be given to the evidence against him. OH and GH are sisters. SB and BS were said by the claimant to be close friends with OH and GH and GH volunteered in her 6 July 2020 interview with KLE that she had gone to school with SB and BS and been friends with them before working for the respondent (page.907).

88. It is a fair comment that just because people are friends that does not mean that they will make up false allegations. However, in oral evidence, KLE denied that the fact of the friendship meant that they had a motive to make false allegations. We think that the reasonable investigator would immediately see that there was a motive to make false allegations in support of a family member or close friend who was accused of a career limiting act –

even if the investigator then discounted the possibility that the witness had done so after consideration and investigation.

89. GH, interviewed on the same day as her sister, was asked by KLE "Who do you think has made the Convercents?" and replied,

> "I know its Mike. All over lockdown it's been in my mind, the more I think about it the more I know it is him. All these things, I can put the pieces together. He has been there for so long. Every manager that he doesn't like or he has clashed with and he doesn't like Liv, he has stated that before and I know he isn't happy about us being promoted."

90. We are concerned that the fact that KLE asked that question suggests confusion about the purpose of her investigation which was, as we understand the respondent's case, into the allegations themselves not a hunt for the source of the reports. This interview record was not relied upon in the disciplinary proceedings against the claimant but was available to the managers who decided how to frame the allegations against him. Nevertheless it contains information to the case against the claimant because it confirms the relationship between GH, OH, SB and BS and contains a very strong statement of belief by OH's sister that the claimant was the source of the Convercent reports.

91. On 9 July 2020 the claimant wrote a detailed email to KLE (page 290) raising questions such as why he was now facing historic allegations and asking for changes to be made to the hearing notes. KLE referred his email to HR. On 21 July 2020 (page 188) the claimant asked KLE whether there were any specific allegations against him, what they were and when they were made. In her reply on 26 July (page187) KLE declined to tell him what the allegations are.

92. The invitation to next meeting is dated 12 August 2020 and sets out the allegations which KLE she's decided to pursue as disciplinary allegations (page.315). Those allegations are,

    92.1 The Birthday Cake allegation;

    92.2 The Valentine's Day Biscuits allegation;

    92.3 That between January to March 2020 the claimant had deliberately not provided enough food on numerous occasions for the children in the pre-school room (this was not pursued to the disciplinary hearing);

    92.4 That on numerous occasions between September 2019 to March 2020 he had not provided food in line with babies' individual requirements and dietary needs (this was not pursued to the disciplinary hearing);

    92.5 That the claimant had made inappropriate comments to BS between August 2017 and September 2018 (this was not pursued to the disciplinary hearing);

    92.6 The Toilet Cubicle allegation;

92.7 The Trolley allegation; and

92.8 The Toast allegation.

93. The respondent's case is that the additional allegations came to light in interviews conducted in the course of investigating the Convercent reports. All of the notes of the first round of interviews with BS (page 277), EZ (page 279), SS (page 281), SB (page 283) and BL (page 285) state that they took place on 7 July 2020 but, to judge by the times stated on the notes, either they did not all take place on the day recorded or not at the time recorded. Further interviews then took place by phone with ES (on 28 July 2020 – page 298); EZ (on 28 July 2020 – page 307); with MC (on 28 July 2020 – page 312) and with OH (on 29 July 2020 – page 270). These are described to the witnesses as being specifically about the conduct of the claimant.

94. The chronology of the investigation from that point is that KLE invited the claimant to a further investigation meeting by letter of 3 August 2020 (page 315) which took place on 14 August 2020 (the respondent's notes are at page 327 and the claimant's transcript at page 340). The claimant was signed off work with work related stress for 2 weeks on 17 August 2020 (page 405).

95. Further interviews took place on 8 September 2020 with BS (page 428); EZ (page 432), MC (page 436) and OH (page 439) at which particular responses of the claimant were put to the witnesses for their comments.

96. KLE's report was produced on 9 September 2020 (page 442). The report states that the allegations amounted to potential bullying and harassment towards some of the nursery staff. KLE found that the Birthday Cake allegation, the Trolley allegation, the Toilet Cubicle allegation and the Toast allegation were substantiated and the Valentine's Day Biscuits was substantiated in relation to alleged targeting of OH by excluding her from the biscuits but not in relation to SB.

97. The allegation of not providing sufficient food was found to be unsubstantiated as was the allegation of not preparing food in line with the babies individual requirements. The allegation of inappropriate comments to BS was found to be unsubstantiated and we analyse the reasons for this and the implications of KLE's conclusion on this allegation below when considering the Toilet Cubicle allegation.

98. The claimant was invited to a disciplinary hearing into the 5 allegations which KLE had found to be substantiated on 14 September 2020 (page 455) which was conducted by SE on 18 September 2020 (page 524) by video with the claimant's father acting as his companion. SE carried out further investigations by interviewing BS by Teams on 6 October 2020 (page 555). The notes of this were provided to the claimant who provided feedback (page 560) She decided to dismiss the claimant and provided that decision in writing on 16 October 2020 (page 564).

99. He appealed against his dismissal on 22 October 2020 (page 580 with his detailed critique of the decision at page 582 and in tabular form on page 607)

and the appeal meeting was conducted by Ms Kendall on 9 November 2020. On 11 November 2020 (page 681) the claimant requested a number of documents which he considered to be potentially relevant to the exercise including "all previous investigation notes requested by not supplied: interview notes of [EZ], [BS], [SB], [OH] and [SS]." She forwarded a copy of his PIP to him and invited comments upon that which he provided on 16 November 2020. The redacted meeting notes with EZ, OH, SS, SB, and BS were provided on 26 November 2020 (page 701). He had been provided with some information as a result of a DSAR and on 2 December 2020 asked for that to be considered (page 673). The outcome dismissing the appeal (page 710) was provided on 11 December 2020 (page 670).

100. The claimant was signed off with depression for two months on 3 December 2020 (page 709).

KLE's investigation of the Trolley Allegation

101. KLE interviewed EZ (page 279). She was not in the core clique of OH, GH, BS and SB. She was first asked the open question "Have you even had any issues with any of the staff within the Nursery" and answers "Nothing major from my point of view". She was then asked directly about the Valentine's Day Biscuit allegation. She was then asked about the claimant and volunteered information about the Trolley allegation saying that she had gone to the bathroom and that the claimant had used a trolley to block her into the toilet which made her feel uncomfortable. It was at a difficult time in her personal life. She had managed to push the door and remove the barrier to getting out and told OH about it at the time but did not raise it with the claimant until after she returned from a period away from work. She told KLE that he had apologised when she raised it with him when she returned about two weeks later.

102. There was an acceptance on the part of the respondent that there was a pranking culture at the nursery. The Trolley Allegation was alleged to be targeting of EZ rather than general pranking. Therefore whether the claimant knew that he was targeting EZ is what would be determinative of that element. He denied that the subsequent conversation with EZ took place in which he was said to have apologised. Her account places the conversation with the claimant at least 2 weeks after the incident is said to have happened in 2019. So he was being asked about a conversation said to have taken place with EZ 15 months after it happened. Further, he was investigated for something EZ said she considered she had dealt with by talking to him where the first time EZ raised it with him was 2 weeks after the event in question. EZ works with OH in the babyroom and OH had not initially raised this incident.

103. The Trolley allegation was revisited in the second interview with EZ (page.307 @ 310). It appears from that interview that EZ thought that the claimant could be responsible for the Convercent allegations which she says have caused a lot of anxiety. That was when the particular detail emerged that EZ had heard the kitchen door and heard the claimant which was the basis of her immediate conclusion that it had been the claimant. This was not a detail revealed in the first interview and is, in essence, a presumption. It

may have been a reasonable one but the respondent ought to have evaluated the prospect that EZ was mistaken before finding that she was targeted, given that they accepted that others were involved in the general practical joke of blocking the toilet door. In the second interview she refers to the obstacle being the gate from toddler room 1 rather than a trolley. She referred to anxiety that she did not want him to be like "he is with [OH]" and that "you never know what Mike you get every day grumpy withdrawn happy".

104. Among the criticisms of KLE's investigation is that she did not interview all relevant witnesses in relation to this allegation. It is argued by the respondent that, at best, his witnesses would have provided context which was not contentious because they accepted that there was a general practice of blocking the toilet (RSA para.85). They argue that it was a stark question of whether the claimant targeted EZ or not because he had not, at the time, admitted to blocking her in but argued it to be a joke, or a case of mistaken identity.

105. However, KLE said that she had rejected the possibility that someone other than the claimant had been responsible for blocking the toilet door on the occasion about which EZ complained. She did have EZ's further evidence that she had confronted the claimant about it on her return from France and he apologised as well as the claimant's denial that that conversation had taken place. It was open to KLE to conclude that he had apologised because it was open to her to prefer EZ's account of this to the claimant. However, we consider that, even presuming he did apologise the fact that he did so wasn't strong evidence that he was responsible when the incident happened 2 weeks before he is first accused of it. He might have apologised for upsetting EZ without really knowing whether he had done it or not.

106. KLE does not appear to have been open to the possibility that EZ might have been mistaken about who was responsible. Others who were involved in the pranking might have provided context to the frequency with which it was done and, therefore, been able to shed light on whether EZ might be describing a real event for which the claimant was not responsible. Asking the witnesses might have been futile; but the prospect that someone else remembered the timeline of the incident, the fact of the complaint was not considered. This is an example of KLE not treating the evidence with a reasonable degree of detachment when evaluating the competing claims.

107. There is a parallel with the enquiry into the grievance against SB. The investigator did not ask the other witnesses present at the time of the comment in order to get a view of the gravamen of it. We also consider there to be a contrast between the fact that the claimant faced a disciplinary charge for this incident more than a year after it had happened when EZ chose not to pursue it at the time. This contrasts with the situation with SB where the claimant wished to pursue his grievance against her and no action was taken.

<u>The claimant's criticisms of KLE's report and investigation.</u>

108. It is argued by the claimant (CSA1para.45) that the way in which the allegations of sexual harassment were raised against him are unclear because the language emerged in a conversation after the end of the interview proper between BS and the notetaker which was briefly noted (page.306). We do not give any weight to that complaint because the factual allegations made by BS were the same and could reasonably have been regarded by the investigator as allegations of sexual harassment whether or not BS herself used that term.

109. We accept that interviewing the claimant via Zoom but his accusers by telephone caused at least the appearance of parity problems. The claimant and those making the allegations were not on an equal footing when the decision maker was evaluating their credibility. KLE did not appear to appreciate that this presented her with a challenge to her decision making.

110. As outlined in CSA1para.37 & 38 two key sources of the allegations against the claimant stated in interview that they believed him to be source of Convercent allegations. A number of other staff also believed this, at least one of whom, OH's sister GH, was also in the friendship circle and on the What'sApp group with SB and BS – the latter the source of the most serious allegation against the claimant. There was no mention of that in the management report. It is patent that that information should have put forward for the decision maker to consider and yet SE was unaware of those pieces of information.

111. More to the point, the claimant did not know at the time of SE's decision that he was believed to be the source of the Convercent reports and, since he was not the source, did not know of the serious nature of the allegations. He was therefore unaware of something which might affect the credibility of the evidence against him and which might provide a reason why some of his accusers might lie. This was not an argument he was able to put forward in own defence because he was not told the relevant information. He did argue that the relevant accusers were lying because they are friends. This means that the presence of a reason why they might wish to falsely accuse him was even more relevant and information that he and the decision maker ought to have been aware of.

112. KLE didn't appear to understand these points when she was asked about this criticism during her oral evidence. She repeated that she did not believe either that the information that OH, GH, CL, BL and EZ believed the claimant to be the source of the Convercent reports or that the opportunity available to the friendship group to communicate during lockdown to be relevant but was unable to explain why. It is fair to say that EZ's belief is apparent on the face of the meeting notes from her second interview but OH's belief is not.

113. JK was aware of the beliefs because the redacted notes had been produced by the time of the appeal.

114. We are also of the view that KLE unreasonably discounted the grievance against SB as a reason why she should make false allegations against the claimant. One would have expected the circumstances of the grievance and

the outcome to have been covered in the conclusions on the allegations about deliberately not providing enough food for the children (page 448). She did not appear in oral evidence to be able to explain her reasoning.

115. We also accept that the lack of analysis of the reliability of BS's evidence about the Toilet Cubicle allegation is a serious omission. No reasonable investigator would fail to analyse the potential impact of the delay in reporting, or the reason given for delay in reporting on the credibility of BS's evidence. This was particularly so when there had been an unrelated Convercent investigation at the nursery in the meantime which would have been an opportunity for BS to report her 2015/16 allegations.

116. There is also the description in KLE's report of the claimant's texts as inappropriate without apparent regard to them being in the context of texts from BS which could equally be described as inappropriate (but which are not). In her conclusions on the Toilet Cubicle allegation she appears to give no consideration to the potential impact that BS's texts to the claimant have on whether it is true that he had harassed BS some two to three years previously in the way alleged – or why careful scrutiny should be given to BS's reasons for raising in 2020 the incidents she said took place in 2015 or 2016 given the nature of the relationship disclosed by the texts dating from 2018 and 2019. Had she been asked these questions, BS might or might not have provided explanations which it was open to a decision maker to accept but they were not asked. Again, a line of enquiry which had the potential to weaken the evidence against the claimant was not pursued and KLE was unable in oral evidence satisfactorily to explain why not.

117. To explain what we mean about the texts we refer to pages 378 and 379. The allegations that the claimant had faced about the texts had been that he had sent the message on page 376 "make dat pussy moist make dat pussy wet make dat pussy drip". BS appears to have initiated the conversation that day and sent the claimant a song lyric (page 378) that reads "Say little bitch you can't fuck with me if you wanted too". Later (page 379) she sent texts which read "Cant keep my dick in my pants" and "I put a hole in your parents". If the texts sent by the claimant are inappropriate, then so are those sent by BS.

118. KLE showed very poor investigation practice when she disclosed to OH the way that EZ had described the Valentine's Day Biscuits incident. The potential for contamination of the evidence is clear; she provided an opportunity for OH to tailor her evidence to that of another witness. She had asked initial questions in the earliest interviews about who each witness had been in contact with during lockdown but did not provide SE with this information about opportunity for collaboration or with the information she had about existence of the friendship circle.

119. She was criticised for asking the question "How did that make you feel?". There is nothing wrong with asking it, once. But on one occasion KLE asked it repeatedly and that leads us to infer that she was seeking more from the witness than they volunteered originally. This is an example where KLE is argued by the claimant to be looking for supporting allegations. She did

appear by her questions to be investigating concerns about the claimant generally not just specific allegations which had already been made. She did not confine herself to the allegations she already knew about.

120. If she had equally assiduous about looking for exculpatory evidence then we would have been more comfortable with this approach because general allegations had been made that the claimant made a number of the people he worked with feel uncomfortable and the respondent was right not to ignore that. But KLE was not equally assiduous in looking for exculpatory evidence. It is argued by the respondent (RSA para.17) that there is no exculpatory evidence even now. We disagree. The most obvious example is the evidence of a potential motive for some of the complainants to lie. Although not direct evidence of a specific incident, when allegations depend on the oral account of witnesses then evidence of a motive for one or more witnesses to make up an allegation is, potentially, exculpatory, in our view.

121. Overall, KLE did not appear to approach the investigation in an even handed way and that disadvantaged the claimant in ways which we have described above and, in relation to the Trolley allegation, at paras 105 to 107 above.

The disciplinary hearing

122. Although there were a number of ways in which the investigation fell short of what one would expect from the reasonable investigator, the principal problems with the report (page 442 to 454) as the basis for a decision by SE were,

    122.1 It did not inform SE that OH believed the claimant to be the source of the Convercent reports.

    122.2 It did not inform SE that the allegations against the claimant were first raised within OH's police interview. It did not state that the first complainant against the Chef was themselves the subject of potentially career limiting allegations in the Convercent reports. It did not provide information about the way in which the allegations had emerged which is at least relevant to the weight to give to the accounts.

    122.3 It did not mention the PIP. This causes us concern that the route taken by the claimant's then manager to address performance concerns known about as at March 2020 was not provided to decision maker. It is true that the allegations which most nearly concern the claimant's performance were not upheld by KLE but there is some information about relationship with co-workers which is apparently relied on later. When this does arise, the respondent appears to have relid on the unagreed PIP and not the claimant's amendments but not to have interviewed CL about the authenticity of the contents of the PIP.

    122.4 Relevant witnesses had not been interviewed in relation to the Trolley incident.

123. In the invitation to the disciplinary hearing there is a list of the documents he was provided with (page.456). We see nothing wrong in principle with SE only

including the matters that KLE found to have been substantiated, provided that there has been an even handed approach to the potential relevance of the evidence no longer relied to the remaining allegations, but there was not.

124. The claimant made a statement at page 493 dated 18 September 2020 and took the opportunity to critique the investigation report and the evidence relied on. Among other things, in relation to the Toast incident he insisted that he was not informed that it had been a medical request and said that he had been cooking for the children which was why he had asked that BS made herself some toast or that someone else could. He also questioned why managing BS's health condition was his responsibility rather than an individual or management responsibility; for example that she should be given sufficient breaks to enable her to manage her diabetes.

125. This allegation was not upheld. However we have considered why the Toast allegation was pursued that far. For it to be misconduct to refuse to make toast for a particular member of staff (rather than performance – and we have not been taken to a job description so do not know whether providing food for staff was within his role) he would have had to have known that the toast was required for BS (and refused it to target her) or that it was needed for medical reasons. MC's statement in her original interview was that she heard BS tell the claimant to make her some toast because she was not well due to her blood sugar levels and the claimant refused but when the claimant's account was put to her in her second interview she said that she couldn't remember whether it was mentioned to be for a medical condition and said that she herself had asked him to make the toast (as BS had originally alleged – page 278).

126. SE recognised the elements which would make that allegation potential misconduct and in para.15 of her statement explains that the reason why she didn't uphold it was that the staff witness could not remember whether they had informed the claimant that there was a medical need for toast. KLE also accepted in oral evidence there was no evidence that the claimant knew it was needed for medical reasons. There was no evidence that he made toast for other members of staff such that a suggestion that he had singled SB out could be made. The evidence before us on this point was that, if he had time to make toast he would do so but that they could make it themselves. It therefore appears that the evidence from the investigation about why the claimant did not make toast - without which his actions could not have been classed as misconduct - was patently flawed and yet it was included as an allegation of misconduct potentially justifying dismissal.

127. Other than that allegation, SE upheld the findings of KLE's report and her written outcome and statement do not distinguish between the weight given to any particular allegation when deciding to dismiss. However she did admit in cross-examination that in isolation both the Birthday Cake allegation and the Valentine's Day Biscuits allegation were trivial. Our finding based on that is that it was the other two which meant the sanction decided on by SE was dismissal rather than something else. She did not accept that the Trolley incident was trivial because of the impact on EZ.

128. She said that she had no conversation with HR or with KLE at this stage to explore why these matters had gone to disciplinary.

The Birthday Cake Allegation

129. The only evidence of what the claimant was asked to do and what he agreed to do came from MC. See p.314,

"I said to him do you mind me putting this in the oven. He usually takes it out but didn't. He left it in. Mike said I didn't realise I was busy. You didn't ask me. He knew it was for Olivia."

130. MC didn't say that she asked him to take it out or that he agreed to do so, just that he usually does. She said that she was upset about it and "If he was busy I think he could have taken it out". The opinion that a chef could have taken a cake out of the oven is a poor basis for concluding that he deliberately burnt it.

131. OH's evidence about what the claimant knew is supposition based upon what others have told her but she raised it initially as an example to demonstrate a poor working relationship which caused her to think that the claimant had made what she states are false and potentially career limiting allegations against her via Convercent. SE's reliance upon OH's evidence is undermined by her lack of knowledge that OH and others believed the claimant to be responsible for allegations against OH and the other management team members. We think it probable that she was influenced by the emotions that OH and MC express about this incident rather than looking at simply what the evidence was against him.

132. The allegation was of deliberately allowing the cake to burn or failing to adopt an adequate level of care because the cake had been made for OH. It is that element of targeting which, in our view, causes this to be potential misconduct rather than performance. SE concluded that it could not be said that the claimant would not reasonably be able to ensure that the cake did not burn, that he could have set the timer to ensure it was not overlooked, that accountability for overcooking the cake lies with him as the chef. These matters cannot go further than showing that he could have prevented the cake from burning which no reasonable employer would have concluded to be sufficient to amount to misconduct rather than performance. As to the evidence that it was to target OH, as we have noted, the claimant was not said by MC to have told her that he would watch the cake. The examples throughout the evidence relied upon by SE as evidence of the claimant not only not liking OH but of being awkward or unhelpful specifically with her (page 573) are undermined by SE's inability to weigh up those statements in the light of them being made by those who believe the claimant to be the course of the Convercent reports.

133. It is common ground that the claimant himself took the cake out when it became clear it was overcooking. We consider that this means that KLE's reliance upon the Health & Safety concerns is irrelevant as well as something that wasn't raised by her in the interviews with the claimant.

The Valentine's Biscuits

134. There was evidence from which SE could reasonably conclude that the claimant had deliberately excluded OH from the Valentine's Biscuits because it was open to her to accept EZ's evidence that her name was on the label on the plate of two biscuits. Although EZ worked with OH which might have been reason to think she'd be sympathetic to OH that wasn't a strong reason to think her account should be rejected. Therefore the conclusion she reached was open to her.

135. However SE didn't know that OH (and, potentially, EZ) had a motive for trying to get the claimant into trouble or to try potentially discredit the person who she blamed for the police investigation. Furthermore, this incident was fairly trivial. No reasonable employer could discipline for this taken on its own with an employee with no live disciplinary warnings even had it been taken together with the Birthday Cake allegation.

The Toilet Cubicle Allegation

136. We note the claimant's critique of the Toilet Cubicle allegation (page 497), in particular at paragraphs 3.4 to 3.6 where he criticises KLE's statement that her conclusion that the Trolley allegation is made out makes it more likely that the Toilet Cubicle allegation is true.

137. We agree that this statement is specious reasoning. Superficially there is the similarity in that a person is alleged to have been obstructed when they wished to leave a toilet but the element of intimidation is entirely missing from the Trolley allegation. We think that it is not rational to use the Trolley Incident in this way – this is in part because KLE did not state whether her conclusion on the Trolley allegation was that the claimant had blocked the exit to the toilet cubicle in the knowledge that EZ, who was not part of the group who played that practical joke on each other, was in there or not. Having concluded that in 2018 the claimant put a Trolley across a toilet door she appears to have thought that made it more likely that he followed a female employee into a toilet in 2015 and/or 2016 and locked the door behind him. The quality of the incident is so different that that mental process is, we consider, irrational. KLE accepted as much in her oral evidence, with the benefit of hindsight.

138. SE's approach to deciding this the most serious of the allegations is set out in her statement para.12 and the outcome letter pages 574 to 575. She acknowledged the claimant's criticisms of KLE for supporting her conclusions on the Toilet Cubicle allegation with reference to the Trolley incident but does not refer otherwise to it. In our view she should have dealt with his argument but we are satisfied from her oral and statement evidence and the outcome letter that she probably did not take account of the Trolley allegation herself in deciding that the Toilet Cubicle allegation was made out.

139. At page 574 she referred to the claimant's argument about "the messages to and from Beth to substantiate the likelihood of this incident occurring" but she dealt very superficially with it. The argument raised by the claimant in his para. 3.7 to 3.9 is that it is illogical to say that the texts sent by him made it more

likely that he had behaved as alleged in relation to the Toilet Cubicle allegation because all of the texts were two-way banter. He also argued that it was illogical to say that the allegation of sexual harassment based upon the texts is unsubstantiated and yet that it supports the allegation of sexual harassment in relation to the Toilet Cubicle allegation.

140. All that SE says in response to those arguments is that the texts allegation concerned the song lyrics which he texted to BS and not that he had asked her for dates. In the first place, the allegation was fully withdrawn, not partially withdrawn so that response is difficult to understand. Secondly, we take SE to mean that because she has accepted that the claimant later asked BS for dates there is evidence to support BS's allegation that he had locked her in a Toilet Cubicle. This seems to us to be irrational. Furthermore, the claimant's argument targets KLE's statement that "the way Mike had been talking to her through the messages that he had sent supported BS's evidence about the Toilet Cubicle incident" which is not limited to BS's evidence that she had declined the claimant's request to go on a date.

141. We are of the view that SE simply did not address to the argument that the texts between the claimant and BS undermine BS's evidence on the Toilet Cubicle allegation at all. We are further of the view that this argument, so long as it remained unexplored and unexplained, has the potential to be a gaping hole in the credibility of BS.

142. Before going further we wish to make plain that we accept without reservation that responsible employers should take seriously allegations of this sort whether or not they are historic in the sense that they date from months or years before they come to light. Employees should not feel scared that they will not be believed or will not be taken seriously if they come forward to complain about things which happened a long time ago. There can be many reasons which adequately explain why complaints about inappropriate or threatening behaviour are not made contemporaneously.

143. However, in the present case, in the absence of any acceptable explanation, any decision maker would find that BS's credibility was potentially undermined by the delay in reporting and by the texts for the following reasons:

    143.1 The nature of the texts sent by BS to the claimant potentially undermines her account to KLE that she was as upset by the alleged actions of the claimant in the Toilet Cubicle allegation as she says. The way she felt about the incident appears to have been part of the reason why SE believed that it had happened. BS should have been asked to explain why she repetitively engaged in two-way texts with the claimant of the kind that she did if there was a history of approximately three incidents which she describes as making her feel horrible and uncomfortable. A decision maker might conclude that she did not feel as described and therefore that the incident had not happened as alleged.

    143.2 The fact that BS included the texts as an allegation against the claimant when she was first interviewed without volunteering that the texts were

clearly part of a reciprocal conversation in which she, on occasion, initiated statements which were as inappropriate as the claimant's, both of which were quotations from lyrics, causes us to conclude that she did not, when making the complaint, provide the employer with an impartial unvarnished account. That unexplained lack of openness undermines her credibility.

143.3 There were opportunities in the 4 or 5 years between the date of the alleged incidents and the report for BS to raise her complaint, notably during the separate 2018 Convercent investigation.

144. SE did carry out further investigations with BS about the delay in reporting the allegations and page 555 is the note of the interview. She shared this with the claimant (see page 574). BS's explanation for the delay in reporting were that she did not think that the claimant would receive more than a "slap on wrist", risk of retaliation and that she did not recognise the seriousness of it at the time. SE accepted these explanations and referred to previous alleged consistent complaints to other staff members (page 575) where SE reasoned,

"Beth has also provided a lot of detail and her clarity on her reaction at the time, and how she feels that this was part of your joking around without malicious intent, the fact that she feels that you weren't horrible to her like she alleges you are to others because she didn't stand up for herself, the jokey relationship you had with her where you have not been aware of her dislike of some of the behaviours are all factors in my decision and so I therefore uphold this allegation based on the balance of probability".

145. We have considered the notes of SE's investigation meeting with BS, for example at page 558 where BS says that, at first, she didn't think what had happened was so bad. SE does not question BS about why as at 2015 or 2016 she would have feared reprisals. The notes of the interview may not be verbatim but the extent to which SE pushes her on the matters which potentially undermine her evidence is at page.559 where she asks "What's your thoughts now in relation to not speaking up earlier?" and BS answers "I didn't think that this was so bad, … thought I would tell on him and he gets a slap on wrist like usual".

146. In the first place it appears that SE has replaced BS's own opinion of how bad the situation was with her own. BS appears to say that she didn't think the behaviour was so bad at the time. Secondly, SE did not ask BS what she meant by "like usual" – what had happened by 2015 or 2016 which involved a complaint about the claimant for which he received a slap on the wrist which had the potential to explain why BS had not reported the Toilet allegation at the time? Overall, we are of the view that SE accepted BS's explanation without suitably sceptical analysis.

147. There are circumstances in which a decision maker could believe that a person sending the texts sent by BS was nonetheless not consenting to the claimant's texts and in all the circumstances had been harassed. However would need more evidence that is present in this case that at the time the texts were exchanged there was a rational basis for fear of reprisals, an evidential basis for BS's assertion that she didn't want to suffer the behaviour from that claimant

that he meted out to others or that management would not take the complaint seriously.

148. There are circumstances in which a decision maker could believe that a person who delayed as BS did was nonetheless truthful. However, BS's explanation to SE for not reporting them earlier, specifically during the earlier Convercent investigations doing is not supported by the seriousness with which those allegations were taken. It is clear that she was spoken to during the Wokingham HR Session between 11 and 12 June 2018 when BS mentioned concerns about the claimant but nothing about the allegations she raised in 2020 and said that she would prefer to speak to him directly than for management to intervene.

149. It is probable, based upon SE's oral evidence, that she did not see all of the texts which had been supplied by the claimant to KLE as part of his response to the allegations (page 376 onwards). She accepted that in order to assess the credibility of a witness one should look at allegations by that witness which had not been upheld at the investigation stage as well as those which had. Example messages from 14 August and 17 August appear to have been included with the pack although it is unclear which those were (page 442) and there is reference to the screenshots supplied by the claimant at page 449. Although SE accepted that para.21 of her statement suggested that she had seen the texts and that was why she agreed with the decision not to uphold the allegation specifically about the texts she could not recall whether she had seen them or not. Elsewhere she said that she wasn't sure that she had seen the texts themselves rather than a summary.

150. Her explanation appeared to be, as she put it, that the texts themselves did not come to her in the disciplinary pack, and

> "I did recognise that she [BS] had had that two-way banter with the claimant and lots of texts. I can see why that would be confusing for him. And his statement said that. My reasoning was around "I don't want to rock the boat and I don't want to be on his bad side". Another example - EZ saying why she was dancing in the kitchen "I don't know why I did that". Not using to discredit her there had been behaviours by some of the team which were unusual for them that they didn't feel comfortable with on the basis that [they did not want to be] on the claimant's bad side on the basis that then he would give behaviour that he had given to OH."

151. In reasoning in this way, SE appears to have ascribed to BS a reason for replying to the claimant's texts or for texted to him which she herself did not put forward because she wasn't asked for an explanation. SE appears to have relied upon statements made by others to excuse BS's behaviour but apparently did not look at the texts themselves to see whether that made sense in context.

152. Overall, we do not think that SE properly and fairly considered the arguments raised by the claimant about the impact of the texts on the judgment about whether his account or BS's account of the Toilet Cubicle allegation should be preferred. Given the points the claimant makes in his response at para.3.7 to 3.9 (and in his comments on page 5 of the 6 October 2020 interview with BS - page 562) any reasonable decision maker would have called for production of

the full texts and probably asked BS about them. SE agreed that she should have weighed this evidence. Elsewhere in cross examination it was suggested to her that the fact that BS raised the texts by the claimant as an allegation of poor behaviour by him towards her suggested that she was prepared to make false allegations of harassment and SE agreed with that but said that the other side was that people would act differently to their usual character because of fear of reprisals. It was irrational for her to reach that conclusion without scrutinising the texts themselves and without asking BS for her explanation – in essence she has, probably unconsciously, invented an explanation.

153. It is apparent on the face of the outcome letter that part of SE's reasoning was that she did not think that at the time the allegations were raised that BS had anything to gain from making false allegations. Although there is no direct evidence that BS believed the claimant to be the source of the Convercent allegations, she was friends from school days with those who did so the failure to provide that information to SE affects her conclusions on this allegation. Ultimately SE felt that BS was credible and genuine but had not explored fairly with her matters which had the potential to undermine that judgment.

154. As it was suggested to SE in cross examination, in principle there were 3 reasons which might have caused the open minded decision maker to disbelieve BS: the explanation for delay (that she thought that the claimant would simply receive a slap on the wrist) was inconsistent with the way the respondent treated serious allegations made via Convercent; that she was friends with someone who had cause to dislike the claimant (SB); that the discontinued allegation about the texts suggested that BS was capable of making an unfounded allegation or, at least, not being open and transparent with her employers when complaining about the claimant. They might, after investigation, have been explained but there were no adequate explanations before SE.

155. No reasonable employer would have decided to believe BS without addressing these potential reasons not to believe the key witness. In particular in relation to the texts, SE unreasonably disregarded potentially exculpatory evidence.

Trolley allegation

156. We have covered our view of the investigation of this allegation in paras.101 to 107 above. Relevant witnesses were not interviewed and SE confirmed this decision. EZ first reported this in July 2020 when it is said to have happened in March 2019.

157. We accept that evidence was uncovered which, if accepted, suggested that the claimant's behaviour was unprofessional and had upset his co-workers. Subject to the relevant witnesses being interviewed, it was open to SE to accept EZ's account, but in order to fairly consider it under the disciplinary policy she should have focused on what it was about the claimant's actions that made it misconduct by him, rather than just on the impact on EZ. Our finding is that she did not do that. Given that, no reasonable employer would have given a disciplinary sanction for something which EZ dealt with herself and where her subsequent relationship with the claimant suggested that nothing

further had happened in the intervening 12 months before the national lockdown.

The Appeal

158. The grounds of the claimant's appeal included,

158.1 Not interviewing all the relevant people about what he called Trolley banter (para.18 to 21). He argued that they might have been able to confirmed the banter and support the position that he might have unknowingly shut EZ in the toilet believing it was one of the others.

158.2 Para.22 to 35 onwards points to the possibility of collusion between witnesses. He also alleged in para.33 that the hearing notes suggest that KLE breached confidentiality to tell witnesses things which, had they been colluding, would have enabled them to do so more effectively. KLE accepted that she did do that and that she shouldn't have.

158.3 He argued that KLE was not impartial.

158.4 He pointed to inconsistencies in relation to the Toilet Cubical allegation and to the prospect of BS making up an allegation because of his grievance against SB.

158.5 We also note that when he refers to the text messages between himself and BS in para.43 of his grounds of appeal (page 588), he argued that the messages showed that BS dislike his behaviours and initiated some of the conversations – which she does in the texts he has produced. In general in para.41 to 43 he argued that the text messages have been used selectively and illogically by the decision maker and investigator.

158.6 In paras.44 to 46 he argued that it was unreasonable to rely upon statements in his PIP to the effect that he had not got on well with some people when he denied that; that passage was not in the an agreed statement of what was discussed in the PIP and CL who wrote it did not provide evidence in the disciplinary. He also complained that he had not completed the PIP and had not been given an opportunity to change having been started on one.

158.7 He complained of discrimination based on gender (para.71) and alleged that he is being victimised for making a grievance against SB. In para.113 he alleged that BS's words have been taken at face value because she is female and his have been disregarded because he is male.

159. JK was aware of the information in the redacted notes of the various interviews conducted between 6 and 8 July 2020. They were sent to her and to the claimant on 26 November 2020 (page 701) after the appeal hearing which took place on 9 November 2020 (page 645).

160. In her outcome letter of 11 December 2020 (page 710), JK divided the claimant's arguments into the following,

    160.1 An alleged failure to follow procedure, that the investigation not fair, impartial or consistent and (within that) that there was a failure to interview relevant witnesses. She seems nonetheless to conclude that the claimant created the culture (page 712).

    160.2 That the evidence did not support the conclusion.

    160.3 That the Penalty was too severe.

    160.4 That there was new evidence which had been presented since the disciplinary hearing.

161. In relation to the Toilet Cubicle allegation she found the following,

    "On balance and after consideration of the information present I can see no evidence to support Beth would have fabricated this allegation and do not deem this to be hearsay." (page 712)

    We consider it surprising that JK could have reached the conclusion that there was *no* evidence to support an argument that BS had fabricated the allegation when she was, according to what she told us, aware of the detail of the text messages.

162. In cross-examination, JK was taken through the impact of the texts and refused to accept that this was evidence that BS was capable of making false allegations of harassment. We consider this position to be unsustainable. One might or might not decide that BS had been harassed despite having participated in initiating and sending those texts but a complaint about the claimant's texts within those exchanges was capable of being a false allegation of harassment and that should have been explored before deciding to rely on BS's evidence. At the very least BS needed to be challenged about this.

163. JK appeared to accept in oral evidence that, in isolation, the Trolley allegation would not be something it was reasonable to dismiss for unless it had been made clear that this was not acceptable and that anyone doing it would be subject to disciplinary. She rightly said that there was evidence that EZ had been quite distressed about the incident at the time. However, she also accepted that, given that she was satisfied on the balance of probabilities that the claimant had blocked the exit to the toilet so that EZ was unable to leave, there wasn't any evidence that he had known that it was EZ who was in there rather than someone who had been in on the practical joke. She regarded it as culpable because it was a careless act to put a trolley in front of the toilet door.

164. There is no reference in JK's witness statement to what account she took of the interviews from between 6 and 8 July 2020 with OH, EZ, SS, SB, BS and BL – indeed, no reference to them at all. Nor is there any explanation in the outcome letter of what consideration she gave, in particular, that with OH on 6 July 2020 (page 217). According to the notes as provided to JK at the time KLE

started her questioning with "Who do you think said it" – meaning the Convercent allegations. OH replies that she believes it to be the claimant because of various matters which make her think she has bad relationship with him.

165. JK accepted that from reading the notes of the interview with OH she would have realised that OH believed that the allegations that had been made against her had been made by the claimant. It was suggested that that OH had not raised complaints before and was only raising them now because she believed that the claimant was the source and her response was that she didn't know whether OH would have raised them regardless. Although she accepted that she was unaware of any complaint about the Birthday Cake allegation or Valentines Day Biscuits being made at the time she did not believe that it was reasonable to conclude that these matters were being raised by OH in response to what she believed to be false Convercent allegations against her and that she herself did not make that connection. She believed that it was simply the fact that someone external to the nursery was making enquiries that had led to OH making the allegations.

166. We consider this position to be simply unsustainable when you look at the redacted notes which apparently set out in full that part of the interview. OH was asked who she believed to be responsible for the allegations against her and, in naming the claimant, provided information about incidents apparently to substantiate her belief that her working relationship with the claimant was poor and he was likely to have made serious allegations against her. The Birthday Cake allegation and the Valentine's Day Biscuits allegation are cited. We are conscious that we have not heard from OH but then neither did JK when she appears to have discounted the interview record of 6 July 2020 as not relevant to the appeal before her.

167. The wording of the questions to OH does raise the suspicion that the respondent's investigation was to look for the person who made the Convercent reports although that is not an issue in the case. The relevance to the claimant's dismissal is that JK simply didn't consider whether this affected the reliability of the case against him at all. Knowledge of this belief on the part of OH and the ability to piece together how the allegations against the claimant arose means that the respondent knew that there was opportunity and motive for collusion between the key complainants. This does not amount to direct evidence that collusion in fact took place but in the circumstances that, occasionally, KLE's asked questions which breached confidentiality as between witnesses the risk of collusion should have been taken seriously and apparently was not.

168. There were, therefore, key pieces of information which were not before SE – principally the full set of texts and the initiating interviews (even in redacted form). KLE's explanation for not passing everything to SE in para.8 of her statement was that it was not necessary or proportionate to provide all of the meeting records but there clearly was relevant information in the withheld documents and KLE did not regard as relevant some information which potentially supported the claimant's defence. That missing information was

before JK at the appeal stage but we find that she dismissed that evidence without considering its potential relevance.

169. The appeal was dismissed.

Conclusions on the Issues

170. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions. It was agreed that we should not consider any remedies issues. We return to the issues relevant to time limits after considering whether any of the discrimination and victimization complaints are made out.

Unfair dismissal (issues 2.1 to 2.3)

171. We accept that both SE and JK genuinely believed that the claimant was guilty of the misconduct which they found proved namely that he had

    171.1 On 7 February 2020 deliberately allowed a cake baked for OH to burn or failed to adopt an adequate level of care in checking the baking of the cake because it had been baked for OH ("the Birthday Cake allegation").

    171.2 Deliberately left OH out when he distributed Valentine's Day biscuits on 14 February 2020 because he did not like her("the Valentine's Day Biscuits allegation").

    171.3 Followed BS into the downstairs toilet on at least three occasions in 2015 to 2016 and locked the door ("the Toilet Cubicle Allegation").

    171.4 On about 22 March 2019, obstructed the toilet door with a trolley which prevented EZ from leaving and caused her distress ("The Trolley Allegation").

172. However, the investigation which formed the basis of their respective beliefs was not reasonable in all the circumstances.

    172.1 In the case of SE, relevant evidence was not made available within the investigation pack – she did not have the full exchange of texts between the claimant and BS because the allegation that he had harassed BS had not been pursued and KLE unreasonably failed to appreciate that BS's text potentially undermined her credibility as the only witness to the Toilet Cubicle allegations. She also failed to analyse the potential impact on BS's credibility that she had apparently not reported the Toilet Cubicle allegations for between 4 and 5 years after they had happened.

    172.2 KLE had interviewed a wider range of witnesses than she relied on in relation to the case against the claimant. By excluding the statement

of GH she excluded information to support the claimant's argument that there was a friendship group which was colluding against him.

172.3 KLE interviewed the claimant by video and the complainants by telephone which meant that she risked being unable to assess the weight to be given to the different witnesses equally when much of what was alleged was one person's word against another.

172.4 KLE did not interview all the relevant witnesses to the Trolley Allegation who might have been responsible for blocking EZ in the toilet rather than the claimant (see paras.104 to 106 above).

172.5 KLE unreasonably discounted the claimant's grievance against SB as a reason why she should make false allegations against the claimant and did not include this information in her report which therefor lacked balance.

172.6 KLE disclosed to those she was interviewing information provided by other witnesses which meant that there was the potential for contamination of the evidence (see para.118 above).

172.7 Evidence which showed reason that an important witness (not BS herself) but those whose allegations had started the investigation in the claimant had a motive for revenge or for discrediting the claimant was withheld from SE. By excluding the statement of OH, KLE excluded information that OH, the first person to make complaints against the claimant, believed him to be the source of Convercent reports to the respondent's whistleblowing hotline which had led to her being interviewed by the police about potentially criminal and career limiting activities. The claimant did not know about this either and was therefore unable to use an argument which could potentially have undermined the evidence against him from one or more individuals

173. The failure of KLE to disclose relevant information to the decision maker itself makes the decision to dismiss unfair: Uddin. To the extent that the respondent argues (RSA para.59) that the failure to disclose the full (rather than the redacted) version of the interviews was of no consequence that is potentially a point to be argued at the remedy stage.

174. We are mindful that we must not substitute our view for that of the employer. SE interviewed BS and saw the claimant at the disciplinary hearing and, in principle, it is open to employers to decide what evidence they should accept and which they should reject – provided that they at all times act within the range of reasonable responses. For reasons which we set out in paras.143 to 146 above, we are of the view that SE irrationally failed adequately to consider three matters which had the clear potential to undermine BS's evidence and which were not adequately explored with her. This is not merely being wise with hindsight. SE failed properly and fairly to consider the arguments raised by the claimant at the time about the impact of the two-way texts on whether his account or BS's account of the Toilet Cubicle should be preferred as we explain in detail in paras.147 to 152.

175. When the full texts and the redacted interview notes which disclose OH's belief that the claimant was responsible for the allegations against her were made available at the appeal stage to JK she appears to have taken no account of them. In this, relevant evidence which tended to exculpate the claimant was irrationally discarded (para.162 to 166 above). Her reasons for discounting the evidence that OH had a motive to discredit the claimant were that she believed that the opportunity had arisen to speak to someone outside the nursery but that is inconsistent with the wording of the interview.

176. In RSA para.53 the respondent argues that there was no evidence to indicate that there was a link with an individual holding that belief and them then raising allegations against the claimant. We disagree, the evidence is plain on the wording of the interview when OH provided information about alleged behaviour of the claimant apparently in order to substantiate her belief that her working relationship with the claimant was poor and he was likely to have made the Convercent allegations against her. Although she was not the only person who makes allegations against the claimant she is the first one to do so. She worked in the Baby Room alongside EZ who also said that she believed the claimant to be responsible for the allegations against OH. It is true, as the respondent argues, that EZ who was the principle witness in the Trolley incident, was not herself the subject of Convercent reports. However no reasonable respondent would have failed to probe whether EZ's credibility both in relation to that incident and in support of the incidents for which OH was said to be the target was adversely affected by her belief that the claimant was responsible for reports against her co-worker. No reasonable employer would have concluded that he was guilty of the misconduct alleged without investigating and weighing up these potentially exculpatory matters.

177. For all these reasons we are of the view that the investigation was not within the range of reasonable responses and there were no reasonable grounds for the belief of SE and JK that the claimant had committed the misconduct alleged because they had relevant information withheld from them and irrationally disregarded arguments and evidence which had the potential to exculpate him. The claimant was unfairly dismissed.

<u>Wrongful Dismissal (Issues 4.1 to 4.3)</u>

178. In order to defeat the claim of wrongful dismissal, the respondent has to show that the claimant was guilty of gross misconduct or otherwise did something so serious that it undermined the relationship of trust and confidence between employer and employee such that they were entitled to dismiss him without notice. They rely upon the conduct which SE and JK found the claimant to have committed (excluding the Toast Allegation which was not upheld by SE).

    178.1 The Birthday Cake Allegation;

    178.2 The Valentine's Day Biscuits Allegation;

    178.3 The Toilet Cubicle Allegation;

    178.4 The Trolley Allegation.

179. Of these, as first disciplinary offences to an employee with no live disciplinary warnings, it seems to us that it is only the Toilet Cubicle allegation which is capable of being serious enough to warrant the description gross misconduct, even when taken in combination with other matters. Were the other allegations to be made out at their height, they could be regarded as targeting or bullying but, particularly given the age of the Trolley Allegation, there would have been other less drastic ways of dealing with incidents which indicate a problem with working relationships that need rebuilding before moving to disciplinary action. However, were we to accept that the Toilet Cubicle allegation happened as described by BS then it could amount to intimidating conduct by a male employee invading the private space of a female employee. It could, potentially, be described as harassment on the basis that it was intimidating and violated the female employee's dignity and as related to sex because of the nature of the Toilet as a private single sex space.

180. However we are not satisfied on the balance of probabilities that the incident happened. We accept the claimant's denials.

181. We did not hear oral evidence from BS and therefore were only able to take into account the written hearsay evidence from the interviews with her. This means not only do we only have the interview notes to set out her account of what happened but we do not have her explanations for the delay in reporting the allegations or the texts which she and the claimant subsequently exchanged. The only evidence of those explanations are in the notes of the meeting between SE and BS at page 555 which we summarise in paras.144 to 146 above.

182. As we set out in para.143 above, there are three matters which potentially undermine BS's account and for which, since we have not heard from her, we do not have an explanation.

183. There is nothing comparable to cause us to doubt the claimant's account and there are reasons to consider BS's credibility undermined. On the balance of probabilities, we do not find that the claimant was guilty of the conduct alleged in the Toilet Cubicle allegation.

184. The other incidents could, reasonably, be described as comparatively trivial on their own. Collectively these sorts of incidents at their height could be regarded as targeting individuals or of excluding them and would certainly cause an employer to need to take some sort of managerial action, potentially formal action but they did not have the potential to amount to gross misconduct either singly or collectively where the employee did not have a live disciplinary warning.

185. We conclude that the claimant did not behave in a way which justified the respondent terminating his contract without notice and the wrongful dismissal claim is made out.

<u>Direct sex discrimination and victimisation</u>

186. **Issue 5.1.1. and 6.2.1.** The requirement for the claimant to attend every staff meeting was an outcome of his grievance against SB (para.46 above). Therefore the facts underlying this allegation have been made out.

187. The decision maker was JD, from whom we have not heard. The respondent argues that it was not a detriment to be required to attend staff meeting.

188. As we note in para.48 above, in the claimant contract as Kitchen Assistant with the respondent (page 79 and following), it is stated that he is required to work during the respondent's normal working hours but "there may be occasions that require you to work additional hours, …, as reasonably required for the proper performance of your duties" and that this has already been taken into account in determining his salary (page 81 – clause 6.2).

189. The question is therefore whether the reasonable employee with such a contract would consider themselves disadvantaged in their employment to be told that they have to attend a mandatory meeting outside their normal working hours.

190. We accept that there may have been other ways of circulating to staff than at a staff meeting information and that the practice of requiring all staff to attend a staff meeting (while commonplace in other nurseries) had not been a requirement previously at this nursery. However, given the terms of the contract, it is our view that no reasonable employee would consider themselves to be disadvantaged by this requirement. This was not a detriment within the meaning of s.39(1)(d) or s.39(4)(d) EQA.

191. Further, there is no evidence from which we might infer that had the investigation of a woman's grievance uncovered that there was inconsistent application of policies or apparent failure to understand or to follow policies with regard to the provision of hot meals then they would have been treated more favourably than the claimant or that the reason for that would have been sex. We have been critical in some respects of the handling of the grievance and accept that the outcome had the consequence that the recommendations impacted more on the claimant than they did on SB against whom the grievance was upheld. Nevertheless JD was addressing the fact that the background to the act about which the claimant complained was that, for whatever reason and regardless of fault, a child had not been provided with a hot meal. In those circumstances we do not think it possible to infer less favourable treatment on grounds of sex, even in the absence of evidence from the decision maker.

192. It is accepted by the respondent that the grievance was a protected act. The victimisation claim based upon this requirement requires us to ask whether it was made of the claimant because of the grievance? The decision that he should attend arose from something which came to the decision maker's notice during the grievance namely that the facility for communication of policies needed to improve (to judge by the face of the outcome letter – see para.46 above). We conclude that the grievance was no more than the context within which it was decided to enforce that requirement that all staff, including the Chef, attend every staff meeting as is required of staff

elsewhere. It was not a material influence on the reasons why the requirement was made.

193. The claims of victimisation and direct sex discrimination based upon this alleged act fail.

194. **Issue 5.1.2. and 6.2.2.** concern the imposition of the PIP on 4 March 2020. Our findings about this are at paras.52 to 62 above. Again, the facts underlying this allegation are made out in that the PIP was imposed on the claimant.

195. We have not heard from decision maker. As we set out in para.55 above, it appears from page 169 that it was instigated by CL, the nursery manager. However, that email does not read as though she was arguing for it rather than recording what she said in the one-to-one the previous day so that is not absolutely clear.

196. We have no doubt that the introduction of a PIP was a detriment to the claimant, despite the respondent's arguments to the contrary. Although a PIP may be designed to be supportive, there is the underlying implication first that your manager considers that your performance needs to improve in some respect and secondly that if you are not judged to have done so within the period of the PIP then more formal proceedings might be taken. We think that the reasonable employee would reasonably consider themselves to be disadvantaged by the imposition of a PIP particularly when, in the case of the claimant, it has been done without, so far as we can tell, consistent informal management (see paras.58 & 59 above for the limited evidence of the claimant being spoken to about his behaviour with colleagues). The HR Sessions from June 2018 may record that management were going to review concerns about the claimant but there is no evidence that this was actually done.

197. Furthermore, the PIP concerned quality of food preparation and following instructions from senior management. We have not been provided with evidence of specific complaints or concerns about these matters outside the terms of the PIP itself. We have concluded that it was unreasonable for the respondent to have gone straight to a PIP in these circumstances (see para.61 above)

198. Nevertheless we do not think that mere unreasonableness is sufficient in this case for us to infer that a hypothetical female chef in materially similar circumstances would not have been subject to PIP.

199. The situation is otherwise with the victimisation claim based on the PIP. The grievance outcome is dated 21 January 2020. The claimant was told on 4 March 2020 that a PIP was being imposed. There is no evidence from the respondent of anything that the claimant had done in the meantime which caused them to put him on a PIP. There was a clear difference in the respective accounts of the chef and the nursery workers about who was responsible for the miscommunication about whether a meal suitable for the child with dietary preferences was needed on the day in question and that

does not appear to have been resolved in a way which meant it was reasonable to attribute fault to the claimant rather than to another.

200. These matters we consider to be factors from which we could, in the absence of any other explanation, infer that the grievance about SB calling the claimant a "fucking dick" was a more than trivial influence on the decision to impose the PIP. There are also things on the PIP which are curious inclusions on a formal performance improvement plan; the claimant appears to take issue with it being his job to cakes for children on their birthdays and to include that on a PIP without resolving whether it was part of his role needs explanation.

201. Despite the Tribunal drawing attention to the apparent lack of information to explain any particular reason why CL was not called to give evidence there has been no such explanation. SE was asked in cross-examination whether she was aware of any reason and she was not. Nor could she assist with any reason why a suitable member of HR had not been called to give evidence about the reasons why the PIP was imposed had CL not been available. SE's belief was that CL is no longer in post as the manager of that nursery.

202. In the absence of any explanation for the imposition of the PIP, this victimisation claim succeeds.

203. **Issue 5.1.3. – 6.2.3**: The next alleged act of sex discrimination and victimisation is that of suspending the claimant and commencing a disciplinary investigation. Again the respondent hasn't called the individual who decided to suspend the claimant because it was not, according to our findings, KLE who signed the letter communicating the suspension to the claimant and she did not appear to know who had decided to suspend him. Her oral evidence was at odds with her witness statement evidence about the suspension (para.71 to 74 above). We have decided that the claimant and the three members of the management team were suspended to facilitate the investigation and because of the investigation (para.75 above). The others who were suspended were all female and we note the arguments in RSA para.62.

204. In many ways the explanation of the circumstances in which the claimant was included as a subject of the investigation when he wasn't himself the subject of the Convercent reports is unsatisfactory (see para.76 to 79). It is hard for us to see why the initial allegations were sufficiently serious to merit the investigation and, therefore, the suspension to facilitate it.

205. The claimant contrasts his treatment with that of SB when he grieved about her conduct towards him. We do not think that the situations are comparable for reasons which go beyond the identity of the decision maker. JD appears to have decided not to refer SB's conduct to a disciplinary investigation. Someone, possibly CH, appears to have decided to include the claimant in the wider Convercent investigation taking place at a time when all who were the subject of the investigation were on furlough. That was a completely different background to the decision about whether or not to suspend the claimant, OH, GH and CL which means that SB is not a suitable comparator.

Furthermore, the allegation against her did not involve the potential wellbeing of children. The original allegations KLE was to investigate included preparation of food for children that potentially involves wellbeing and it is relevant that it was being dealt with within the context of safeguarding investigation.

206. Despite our criticisms of the decision to include the claimant in the investigation, it is clear that the respondent dealt with the four people suspected of safeguarding or child wellbeing matters in the same way. This is strong evidence that the claimant did not receive less favourable treatment on grounds of his sex. Despite our criticisms of the respondent's evidence on this point we are satisfied that the decision to suspend was not sex discrimination.

207. As Mr Gray-Jones said, there is evidence to suggest that the respondent included the claimant in the investigation and therefore suspended him because they believed him to be the source of the Convercent reports, but that is not unlawful under s.47B ERA.

208. There is evidence that CH, if it was she who decided to include the claimant in the investigation or to suspend him, knew about the claimant's grievance against SB but that is not, in our view, sufficient for us to infer that the claimant was suspended because of the grievance. Unlike with the imposition of the PIP, we do not think that there is anything in the timing of the grievance and the investigation from which a link between them could be inferred particularly when it is reasonably clear from what we know about the Convercent reports and from the Investigation Plan that allegations against the claimant did arise from OH's police interview. In all the circumstances we do not think that there are grounds for thinking, even in the absence of the respondent's decision maker, that the grievance was a material influence on the investigation and on the decision to suspend.

209. **Issue 5.1.4 & 6.2.4.** KLE concluded that four allegations were substantiated and one was partially substantiated and should be considered at a disciplinary hearing. The allegedly unlawful event happened as a matter of fact. It was clearly a detriment to reach the conclusion that the claimant should be referred to a disciplinary hearing. Was it less favourable treatment on grounds of sex?

210. We consider that a suitable hypothetical comparator would be a woman who was accused of deliberately excluding a co-worker, causing distress to co-worker by shutting them in toilet and of causing distress by following a co-worker into the toilet and blocking exit.

211. In CSA1 para.84 it is argued that KLE showed discriminatory bias in believing female complainants or witnesses as opposed to the claimant. We are not satisfied that discriminatory bias is shown simply because the complainants were of a different sex to the claimant and were believed. The question is whether, had the claimant been woman would his explanations been treated with as little regard.

212. The claimant contrasts his treatment with that of SB when he said that he was not satisfied with the outcome of his grievance against her. That was a different decision maker. It is clear that the existence of a different decision-maker does not necessarily amount to a material difference for the purposes of identifying a comparator: Olalekan. In that case it was made clear that,

> "The employer could therefore be liable for discriminatory treatment meted out to different employees in similar circumstances even though different decision-makers were involved. An employee alleging discrimination ought, in principle, to be permitted to compare his treatment with that meted out to another in similar circumstances, notwithstanding the fact that a different decision-maker in the same employment was involved. There may well be cases where the difference in decision-maker amounts to a material difference: this could arise, for example, where one decision-maker was operating under a different policy from the other, or where one decision-maker is operating at a significantly different level from the other. However, if the only difference is the identity of the decision-maker that would be unlikely to amount to a material difference because the employer would be liable for the actions and decisions of both decision-makers. The focus would still be on the mental processes of the decision-maker who dealt with the claimant."

213. In the present case it seems to us that the decision makers were operating under different policies: the grievance policy versus the disciplinary policy. KLE carried out safeguarding investigation whereas JD carried out a grievance investigation. That is not to say that the respondent has fully explained the circumstances in which the claimant was investigated or why he was investigated as part of a safeguarding investigation when the only allegation with the potential to be a safeguarding matter against him was dropped.

214. Nevertheless there is a valid evidential comparison is between the Trolley allegation or the Toilet Cubicle allegation which go forward to disciplinary when the claimant's complaint about the sex specific term of abuse SB used towards him was not taken further. This does, it seems to us, show a difference in the seriousness with which a complaint by a man about what was accepted to be a complaint of sex related harassment was taken compared with the seriousness with which a complaint by a woman about a potential act of harassment or sex related harassment was taken and this requires explanation.

215. The reason that SE dismissed the claimant, rather than considered the possibility of a lesser sanction, was BS's allegation that in 2015 or 2016 he had followed her into the toilet and locked the door behind him. The importance that she attached to that incident is why SE spoke to BS individually.

216. As we explained in connection with the wrongful dismissal allegation, the nature of the texts sent by BS to the claimant in 2017 and 2018 suggest that the impact on her of the alleged toilet cubicle incident may not have been what she now suggests. The fact that she was not open with KLE in her description of what happened in relation to the texts diminishes her credibility.

Had the texts allegation gone forward to disciplinary, that would have been relevant towards whether the claimant's texts were unwanted (which could not have been presumed) and whether the texts actually caused the harassing effect. These seem to us to be concerns which any investigator should have had about the reliability of BS's account.

217. KLE was clearly not being even handed in relation to the texts. BS completely misrepresented what those texts meant when she first described them. There was no comparable reason to doubt C's denial. The Toilet Cubicle incident is the only allegation which is invasive or intrusive in a nasty way. We see from page 452 that when reaching her conclusion that the Toilet Cubicle incident is made out she says that "This behaviour in relation to [BS] is supported by the way [the claimant] had been talking to her through the messages that he had sent." She uses the texts to support her conclusion on the Toilet Cubicle allegation but she does not balance that with an analysis of BS's behaviour in relation to the same texts. It was irrational to have concluded that the claimant's texts were not potentially disciplinary but yet supported a finding that he had intimidated BS some years previously. It was also irrational not to consider that BS's credibility in relation to the 2015/2016 incident was potentially affected by the texts.

218. In the texts at page.378 & 379 BS appears to be initiating the vulgar or inappropriate element of the text (see para.117 above). KLE criticised the claimant in her report for sending such texts to a member of staff who was in a relationship. We do not understand what the basis for that criticism is particularly when she does not criticise the person was *in* the relationship for sending and initiating similarly vulgar texts – both of which are accepted to be song lyrics rather than aggressive language or vulgar language sent without any context.

219. We have come to the conclusion that there is gender bias in the way KLE approached the evidence of the texts. The fact that the claimant sent the texts is relied upon as supporting evidence of an allegation from some years previously despite him not facing an allegation of misconduct in relation to sending the texts. If sending them, in the context in which they were sent, was not worthy of disciplinary action then logically it was not evidence which supported a different allegation of misconduct. The claimant appears to be more criticised for sending the texts to an individual whom he knows to be in a relationship that BS was for sending the texts to another man when she was in a relationship. We are unable to account for the difference in treatment of the claimant's texts compared with BS's texts apart from a gender bias in the investigation. KLE did not put forward a credible explanation for failing to evaluate the texts in a balanced way.

220. The points made in CSA1 para.86 that all of KLE's mistakes in the investigation were against C's interest are, in principle, valid. As we point out in para.120 and 121 above, KLE was not even-handed in her approach to the investigation.

    220.1 KLE did not interview the complainants and the claimant in a way which enabled her to evaluate their evidence equally; The female

complainants were not treated the same as the male defendant in this respect.

220.2 She did not tell SE that some witnesses believed the claimant to be the source of allegations against OH which would be a potential reason for them to lie.

220.3 She did not provide the evidence she had that some witnesses were in the same social group and did not follow up upon initial questions about the opportunity for collusion among the social group.

220.4 She unreasonably dismissed as irrelevant the belief that the claimant was the source and the SB grievance as reasons why the complainants or some of them would lie

221. The above are flaws in the investigation for which KLE was unable to, provide an acceptable explanation. Those set out in para.220 do not themselves directly raise the concerns of gender bias which the treatment of the texts does. However, put together with her approach to the texts, there are sufficient facts from which we could, in the absence of any other explanation conclude that were a woman to have faced similar allegations, then she would not have been subjected to the same flaws in the investigation process and decision making rationale which ultimately meant that the case was referred to a decision maker.

222. The above transfers the burden of disproving the allegations to the respondent. The respondent has not provided cogent evidence to show that the reason for this difference of treatment in relation to the investigation was not that of sex. KLE's explanations were unsatisfactory. In the absence of satisfactory explanations we find that the claim of sex discrimination is made out in relation to issue 5.1.4 .

223. The basis of the victimisation claim in issue 6.2.4, 6.2.5 and 6.2.6 (CSA 1 para.103) is that the fact that the claimant had submitted his grievance against SB is likely to have made the respondent form the view that he was responsible for the Convercent disclosures and, since this was – it is argued – a material influence on the disciplinary action the grievance should also be regarded as such. It is entirely speculative to say that the fact of grievance played some role in the a person unknown reaching a view that action should be taken against the claimant, given the actual allegations made by OH and others. Furthermore, this was not a case which was put to the respondent's witnesses.

224. If anything, KLE, SE and JK unreasonably disregarded the grievance as relevant to their decision making. There is nothing from which we could infer that the grievance was an influence on their decision making at all. This conclusion applies not only to Issue 6.2.4 but also to 6.2.5 and 6.2.6. Those victimisation complaints are dismissed.

225. **Issue 5.1.5.** We have accepted that SE's decision making was flawed for reasons which we set out in our conclusions on the unfair dismissal claim.

We remind ourselves that, on the balance of probabilities, it appears that SE did not have the full extent of the texts in front of her – although she could have called for them.

226. The claimant's argument that SE's actions were sex discrimination is set out in CSA 1 paras.91 to 95 to which we refer.

    226.1 First, it is said that some allegations were trivial. However, the claimant was not dismissed because the trivial allegations had been upheld.

    226.2 Whether you consider that there was a difference of treatment of SB compared with that of the claimant depends entirely upon what you find the claimant to have done. SB was accused of an isolate incident. The claimant was not. The question is really whether SE had a reasonable basis to conclude that the claimant had done what he was accused of. If she did then those conclusions would be a valid reason to treat the claimant more harshly than SB had been.

    226.3 The heart of the argument is that SE's treatment of the Toilet Cubicle Allegation showed a discriminatory bias in that she accepted BS's allegations at face value despite there being significant reasons for doubting her credibility when there were no such reasons to doubt the claimant's.

227. SE accepted BS's explanations for not reporting her allegations until 4 or 5 years after the event at face value and did not properly investigate the texts – which she was alerted to. So she both didn't engage properly with the claimant's defence and took BS explanations for delay at face value. In this she treated BS and the claimant differently. The fact that we have found that KLE's decision to refer the claimant for a disciplinary hearing was sex discrimination does not mean that we can directly ascribe that discriminatory basis to SE who made the decision to dismiss: Reynolds. What we have to be concerned with is what was in the mind of SE when deciding to uphold the Toilet Cubicle Allegation.

228. She seems to have been swayed by the apparent detail that BS gave her when she interviewed her by Teams; she seems to have empathised with BS. The texts may not have been directly in her mind at the time she reached her conclusion but KLE's reasoning in the report which did rely upon them was. There was a failure satisfactorily to explain the dismissive approach to the claimant's evidence and arguments and an unquestioning approach to BS's answers. These are matters from which we consider we could infer that a woman who was defending herself against those allegations would have been treated more favourably than was the claimant and that the reason was that of sex. That transfers the burden of disproving discrimination to the respondent. They are unable to prove that the decision was not in any way influenced by sex because of the gender bias in the investigation and in the evidence which formed basis of that decision. This allegation of sex discrimination is made out.

229. **Issue 5.1.6.** JK was guilty of the same gender bias in her assessment of the texts as was KLE in hers and we refer to our rationale above at paras.216 to

219. There has been no rational explanation of JK's apparent acceptance that SB's own texts had no bearing upon her credibility as a witness. The respondent has failed to show that the decision had nothing to do with sex.

230. The three acts of sex discrimination – finding 5 allegations substantiated and putting him forward to a disciplinary hearing; dismissing the claimant and refusing his appeal are clearly continuing act because they form part of the disciplinary process. The subject matter and reasoning of the decision makers also link these acts. Proceedings were commenced in time in relation to these acts.

231. We have found one act of victimisation which took place on 4 March 2020. Is imposing the PIP part of that continuing act formed by the disciplinary process? The PIP appears to have been imposed by CL (possibly instigated by or on the advice of HR). There are hints in the claimant's arguments about some actor behind scenes who was ill-disposed towards him but we have not seen sufficient evidence to support a conclusion that someone was trying to get rid of the claimant by means of the PIP and then by the disciplinary process. The enquiries by CH between the Convercent reports and the start of the investigation do not lend themselves to a conclusion that he was the target of a campaign which included the imposition of the PIP. We do not think that this is linked to the later action in a way which means that they can be regarded as an act extending over the period from 4 March 2020 to the dismissal of the appeal.

232. We therefore need to consider whether it is just and equitable to extend time for presentation of the complaint which is the subject of Issue 5.1.1. The claimant obviously thought it was an act victimisation at the time – he wrote as much in his comments on the face of the PIP. The first meeting under the PIP was approximately a month later. By then there was a national lockdown and the nursery was closed and the claimant was on furlough. By 3 July 2020 the claimant had been suspended and was being investigated, which would naturally have been the focus of his concern.

233. No reason has been put forward as to why CL not called to explain the imposition of the PIP. If the respondent was going to establish that they had suffered prejudice because the claimant raised the allegation that the PIP was an act of victimisation more than three months after it was imposed then they needed to evidence that prejudice. They do not appear to rely on or explain the absence of CL or to rely upon any other specific prejudice.

234. Although there comes a point when the claimant was unwell he was able to bring his claim within the application time limit for the unfair dismissal claim in any event and we do not consider that ill health was a reason why the claim based upon the PIP was not presented sooner. He argues that he did not receive legal advice until September 2020. The successful victimisation claim was presented 6 ½ months out of time. He may have regarded this action as less important than being dismissed. There is some explanation for the delay in this and in him spending time concentrating on fighting the disciplinary proceedings with the appeal stage lasting until December 2020. There is clear

prejudice to him in being unable to be compensated for an act which we have found to be victimisation.

235. Taking all of those matters into account, we consider that it is just & equitable to extend time. There is no evidence that the respondent has been disadvantaged and the claimant would be prejudiced by us not extending time. There is some apparently reasonable explanation for the delay of 6 ½ months considering the other matters which the claimant was contending with at the time.

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Employment Judge George

Date: 18 July 2022……..
Corrected on: 02 February 2023…….
Re-corrected on: 21 March 2023

Sent to the parties on: 4 April 2023

For the Tribunal Office