EMPLOYMENT TRIBUNALS

Claimant: Mrs L Jones

Respondent: Kammac Limited

Heard at: Manchester **On:** 16 to 24 January 2023 , 24 April 2023
25 April 2023 (In Chambers)

Before: Employment Judge Holmes
Ms C Neild
Mr B J McGaughey

Representatives
For the claimant: Ms S Wheeler , Solicitor
For the respondent: Mr D Tinkler, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1.The claimant's applications to amend her claims, and the List of Issues, are refused.

2. The claimant was not constructively , and hence not unfairly , dismissed and this claim is dismissed.

3.The respondent did not discriminate against the claimant on the grounds of her sex, in relation to the last claims of sex discrimination that she makes which were presented in time, and they are dismissed.

4.The claimant's claims of sex discrimination which arose before 3 March 2020 were all presented out of time and it would not be just and equitable to extend time for their presentation. They are dismissed.

5. The claimant's claims for unlawful deductions from wages and for holiday pay have been agreed between the parties, and, unless cause is shown within 7 days of the sending of this judgment to the parties why they should not be, they will stand dismissed upon withdrawal by the claimant.

REASONS

1.By a claim form presented on 17 August 2020 the claimant brings claims of sex discrimination, and constructive dismissal. The claimant was employed by the respondent until her resignation on 18 May 2020. She claims that the respondent fundamentally breached in a number of respects, going back to September 2018, and culminating in May 2020. She also alleges that she had been subjected to direct sex discrimination from March 2019 until May 2020. The claims also included claims of unlawful deductions from wages and for holiday pay. Fortunately, the parties were able , in the closing stages of the hearing , to resolve these claims by agreement (confirmed in email correspondence to the Tribunal on 25 April 2023) and they will be dismissed upon withdrawal.

2. The claims were case managed, and orders were made at a preliminary hearing on 9 June 2021. A list of complaints and issues was annexed to the record of the preliminary hearing, and these were understood to be the agreed issues in the claims. The claimant was represented by Ms Wheeler, a solicitor, and the respondent by Mr Tinkler of counsel. There was an agreed bundle, and references to page numbers are to that bundle. There was also a supplementary bundle, largely comprising of text messages and an email chain. References to page numbers therein will be prefaced by the letter "S".

3. At the outset of the hearing the claimant made application for permission to amend her claims, by seeking to amend the List of Issues. The principal amendment sought was to add, or substitute, a new last straw as the final event which led to the claimant resigning. The claimant had pleaded at paras. 49 to 51 of the "claim form" that the last straw was the respondent only paying her SSP , and preventing her from returning to work , for a period in March 2020. By the amendment , however, the claimant now sought to change , or add to, the last straw to the holding of an investigatory meeting with her on 27 April 2020, as set out in paras. 137 to 144 of her witness statement.

4.This was opposed by the respondent , and the Tribunal determined the application on 17 January 2023, refusing it. Reasons were announced orally, and written reasons were not requested. Any request must now be made within 14 days of this record of the decision being sent to the parties. On the seventh day of the hearing, the claimant made a further application to amend the list of issues, to add as a breach of contract the respondent's decision to cut off her access to her emails whilst she was on sick leave. This application too was rejected.

5. The claims accordingly proceeded on the basis of the List of Issues annexed to the record of the preliminary hearing (pages 58 to 59 of the bundle) . They are set out in Annex A to this reserved judgment. The claimant did, however, withdraw as part of para. 9, and para. 16, the allegation that the respondent had taken her office away from her, and also withdrew allegation no. 12 , that the respondent failed to renew her company car.

6. The claimant gave evidence, and called Jennie Osman (her sister) , Kath Mayers, and Carrie Blanchard. The respondent called Craig Olson, Laura Olson, Chris Jewell , Gary Bridge, Ged Carabini and Paul Kammel. There was also a witness statement from Leanne Liddell.

7. Having heard the evidence , read the documents in the two bundles, and considered the submissions , the Tribunal finds the following relevant facts:

7.1 The claimant was first employed by the respondent, which is a logistics company based in Skelmersdale, West Lancashire, with four other sites . Paul Kamel is the founder , owner and managing director of the company. The claimant had a good working relationship with Paul Kamel, and she worked her way up to Transport Supervisor, then Transport Manager, and then Head of Logistics from 18 March 2015 (see page 65 of the bundle). She then became Transport Director.

7.2 From 2007 Craig Olson, Paul Kamel's son – in – law, worked in the business. Whilst he was tipped as a future Operations Director, the claimant considered he had little interest in or knowledge of transport, and was suspicious of him. She considered that he had personal dislike of her, and feared that her days in the business were numbered because of Craig Olson's dislike of her. She voiced these fears to Paul Kamel, who reassured her that her role was safe, as long as he was there.

7.3 Subsequently, Laura Olson , Craig Olson's wife, and Paul Kamel's daughter, joined the business. She became Executive Director. The claimant considered that she too disliked her, and she felt further threatened by her presence in the business.

7.4 Ged Carabini had been the Commercial Director of the respondent whilst the claimant was employed there, but he left, only to return in January 2018 as Chief Operating Officer. The claimant and he had a good working relationship.

7.5 In July 2018 the claimant was given a new contract of employment. Laura Olson dealt with this, and there was some negotiation of the precise terms (see pages 230 to 232 of the bundle), the claimant's title then being Transport Director. The resultant contract dated 27 September 2018 is at pages 235 to 251 of the bundle. The relevant provisions as to sick pay are in section 10, under "Incapacity". By clause 10.3 an employee's entitlement to sick pay was in accordance with the company sickness policy, available in the Staff handbook. The relevant handbook was that dated July 2016 , whereby under section 3 – Sickness/Injury Absence Payments and Conditions , under "company sick pay" the following provisions are set out:

"Whilst there is no contractual sickness/injury payments scheme beyond qualification for Statutory Sick Pay (SSP) , we may make discretionary additional payments to you."

7.6 In 2018 the claimant became increasingly concerned over compliance issues within the Transport department. She was named on the Operator's Licence, and was worried that an inspection, or a serious incident, could result in action being taken against the respondent, and her personally. She considered that her attempts to raise these issues internally had been ignored, and her concerns were not taken seriously.

7.7 She therefore sought a report from external auditors , Encompass Universal Limited, with a view to highlighting the issues that she considered required to be addressed. An audit was carried out over November and December 2018. The ensuing report dated December 2018 is at pages 99 to 213 of the bundle, including Appendices. The audit

revealed a number of serious issues with the respondent's compliance regime, which required urgent remedial action.

7.8 The respondent appointed Leanne Liddell as Compliance Manager to implement the necessary action. Whilst the claimant considered that none of this was her responsibility, and she had been voicing her concerns for some time but had been ignored, Paul Kamel appeared to blame her, when she had not been adequately supported in her role.

7.9 In the aftermath of this audit, there was some discussion between Karen Rossington, Head of HR, Ged Carabini, Paul Kamel , and Craig and Laura Olson as to what steps should be taken, and, in particular, whether any disciplinary action should be taken against the claimant. By letter of 5 February 2019 from Ged Carabini to the claimant , she was put on restricted duties, as an alternative to suspension, whilst the respondent fully investigated the matter. The claimant in the interim was to retain the title of Transport Director, her terms of employment would remain the same, but was removed from the Operating Licence. She was to carry out some functions in the transport department, but reporting directly to Ged Carabini and Paul Kamel.

7.10 On 17 February 2019 Karen Rossington sent to Ged Carabii an email in which she sought a decision from the Board as to what action to take. She had taken some (presumably legal) advice, and shared with Ged Carabini the options which she considered were available. That email is at pages 363 to 365 of the bundle. Ged Carabini send a copy of it on to the claimant. In the email Karen Rossington set out the options, which included taking action against the claimant, but she pointed out that others were culpable, and that it would be difficult to confine any investigation, and any potential disciplinary action, to her alone. In the end the respondent did not take any further investigatory action against any other persons, or, indeed, the claimant. In a further email sent by Karen Rossington on 2 March 2019 to Paul Kamel and Ged Carabini (pages S22 to 24 of the bundle) she went through the various options available to the respondent, including dismissing the claimant, or entering into a settlement agreement with her.

7.11 Ged Carabini responded to that email in an email (dated 3 February 2019, but that is probably incorrect, it would be 3 March 2019, page S22)) to Karen Rossington, informing her of the actions that it was proposed to take in relation to the claimant, which was not dismissal. Her salary would be in line with that of the Health and Safety Manager. In March 2019 the claimant and Ged Carabini had discussions about her future role. Whilst the claimant contends that the respondent tried to demote her, and reduce her salary, and that was clearly mooted, it did not actually occur. Instead the respondent offered the claimant a new role a Head of Pallet Track and Commercial , on the same salary, and all other terms and conditions as previously .

7.12 This offer was formalised in a letter , headed "Variation to Contract" , dated 25 March 2019 (pages 291 and 220 of the bundle). By letter of 19 March 2019 (pages 217 to 218 of the bundle) Ged Carabini wrote to the claimant, informing her that the respondent had decided to take no further action , and her restricted duties were lifted. She remained Transport Director, and her primary role at that time was support of the Pallet Track Operation.

7.13 The upshot of these discussions was that by letter of 2 April 2019 (pages 223 and 224 of the bundle) the respondent, in a further Variation to Contract letter, offered the claimant a new role of Head of Networks and Commercial. Again all other terms and conditions would remain the same. Whilst reference is made in that letter to an "enclosed job description" , no such document appears in the bundle. The claimant did not sign or return this document, but from 1 April 2019, this became her role.

7.14 The respondent around this time moved Head Office from an address at Gladden Place on the Gillibrands Industrial Estate to Unit 1 at the M58 Distribution Centre. Consequently , by a further Variation of Contract letter dated 17 June 2019 (pages 225 to 226 of the bundle) the respondent wrote to the claimant asking her to accept this variation, which on this occasion she did, by signing and dating the confirmation document on 18 June 2019.

7.15 Thereafter the claimant carried out her role as Head of Networks and Commercial without incident. She makes no complaint about anything that occurred between April 2019 and November 2019.

7.16 The next event that the claimant complains of relates to Christmas bonus payments for 2019. The claimant was awarded a Christmas bonus of £2000.00. She discussed this with Ged Carabini , and discovered that this was less than was awarded to Lee Crank, who was awarded £8000. Another employee, Natalie Woods, however, was awarded a bonus which was higher than the claimant's bonus. Another employee, June Harman , in accounts, who the claimant described as a "9 to 5" person also received a £2000 bonus. Bonus awards were made by Paul Kamel, who had a discretion as to what to award. He determined that Lee Crank should be paid the higher bonus because he had helped secure two very lucrative contracts in 2019 (NHS and Kellogg's) which justified a larger bonus than that which was paid to the claimant. He considered that Lee Cranks had earned the business millions in additional sales.

7.17 The claimant nonetheless , on the advice of Ged Carabini, sent an email to Paul Kamel on 20 November 2019 (page 252 of the bundle) thanking him for the bonus, which she greatly appreciated.

7.18 In March 2020 the country fell victim to the COVID – 19 pandemic. As with all businesses the respondent had to put into place measures to comply with government policy, protect its workers, and maintain, as far as possible, its business, which, as part of the supply chain , was essential.

7.19 To that end , the respondent issued a COVID – 19 Policy Statement under its Company Health & Safety Procedures Manual , on 10 March 2020 (pages 254 to 257, and page 258, of the bundle), which contains these provisions:

*"**Stay at home***

As a precautionary measure, Kammec may require some (or even all) employees to stay out of the workplace for a temporary period – particularly where it is on notice of potential exposure by one or more employees to the coronavirus.

While some Kammac employees are set up to work remotely from home, the approach to be taken in relation to non – agile office staff should be considered . Employees have an implied right to work and any steps taken by Kammac to prevent them from accessing work could be a breach of this right. Any temporary "barring" staff from the workplace in an effort to prevent the coronavirus spreading , should continue to pay affected staff their normal renumeration. Kammac will clearly communicate the rationale behind this protective measure."

Further on, these provisions are set out (page 256 of the bundle) :

*"**Precautionary suspensions and annual leave***

Whilst Kammac owe a duty of care to employees to take reasonable steps to ensure their health and safety, there is no currently no legal obligation to impose precautionary suspension of non-symptomatic employees returning from holiday or work in an area known to have experienced incidences of Coronovirus."

And:

However, colleagues who have had contact with the symptomatic employee should be made aware of the symptoms and advised to complete the online coronavirus questionnaire on NHS111 ….. If the NHS does not certify the employee unfit for work , but Kammac are still concerned , then Kammac may consider other options, such as asking the employee to work from home in self – quarantine where possible, or briefly suspending them on precautionary grounds. Where Kammac does choose to suspend returning employees just as a precaution, it will have to be on full pay unless the contract gives Kammac the right to suspend without pay for this reason. Such a suspension should not be considered a 'medical suspension.'"

7.20 On 30 March 2020 the respondent issued an update in relation to COVID – 19 sick pay entitlements. This was from Becky Quigley, HR Advisor, in these terms (page 294 of the bundle):

"We want to clarify a few points to you in regards to absence during this unsettled period:

- **If you are isolating from work because you or a member of your family are showing signs of COVID – 19 , you must complete an isolation note and will only be paid Statutory Sick Pay for the duration of your absence."*

7.21 On 9 April 2020 the claimant was absent from work due to a chest infection. She asked Ged Carabini if she could work from home for half the day and take the other half of the day as holiday (supplementary bundle page 15). On 13 April 2020 at 19:01 the claimant sent an email to Paul Kamel. She said that she had has been short of breath since last week. She had been referred to the COVID centre in Skelmersdale as she was displaying signs of COVID. She was not considered to have COVID, although she had not been tested. She was given antibiotics and an inhaler. She said she would log on tomorrow as usual , but would take sick leave or holiday if needed Later on 13 April 2020 Paul Kamel replied to the claimant, saying he was sorry she was feeling unwell. He asked the claimant to stay at home and take sick leave. He said the office was a

delicate place at the moment and he did not want anyone feeling more uncomfortable (page 300 of the bundle).

7.22 On 23 April 2020 at 17:09 Becky Quigley sent an email to the claimant. She said that it would put colleagues at ease if they knew the claimant had a negative COVID result before returning to work. The claimant was asked for a sick note for her recent period of absence (page 303 of the bundle).

7.23 On 20 April 2020 a colleague of the claimant , with whom she had a close friendship, died of COVID – 19 . This was terrible shock for her, and greatly upset the claimant and other colleagues employed by the respondent.

7.24 On 23 April 2020 a memorial parade for Alex Lennie was held. The claimant attended, as did other colleagues from the respondent. Gary Bridge, a driver, also attended to deliver some flowers to Alex Lennie's mother. He saw that the claimant was present, and saw her in the garden of Mrs Lennie's property, and saw her hug Mrs Lennie. This was reported back to the respondent.

7.25 On 24 April 2020 at 11:44 the claimant sent an email to Becky Quigley telling her that she had applied for a COVID test. She said that she was at Mr Lennie's parent's house during the parade but did not enter the house. She understood that Becky Quigley would not want her to return to work until she received her COVID results as per their previous conversation (page 311 of the bundle).

7.26 Later on 24 April 2020 at 16:57 Becky Quigley sent an email to the claimant. There had been some miscommunication in respect of her recent period of absence. The respondent agreed to pay holiday pay for the last 2 weeks. The claimant was told she would receive SSP from Monday. Becky Quigley requested a sick note whilst the claimant awaited her test results (page 305 of the bundle). It was agreed that she could use her holiday whilst she was off sick so she did not lose any pay

7.27 On 26 April 2020 at 14:36 the claimant sent an email Becky Quigley saying that she had had a COVID test. The claimant had also had Andy and Wade tested as they are in the same household, but she could not get Drew (her daughter) tested because of her age (pages 309-310 of the bundle). Later that day (15:49) Becky Quigley replied, advising the claimant to order a home test for Drew and wait for the results. She was asked to confirm the results before the respondent could advise her in relation to her return to work (page 309 of the bundle).

7.28 On 27 April 2020 at 9:05 Becky Quigley of the respondent received an email from Claire Lennie, Alex Lennie's ex – wife , reporting that the claimant had been in an 18 – month relationship with Mr Lennie , and alleging that the claimant had complained to her that the respondent had breached COVID rules , and had been in constant touch with Alex Lennie (page 308 of the bundle).

7.29 The respondent was concerned to receive this email. It was suspected that Mrs Lennie was going to seek some form of compensation, and was seeking to blame the respondent for the death of her ex - husband.

7.30 It is unclear how it was arranged (there was no email or other written invitation), but on 27 April 2020 a meeting was held by phone at 15:07 between the claimant, Becky Quigley and Chris Jewell, the Head of Transport. The claimant's understanding was that it was a welfare meeting. The notes of the meeting were taken on a standard note taking template document. In the boxes for the meeting details on the first page, in the box for the details of who was being interviewed the box had been ticked for "employee who has had allegations raised against him/her".

7.31 The first entry records that this was an "Informal meeting with Lisa Jones , re : recent absence + allegations raised by Claire Lennie". The claimant said she had received a negative COVID result. Drew's test had been ordered. She was asked about suggestions received from staff that she had been in close proximity with Mr Lennie's family. She denied this, and stated that anyone who said that she had been was lying. She was advised that she would have to self - isolate from the date of the parade. She confirmed that she was happy to isolate but not if she was unpaid. Chris Jewell advised that this would be taken back to the business. The claimant said if she was required to isolate, should everyone at the parade also not be isolating She was asked about her relationship with Alex Lennie, and whether she had spoken to Mrs Lennie about the respondent's compliance with COVID rules. When the claimant questioned why she was being asked these things, she was told that this could not be disclosed to her. She was pressed for more details of what she had discussed with Alex Lennie about working during the pandemic, and whether she had ever discussed these issues with third parties (pages 312-318 of the bundle).

7.32 On 28 April 2020 at 11:28 Becky Quigley emailed the claimant asking her to send her confirmation of COVID test results, and asking if she had spoken with her doctor in relation to her sick note. She went on to explain that the additional questions she was asked at the meeting on the previous day were part of a fact-finding following allegations having been raised. She advised the claimant that she would keep her updated (page 319 of the bundle).

7.33 Later that day Paul Kamel sent the claimant a copy of the email sent to the respondent by Claire Lennie (pages 321 and 322 of the bundle). The claimant replied later that day , at 14.54. She had highlighted in yellow the parts of Mrs Lennie's email , which were the only parts that she could comment upon. She denied expressing any concerns to Mrs Lennie that safeguarding rules were not being adhered to , and this was not a concern of hers. She suggested that the information may have come from Alex Lennie's mobile phone, which Mrs Lennie now had (page 321 of the bundle).

7.34 On 28 April 2020 the claimant also spoke by telephone with Paul Kamel. He has no recollection of this call, and the claimant has not said what she said. On 29 April 2020 the claimant went to see her GP, and was provided with a fit note, dated 7 May 2020 which stated that she was fit to return to work from 27 April 2020 (page 323 of the bundle).

7.35 No action further action was taken in relation to the claimant being suspected of leaking information to Mrs Lennie, but her email account was suspended on or about 28 April 2020. Her absence from work from 27 April 2020 until 1 May 2020 was treated by the respondent as being due to the alleged contact with Alex Lennie's family.

7.36 Between 1 May 2020 and 7 May 2020 the claimant's absence was treated as being due to her awaiting her daughter's test results.

7.37 On 8 or 9 May 2020 the claimant suffered a bad panic attack, and was hospitalised. She woke up with chest pains. She does not consider this to be work- related. Her absence from that date was recorded as being due to her having to isolate after a hospital attendance. The claimant was provided with an Isolation note , dated 9 May 2020 covering the period 9 May 2020 to 15 May 2020.

7.38 On 11 May 2020 the claimant sent an email to Becky Quigley, enclosing Drew's negative test results , and her fit note dated 7 May 2020 (pages 354A, 351 , 324 and 323 of the bundle). She asked Becky Quigley to confirm , by return, how each day of absence since 1 April 2020 was being classed , and what she would be paid for each of these days.

7.39 On 15 May 2020 (a Friday) at 10:20 the claimant sent an email to Paul Kamel asking for his assistance in obtaining wage data (page 354(a) of the bundle) which she wanted by lunchtime that day.

7.40 Becky Quigley replied to the claimant by email at 15.57 on 15 May 2020, apologising for the delay. In that email she set out in a table each day from 1 April 2020 to 15 May 2020. The table set out the type of absence that the respondent was classifying each day as, what pay (in terms of general description, not amounts) the claimant would be receiving, and the reason.

7.41 This is a very comprehensive document. Up until 27 April 2020, the claimant was to receive either full pay, or holiday pay. Whilst she had been off sick during that period, the attribution of holiday for those days was the result of the agreement that had been made.

7.42 In respect of the period 27 April to 30 April 2020, the claimant was to receive SSP only. The type of absence was recorded as "Absence – Isolation", and the reason attributed was "Isolating due to contact with Alex's family".

7.43 Thereafter the entries from 1 May 2020 through to 7 May 2020 are recorded as "authorised absence", the claimant was to receive full pay, and the reasons column records that the claimant was waiting on Drew's test results.

7.44 From 8 May 2020 to 15 May 2020 , however, the absence is again described as "Absence – Isolation", the claimant is to receive SSP or nil pay, and the reason is given as "Isolating after hospital attendance – cannot pay SSP unless an isolation note is received."

7.45 There are, it should be noted, two versions of Becky Quigley's email of 15 May 2020. The first is timed at 15.57, and is at pages 353 to 354 of the bundle. The second is timed at 16.58 the same day , at pages 325 to 326 of the bundle. The difference is that whilst in the former the entries for the period 8 May 2020 to 15 May 2020 , in the "Reason" box the reference to "cannot pay SSP unless an isolation note is received" in the earlier version has been deleted. Both, however, state that if the respondent did not

receive an isolation note before 18 May 2020, the absence would have to be recorded as unauthorised absence and would be unpaid.

7.46 On 17 May 2020 at 17:56 the claimant sent an email to Becky Quigley. She enclosed her isolation note for the period following her attendance at hospital. The isolation note confirmed that she had been told to isolate by an NHS website or healthcare professional because she had symptoms of coronavirus. Her first query , in relation to the period 9 April to 24 April 2020, was that previous sick days had been paid in full, but she was now having to take paid holiday, to avoid being paid SSP. She also said that she was required to work during this period , taking calls. She considered that this period should be paid.

7.47 The claimant's next query related to the period of 27 April to 30 April 2020. She said that she was isolating at the request of the business , she was ready to return to work. She did not consider that the isolation requirements applied to her, as she was not a household member, and was not symptomatic, nor had she been in contact with anyone who was. No such request was received after Alex Lennie had been confirmed as positive for COVID – 19. She had not completed an Isolation note for this period, because of her understanding of the position. Finally, after acknowledging that she was to be paid in full for the period when she was awaiting he daughter's results, she pointed out that 8 May was a bank holiday and should be paid in full.

7.48 Becky Quigley replied on 18 May 2020 , i.e the Monday after the claimant's email, at 11:52 saying she would look into the queries raised by her and would respond in due course (page 351 of the bundle). She had in fact on 17 May 2020 , and during the morning of 18 May 2020 been making enquiries with Lois Gaskell, and Dawn Taylor, as to the claimant's entitlements, and the need for an isolation note (see pages 327 to 330 of the bundle). Lee Crank had been absent as well during this period, and there was discussion about the days that he had off, and what he should be paid (pages 327 to 330 of the bundle). As no isolation note had been received from him, Dawn Taylor, Director of Central Resources, proposed that he would not be paid. Paul Kamel's evidence was that it was his decision, on advice, to pay the claimant SSP for the period between 27 April and 30 April 2020. He accepted that she should have been paid in full for this period as the respondent had requested she isolate.

7.49 The claimant phoned Paul Kamel on 18 May 2020 during the morning. She proffered her resignation to him verbally, and was told to put it in writing. Little was said, and there was no discussion of her reasons.

7.50 On 18 May 2020 the claimant sent an email to Becky Quigley confirming her resignation (page 338 of the bundle) , to which she attached her letter of resignation (page 332 of the bundle). That letter is addressed to Paul Kamel. In it she says this was:

"Due to being subjected to unreasonable and unfair treatment I feel that I have no other alternative but to resign from my position.

Due to the above behaviour I believe that the employment relationship has irrevocably broken down and I resign as a result of the fundamental breach of the employment contract. I consider this to be a fundamental breach of the employment contract on your part, inparticular (sic) *the duty of trust and confidence."*

7.51 On 19 May 2020 Becky Quigley wrote to the claimant, accepting her resignation. She invited the claimant to raise a grievance (pages 333 to 334 of the bundle).

7.52 On 22 May 2020 the claimant replied to Becky Quigley. She said that she raised a grievance and provided the necessary detail verbally with Paul Kamel on 29 April 2020. The claimant does not say in this email what she said to Paul Kamel (pages 336 to 337 of the bundle).

8. Those then are the relevant facts. The Tribunal would observe that the respondent's case has not been best advanced by the witness statements prepared on its behalf. Ged Carabini's first witness statement is far too responsive to the ET1, and does not set out in any flowing narrative what actually happened, what he did and why he did it. His second witness statement is better, but that is responsive to the claimant's witness statement, so suffers from the same flaws. Paul Kamel's witness statement is similarly "light" when dealing with matters such as the variation to the claimant's contract in early 2019, and a few other items. The absence of Becky Quigley as a witness was also surprising, but a matter for the respondent. Be that as it may, the Tribunal has been able to pick its way through, and find the essential and relevant facts set out above.

9. The claimant's evidence has been rather wide ranging, and the Tribunal would also observe that a lot of the evidence adduced by the claimant and her witnesses was of tangential relevance. Much was made of alleged sexual overtones in the relationship between the claimant and Ged Carabini, and other forms of inappropriate conduct, none of which were germane to any of the claims made. The Tribunal does not consider that any party or witness has sought to mislead it, and any disputes of fact have turned upon reliability rather than honesty.

The submissions.

10. Both advocates made extensive written submissions, which are on the Tribunal file, and it is not intended to repeat them here. They were supplemented by oral submissions.

The Law.

11. Two types of claim are (primarily) made , unfair constructive dismissal, and sex discrimination, in the forms of direct discrimination and harassment. The law in respect of the former is well summarised in the parties' written submissions.

12. The case of ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35*** cited by both advocate provides useful guidance which covers several aspects of the claims in this case.

13. At para 14 of the judgment Dyson LJ says this::

"1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27****.*

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462****, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.*

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347****, 350. The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship' (emphasis added).*

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in ***Malik*** *at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).*

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

'[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'

14. In relation to the last straw doctrine, it is now clear that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation. The leading authority in this regard is the Court of Appeal's decision in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833*** , cited by Ms Wheeler, which indicates that, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

15. In relation to the sex discrimination claims, the law is contained in s.13 and s.26 of the Equality Act 2010. The provisions relating to time limits are contained in s.123 of the Act. They are set out in Annex B to this judgment, along with s.23 which relates to comparators.

Discussion and findings (i) – the unfair constructive dismissal claim.

16. The claimant has put her case as a last straw case. That is to say that she does not contend that any one act or omission on the part of the respondent amounted to a fundamental breach of contract entitling her to resign. Rather , she contends that the respondent's conduct over a period of time , culminating in a last straw event, cumulatively amounting to such a breach. The problem for the claimant has been that the last straw that she has sought to rely upon has changed during the course of the proceedings. In her claim form, drafted by her lawyers, at paras. 49 to 51 she pleads this:

*"49. In March 2020 the Claimant went off sick with a Chest infection and had to subsequently self – isolate as a result of the COVID19 pandemic. Throughout the period of her illness it wa (*sic) *requested that the Claimant attend multiple conference calls per day and complete numerous work tasks from home, which she did. Despite previously being always paid full sick pay, the Claimant was only paid Statutory Sick pay.*

50. It should also be noted that despite Government Guidelines , the Respondent refused to allow the Claimant to return to work until she, and her entire family received COVID19 tests, which was not a Government requirement at the time, which was further evidence of the Respondents (sic) *harassment of the Claimant.*

51. This was the final straw for the Claimant and she resigned from her position with immediate effect."

17. This was translated into the List of issues as follows:

2.Did the Respondent breach the Claimant's Contract of Employment (whether an express or implied term) by failing to pay her full Company Sick Pay when the Claimant was absent from work as a result of COVID?

3.Was the 'last straw' event, namely not being paid full CSP and being prevented from returning to work sufficient to amount to a repudiatory breach of contract that entitled the Claimant to resign and claim constructive dismissal?

18. In addition to these matters, however, the claimant sought, and the respondent agreed, to add the particulars of the sex discrimination claims to be relied upon as well for the particulars of the manner in which the respondent fundamentally breached the implied term of trust and confidence. It will be noted that nowhere in the claim form as originally submitted , or in the particulars of the claims of sex discrimination, is there any reference to her attendance at the memorial parade for Alex Lennie, or the ensuing meeting on 27 April 2020, as a result of which the claimant was required to continue self – isolating.

19. In her witness statement, however, at paras. 139 to 144, she says this:

139. The meeting held was clearly not any sort of transparent investigation in my mind otherwise the Respondent would have put the allegations to me in order that they could resolve any complaints, but they did not. I did ask for a Representative when I realised it was not simply a welfare meeting as I have been told, but I was told that I didn't need one.

140. It was clear that this was just another attempt to try and either remove me from the Respondent or to push me to the point where I would leave and ultimately, I was getting to the point where I could not take any more. I specifically asked what the allegations were in order that I may provide them with a response but the Respondent refused to tell me, which left me in a position where I knew that some allegations had been made (or at least I was being led to believe that they had) but I was unable to defend myself against them because nobody would tell me what they were.

141. Following several later requests, I was furnished with a copy of the complaint raised by Mr Lennie's ex-wife, who I assume was ultimately looking to make a claim from the Respondent, to which I gave my response as demonstrated on page 322 of the bundle. At this point I was absolutely devastated that despite my 20 years' service, throughout which I have proven to be nothing but a dedicated, loyal and honest employee, it was clear that the Respondent was happy to assume I had furnished Ms Lennie with this information, which for absolute clarity, I did not. To be very clear, I was not in a romantic relationship with Mr Lennie but I am aware, as was the Respondent, that he had a very tumultuous relationship with his ex-wife and they should therefore have taken this into account when receiving this email. Instead, they choose to use it to further bully and harass me.

142. I could see that the Respondent was not going to stop bullying and harassing me and I realised that eventually they would find some way to terminate my employment. I could see that the Respondent was using this as yet another angle to bully and harass me at a time that was very distressing anyway. I was very vulnerable and had lost one of my best friends only a few days before. A situation similar had happened to Mrs Blanchard when Mr Carabini tried to exit her from the business immediately after her mother passed away in a time of great grief.

143. In the following days I would suffer some of the most intense panic attacks to date, the sheer volume and upset that came with this was not only mentally but physically too much to take and eventually I was taken to hospital with chest pains following a severe attack.

144. This latest series of events was the final straw for me; I knew that the Respondent would not stop bullying and harassing me until I left the business and I felt that all the trust that I had in the Respondent and particularly in Mr Kamel had gone. I could no longer put my mental health at risk and so I finally gave in and handed in my resignation, a copy of which is shown page 332 of the bundle. I had completely given up at this point and found it difficult to function.

20. Whilst the claimant sought permission to amend her claims to add or substitute this as the last straw, which was refused, the facts remains that evidentially she has advanced this as an alternative last straw. This clearly gives rise to issues of credibility or reliability of the claimant's account of the reasons why she resigned when she did.

21. Whilst they do have some overlap, in terms of pay during this period of absence, they are very different, in that the later account refers very specifically to the holding of the meeting on 27 April 2020, and its aftermath. The Tribunal can well see how in effectively ambushing the claimant with an investigatory meeting , when she was told that it would be a welfare meeting, where previously unnotified serious allegations of

misconduct, in the form of alleged leaking of company information to a third party were raised with her, the claimant may have considered that the respondent's conduct contributed to breach of the implied term of trust and confidence.

22. The claimant, however, until her witness statement , made no such allegations as part of her claim. Rather her case was put solely on the basis of the respondent's failure to pay her full sick pay, and preventing her from returning to work. The claimant sought to further refine the last straw in her oral evidence. She alleged that the investigation into her conduct at the memorial parade and the payment of SSP during a period of isolation following that attendance were 'all one event', and went "hand in hand". She was clear in her witness statement that it was the investigation into the memorial parade that caused her to resign. At the time of the investigation, the claimant was unaware that Becky Quigley would inform her that the respondent intended to pay SSP due to contact with Mr Lennie's family. She says nothing at all in her witness statement (or ET1 or list of issues) about Ms Quigley's email of 15 May 2020 or the proposal that she would only receive SSP due to contact with Mr Lennie's family.

23. The burden is upon the claimant to satisfy the Tribunal of the reason that she resigned, and why this was in response to the respondent's fundamental breach of her contract of employment. The claimant has claimed that the reason was one of two, or possibly more, last straws.

24. Which one it was, and indeed, whether it was either, or any, of them, is what the Tribunal has to decide. The claimant's case is not assisted by her resignation letter, or her declining of the invitation made to her by Becky Quigley , after her resignation, to raise a grievance. The claimant is not, of course, legally required to specify the reasons for her resignation at the time that she resigns, or indeed, afterwards, but it clearly hampers her constructive dismissal claim that she did not do so.

25. In terms of the two possibilities before the Tribunal , one of the matters that was originally pleaded, and was encapsulated in the List of Issues , the failure to pay full sick pay , rather recedes when one considers the evidence that the claimant responded to Becky Quigley's invitation by saying (page 336 of the bundle) that she had already raised her concerns and the necessary detail with Paul Kamel in a telephone call on 29 (or possibly 28) April 2020.

26. That , of course, means that it cannot have been Becky Quigley's email of 15 May 2020 (pages 325 and 326 of the bundle) in which the claimant was told what she would and would not be paid for April into May 2020 that was the final straw, as it had not occurred at that time. The claimant has not given evidence of what she said to Paul Kamel in this phone call, and he cannot remember it.

27. The upshot of this is that the Tribunal simply does not know what the last straw which led to the claimant resigning on 18 May 2020 actually was, or if there actually was one. The burden of establishing that there was one lies upon the claimant, and she has simply failed to discharge it. That may be because she does not really know herself. Her resignation was hasty. Having on Friday 15 May 2020 chased the respondent for details of what she was going to be paid in her next payslip, having got an answer later that day, and on 17 May 2020 having raised queries with Becky Quigley about the correctness of the calculations (page 352 to 353 of the bundle), to which she replied the

following day at 11. 53 , that she was looking into the queries that had been raised, the claimant proceeded to resign. Quite what the hurry was, and why she did not wait for Becky Quigley to respond further remains a mystery. The claimant was due to return to work that day, but has not said why she felt she could not do so. The claimant does not appear to have discussed the possibility of resigning with anyone else, such as her sister.

28. Whilst it is not for the Tribunal to speculate, there were, of course, a number of matters which may have been operating upon the claimant's mind at the time. The death of Alex Lennie was clearly upsetting for her, as was doubtless the suggestion that was being made , and probably circulating in the workplace, (rightly or wrongly does not matter) that she had been in a relationship with Alex Lennie. This was Paul Kamel's theory, but it is no more than that. It was also being suggested (again, rightly or wrongly does not matter) that the claimant had been responsible for leaking information outside the company.

29. There were also other possible factors. The claimant's sister, who also worked in the business , left on 17 March 2020. Further, as the claimant mentions in para. 143 of her witness statement without providing much detail, such as the date, her health was deteriorating, and she was admitted to hospital , it seems on or about 9 May 2020, with chest pains following a severe panic attack. That, of course, was before the notification by Becky Quigley of what her pay would be for April to May 2020.

30. Quite what was the cause of such an attack is unclear, but this would clearly be a major worry for the claimant. She said in evidence that it was not work – related, which is likely to be so, given that she was not in work at the time.

31. All of these matters may explain why the claimant took the decision to resign when she did, but it is not the Tribunal's task to ascertain the reasons for the claimant's resignation, it is her obligation to satisfy the Tribunal that it was in response to a last straw, which contributed, however slightly to the cumulative fundamental breach of contract on the part of the respondent. She has failed to do that.

32. What then, is the consequence of that finding? On the authority of ***Kaur*** that is not the end of the matter, the Tribunal is then required to examine the antecedent matters relied upon by the claimant as amounting to a fundamental breach of contract on the part of the employer, to consider whether the claimant has established that there was such a breach as would have entitled her to resign, and that she had not, by not doing so, thereby affirmed the contract.

33. If neither of the two alleged last straws can be relied upon, going back to the matters pleaded as amounting to the fundamental breach on the part of the employer, the last one before April/May 2020 is the Christmas bonus issue, which arose in November 2019.

34. The Tribunal has considered this allegation. The implied term of trust of confidence is only broken if the respondent *without reasonable and probable cause* behaves in a manner calculated or likely to destroy or similarly damage that employment relationship. The italicised words are important. The claimant's complaint in this context (leaving aside at this juncture any issues of sex discrimination) is not about the bonus that she

received, but that Lee Crank received a much larger one. That immediately begs the question of whether it can be breach of one's own contract of employment that another employee was over – rewarded under theirs? The claimant has not established any basis upon which she has begun to suggest her own bonus was unduly low, and why she should have received more, her complaint was merely that Lee Crank received such a large one, and someone else got the same as her. In fact, another employee also got more than her.

35. The evidence was that the decision as to what bonuses were awarded was made by Paul Kamel , who had a wide discretion. He explained his reasons for awarding Lee Crank a larger bonus helped secure two very lucrative contracts in 2019 (NHS and Kellogg's) which justified a larger bonus than that which was paid to the claimant in 2019. Paul Kamel described him as bringing in "millions" in sales.

36. Whilst the claimant may have considered that she had equally brought value to the business, the Tribunal fully accepts that Paul Kamel's reasons were genuine ones, and his perception that Lee Crank's performance merited a higher bonus was a bona fide exercise of his discretion, which did not amount to any breach of the implied term of trust and confidence in the claimant's contract of employment.

37. That means that the Tribunal must then go back to the changes to the claimant's role in 2019, which followed on from the failed audit in 2018. There is no doubt that the respondent was seriously considering disciplinary action, potentially dismissal, against the claimant in late 2018 and early 2019, or that she was moved into a new role. She was "suspended" , for a short period, but not, however, dismissed. Reluctantly or otherwise, but without protest, the claimant accepted the new role from April 2019.

38. This requires the Tribunal to consider whether the claimant affirmed any breach that had occurred up until March 2019 by continuing to remain in employment in these circumstances. The law on this subject is as follows. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221,*** the employee 'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'.

39.Notwithstanding these words, it is important to remember that the issue of affirmation is essentially one of conduct, not simply passage of time. Giving judgment in ***Chindove v William Morrison Supermarkets plc EAT 0201/13***, Langstaff, President of the EAT, warned against looking at the mere passage of time in isolation when determining whether an employee has lost the right to resign and claim constructive dismissal. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. The employee's own situation, Langstaff P continued, should be considered as part of the circumstances. As Lord Justice Jacob observed in ***Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908,*** resigning from a job is a serious matter with potentially significant consequences for the employee. The more serious the consequences, the longer the employee may take to make such a decision.

40. Another important factor, according to Langstaff P, was whether the employee was actually at work in the interim, so that he or she could be seen as complying with the contract in a way that was consistent with a decision to terminate it. Where an employee is on sick leave at the relevant time, it is not so easy to infer that he or she had decided not to exercise his or her right to resign. In this case, of course, until March 2020 the claimant was in work.

41. An employee may continue to perform the employment contract *under protest* for a period without necessarily being taken to have affirmed the contract. In ***Cantor Fitzgerald International v Bird and ors 2002 IRLR 867****,* for example, the High Court held that three brokers had not affirmed their contracts by waiting more than two months before resigning with immediate effect. They had indicated their discontent with the employment and given clear signs of their intention to leave. 'Affirmation,' said Mr Justice McCombe, 'is essentially the legal embodiment of the everyday concept of "letting bygones be bygones".'

42. There comes a point, however, at which delay will indicate affirmation. In ***WE Cox Toner (International) Ltd v Crook 1981 ICR 823*** the EAT held that the Employment Tribunal had misdirected itself on delay . Mere delay by itself does not constitute an affirmation of the contract, but if the delay goes on for too long it could be very persuasive evidence of an affirmation. The Tribunal in that case should have referred to the fact that throughout the seven-month period the claimant had continued to work and be paid under the contract. Even if it were arguable that he was working under protest for six months, the delay for a further month after the company had finally made its intentions clear was fatal to his claim that he had not affirmed the contract. If the employee is able to point to special circumstances, this may justify a delay in resigning, but the claimant has not sought to do so in this case.

43. Our conclusion is that assuming for these purposes (we do not so find, as we do not need to determine the issue) that the respondent's conduct from early 2019 in items 8 to 10, and 15 and 16 of the List of Issues did amount to a fundamental breach of contract which would have entitled her to resign and claim that she had been constructively dismissed, by leaving it until May 2020 to do so, the claimant clearly affirmed any such breach. That would also, in the alternative, be our finding if we were wrong about the Christmas bonus issue, as she waited almost 6 months after that to resign, so had that prolonged the period of the fundamental breach, the claimant would still have been found to have affirmed any such breach.

Failure to pay.

44. There is, however, one further issue to be addressed in this context, as it has been expressly raised by Ms Wheeler in her submissions. She contends, on the authority of ***Rigby v Ferodo Limited [1987] IRLR 516*** that failure to pay wages is a fundamental breach, going beyond any breach of the implied term of trust and confidence. That is correct, and in that case the employer threatened unilaterally to reduce the wages of the relevant employees unless they accepted new terms to avoid potential closure of the workplace. That is not, however, what happened in this case. The respondent did not threaten to cut the claimant's pay (i.e. in April 2020, when the issue of what sick pay she was entitled to arose) it interpreted her entitlements one way, and she interpreted them another way. The respondent has since conceded that the claimant should have been

paid at the higher rate that she sought, but this is not a concession that she was contractually entitled to the amounts that she sought, or at least all of them.

45. In any event, the respondent argues that any breach was anticipatory, and would not occur until payday actually occurred. Payday was not until 25 May 2020, and the claimant resigned a week before. No breach would occur until 25 May 2020, so the claimant could not resign in response to a breach which had not yet occurred.

46. Mr Tinkler referred the Tribunal to ***Financial Techniques (Planning Services) Ltd v Hughes [1981] IRLR 32*** , where Brandon LJ held at para 21:

"In my judgment these legal conclusions do not follow from the facts in the way that Mr Justice Bristow suggested. It does not seem to me that Mr Rook's proposal for dealing with the problem that had arisen, and his pressing it without the applicant's consent, constituted an anticipatory breach of a contract which was due to end on 30 September in any case. There was, as I see it, a genuine dispute between the parties as to what the respective contractual rights were, and Mr Rook, by asserting his own point of view as against Mr Hughes's point of view on that issue, was not to my mind doing anything which amounted to a repudiation of the contract. If it had been shown by the evidence that he did not genuinely believe in the point of view that he was putting, so that there was really no genuine dispute about the terms of the contract and the amounts which ought to be paid to the applicant, then the situation would be different. But on the authorities which have been cited to us it seems to me that, if Mr Rook genuinely believed that there was a difference of opinion about the terms of the contract and did no more than insist on his view in the matter, then he was not repudiating the contract."

47. That seems to us to be applicable here, there was a genuine dispute as to the claimant's entitlement, and, as at 18 May 2020 Becky Quigley had not "shut the door", she had received the claimant's email of the previous day, and agreed to look into the points that she raised. That was not the respondent acting in any repudiatory breach, it was quite the opposite. Any claim of constructive dismissal based on this alternative ground must also fail. As, indeed, it still must, given that whatever breach is relied upon by the claimant , she has still not satisfied the Tribunal as to her reasons for resigning, so even if this breach actually would have entitled her to resign and claim constructive dismissal in response to it, the Tribunal remains unsatisfied that she actually did so.

48. It follows, therefore, that the claimant's claim of unfair constructive dismissal fails, as she was not constructively dismissed.

(ii) The Sex Discrimination claims.

49.the Tribunal accordingly now turns to the claims of sex discrimination. These are set out in the List of Issues as being:

Direct Discrimination on the Grounds of Sex – section 13 EqA 2010

8.Did the Respondent treat the Claimant less favourably than her male counterparts by demoting her as a result of the failed audit?

*9.Did the Respondent treat the Claimant less favourably than her male counterparts by placing her on restrictive duties, [taking her office away from her – **withdrawn**] and forcing her to work in the Operations Room following the identification of the compliance issues, despite the fact that other male colleagues, were also responsible for compliance and were of the same level as the Claimant?*

10.Did the Respondent treat the Claimant less favourably than her male counterparts by removing her title of 'Director' and replacing it with 'Head of'?

11.Did the Respondent treat the Claimant less favourably than her male counterparts by paying her a lower Christmas bonus?

*12. [Did the Respondent treat the Claimant less favourably by failing to renew her Company car, but renewing all the male counterparts on her level? – **withdrawn**]*

13.Did the Respondent treat the Claimant less favourably by failing to pay her full Company Sick Pay when the Claimant was forced to stay off work with COVID?

14.The Claimant believes that the appropriate comparators are:

(i) Craig Olsen;
(ii) Jay Patel;
(iii) Leigh Ward;
(iv) Stewart Heather;
(v) Lee Crank.

Harassment on the grounds of sex – section 26 EqA 2010

15. Did the Respondent harass the Claimant by placing her on restrictive duties?

*16. Did the Respondent harass the Claimant [by taking her office – **withdrawn**] and forcing her to work in the Operations Room where the Claimant was able to hear meetings where she was clearly being discussed?*

17.Did the Respondent harass the Claimant by making it clear that they intended to exit the Claimant from the business?

50. The starting point has to be the last of these, as time limit issues arise. The last in time is no. 13, the failure to pay the claimant CSP (note that requiring the claimant to self isolate, preventing her from returning to work, as such, is **not** included in this claim) . No date is put on this, and, as discussed above, it did not actually occur until 25 May 2020, so a more accurate formulation would be "did the respondent treat the claimant less favourably that it did , or would do, a man, in proposing, on 15 May 2020, only to pay her SSP for parts of the period April 1 to 15 May 2020?"

51. On that basis, the alleged act of discrimination would be on 15 May 2020. The claimant commenced ACAS early conciliation on 3 June 2020, and issued her claim form on 17 August 2020, so this claim is in time. Any claim pre-dating 3 March 2020 would be out of time.

52. That then requires the Tribunal to consider its merits. There can be no issue but that paying less than full company sick pay is potentially less favourable treatment, but as with all s.13 claims, the claimant needs a comparator (note that this claim is not advanced in the alternative as a claim of harassment). That can be either an actual, or a hypothetical comparator.

53. Whilst she originally identified five comparators, which was then reduced to two (Craig Olson and Gary Bridge), the claimant has not successfully identified any actual male comparator. That is not surprising, as she was in a unique position in April and May 2020. She had periods of actual sickness absence, but her absence after the meeting on 27 April 2020 was unique, in that she was being asked to stay off work for two reasons, the first was her alleged contact with the Lennie family, and the second was the need to obtain negative COVID tests on her family, where the delay in obtaining one for her daughter was preventing her returning to work. Whilst she has referred to Gary Bridge as a comparator, as he too attended the memorial parade, he did not, or the respondent believed that he did not, have any contact which required him to self – isolate. Whilst the claimant suggested that Craig Olson had also had contact with the Lennie family, she did not establish this, and, in any event, the respondent did not believe that he had. There was thus no other male person in the same position as the claimant.

54. The claimant must therefore fall back on a hypothetical male comparator. That is to say that she has to show that a hypothetical male in the same circumstances , i.e. who was suspected of having had contact in breach of COVID rules, and of leaking company information to a third party, would not have been treated the same way, i.e. he would not have been paid only SSP if off work in these circumstances. The claimant has failed to do so. She can point to nothing in the evidence that begins to suggest that a male in the same circumstances would have been treated any differently. As it was, we know that from 30 March 2020 the respondent had tightened up its COVID policy (page 294 of the bundle) and anyone isolating from work because they or a member of their family were showing signs of the disease they had to provide an Isolation note and would only be paid SSP. The respondent did not require an Isolation note from the claimant in respect of the period 27 April to 30 April 2020, but paid her SSP anyway.

55. Interestingly , in the discussion in the email traffic on 17 and 18 May 2020 between Becky Quigley , Lois Gaskell in payroll, and Dawn Taylor, the Director of Central Resources , about the claimant and Lee Crank, the latter proposed that Lee Crank would not be paid (anything) because he had not produced an isolation note. It is unclear whether that happened, but the respondent paid the claimant SSP for the period 27 to 30 April 2020 without one.

56. It is unclear whether the claimant was in fact treated less favourably than he was, but the claimant (Ms Wheeler's submissions, page 15) rejects him as a comparator in any event.

57. Other than her sex , and (what may be) a difference in treatment, the claimant has adduced nothing to support her claim that her treatment was an act of direct sex discrimination. Crucially, she has not adduced anything that could amount to the "something more" that is required to reverse the burden of proof in direct discrimination

cases, as explained in , and applied since, the judgment of Mummery LJ in ***Madarrasy v Nomura International plc [2007] IRLR 246.***

58. The Tribunal appreciates that the claimant , and some of her witnesses , have given evidence of there being a "boys club" culture in the respondent. The context in which she has done so, however, is in relation to her dealings with Paul Kamel and Ged Carabini, particularly in relation to the failed audit and alleged demotion issues in late 2018 and early 2019.

59. The evidence before the Tribunal, however, is that these pay issues in mid – May 2020 were being dealt with not by Paul Kamel or Ged Carabini, but Becky Quigley and two other females. No input from either of these men is apparent. It may well be that in due course these matters would be referred to them, and the claimant had indeed sought that on Friday 15 May 2020. That , however, was before Becky Quigley's first email to her, and there is no evidence that Paul Kamel had any involvement in the details that she set out in that email. Whilst he did, in evidence, accept that it was he who decided, on advice (an important fact) that the claimant should only be paid SSP, it is unclear when this was, and the implication of the email traffic over 15 to 18 May 2020 is that Becky Quigley was going to seek further advice from the management team.

60. In short , there is no evidence from which the Tribunal could begin to infer that her treatment in this regard was anything to do with her sex. This claim of direct sex discrimination accordingly fails.

The other sex discrimination claims.

61. That then is the only in time sex discrimination claim before the Tribunal. The next before it is issue no. 11 in the List of Issues, the payment of a lower Christmas bonus. That was in late November 2019. It is unclear precisely when the claimant found out about the fact that Lee Crank received a higher bonus than she did, but it seems likely that it would have been before the end of November 2019 (presumably from Ged Carabini, as it was he who suggested she send a thank you email to Paul Kamel, which she did on 20 November 2019). Assuming that was potentially an act of sex discrimination, the time limit for presenting a claim would have expired, at the latest around March 2020. These claims were brought on 17 August 2020, so any such claim would be around 5 months out of time.

62. It follows then that any claims relating to items 10, 9, and 8 in the List of Issues (direct sex discrimination) and items 16 and 15 (harassment) all go back to early 2019, around March or April of that year, if not earlier. It follows that any claims in relation to those matters were presented more than a year out of time. Item 17 of the List of Issues is rather vague, but the claimant does not suggest in her evidence that that this alleged intention was evidenced at any time after the events of 2019, so this too is an out of time claim.

63. The Tribunal has, of course, a discretion to extent time for presentation , under s.123 of the Equality Act 2010. The fact that the Tribunal has found that the one in time discrimination claim is not well – founded means that the claimant cannot rely upon the conduct extending over a period of time provisions in s.123(3) of the Act.

64. She therefore has to invoke the Tribunal's discretion. Unfortunately she has laid no evidential basis for this. Ms Wheeler in her Skeleton (page 16, last paragraph) has attempted to advance a case for the exercise of the discretion, but this is not evidence, it is submission, None of it is contained in the claimant's (extensive) witness statement. This is not a surprising issue for the claimant to have to deal with. Para. 41 of the Rider to the ET3 expressly pleads limitation, and even advances a case on why it would not be just and equitable to extend time for the presentation of the claims out of time. Despite this, (and possibly because of omission of time limit issues in the List of Issues) the claimant's witness statement is wholly silent upon these issues. The only evidence that the claimant gave about this issue was , in answer to Mr Tinkler in cross – examination, that she was never going to bring a claim whilst she still worked there. That may be so, but whilst it is an explanation , it does not adequately explain why she made no attempts whatsoever to raise these matters, even informally, especially with Ged Carabini with whom she was on good terms.

65. The time limits are exercised strictly in employment cases, and that there is no presumption that a Tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can think of a reason not to extend: 'the exercise of discretion is the exception rather than the rule' , as was held in ***Robertson v Bexley Community Centre [2003] IRLR 434 .***

66. In order for the Tribunal to exercise its discretion , generally , it must have evidence, not assertion, before it. The respondent has had no opportunity to cross – examine the claimant upon these assertions made in support of an application to extend time for the presentation of what are , in the main and most serious parts, very old claims. The delay in presentation is considerable, and the Tribunal only has a partial explanation for why the claimant took no steps whatsoever to raise these issues much sooner. The claimant has established no adequate basis for granting an extension of time on the basis that it would be just and equitable to do so.

67. The Tribunal would add that the claimant's sex discrimination claims suffered from the serious potential difficulty that a major theme of her case has been that , since the introduction of Laura Olson into the business, the respondent, or at least the Olsons, wanted her out of it. That, of course, may have had nothing to do with her sex. It may have had a lot to do with the ambitions of the Olsons, particularly Laura Olson, as the evidence was that Craig Olson had been in the business since 2007, and no such issues had arisen. On the other hand, Paul Kamel had been supportive of the claimant, and had overseen and supported her rise to Director level. Resentment at the claimant's abilities, or embarrassment that the failures of the Transport department for which she was arguably not solely, or even largely, responsible may be revealed to be the fault of others (not necessarily because they were male, but because they were relatives) may equally have informed the respondent's views of her. Talk of "hit lists" , on which persons of both sexes featured, evidence of the unfair dismissal of a male employee, and other practices, would have undermined the thesis that the reason for the claimant's treatment was her sex. These are not issues that the Tribunal has had to determine, but they highlight how the claimant's remaining sex discrimination claims were far from certain.

68. They were, however, presented out of time, and are dismissed.

Employment Judge Holmes
DATE: 11 May 2023

RESERVED JUDGMENT SENT
TO THE PARTIES ON
19 JUNE 2023

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Annex A
Complaints and Issues

Constructive (unfair) dismissal

1. Was there a series of conduct sufficient to amount to a repudiatory breach of contract?

2. Did the Respondent breach the Claimant's Contract of Employment (whether an express or implied term) by failing to pay her full Company Sick Pay when the Claimant was absent from work as a result of COVID?

3. Was the 'last straw' event, namely not being paid full CSP and being prevented from returning to work sufficient to amount to a repudiatory breach of contract that entitled the Claimant to resign and claim constructive dismissal?

4. Did Claimant resign because of the breaches?

5. Did the Claimant waive the breaches?

Wrongful Dismissal

6. If Claimant was constructively dismissed, was she also wrongfully dismissed?

Unlawful Deduction of Wages

7. Does the Respondent owe the Claimant sick pay and holiday pay?

Direct Discrimination on the Grounds of Sex – section 13 EqA 2010

8. Did the Respondent treat the Claimant less favourably than her male counterparts by demoting her as a result of the failed audit?

9. Did the Respondent treat the Claimant less favourably than her male counterparts by placing her on restrictive duties, [taking her office away from her – **withdrawn**] and forcing her to work in the Operations Room following the identification of the compliance issues, despite the fact that other male colleagues, were also responsible for compliance and were of the same level as the Claimant?

10. Did the Respondent treat the Claimant less favourably than her male counterparts by removing her title of 'Director' and replacing it with 'Head of'?

11. Did the Respondent treat the Claimant less favourably than her male counterparts by paying her a lower Christmas bonus?

12. [Did the Respondent treat the Claimant less favourably by failing to renew her Company car, but renewing all the male counterparts on her level? – **withdrawn**]

13. Did the Respondent treat the Claimant less favourably by failing to pay her full Company Sick Pay when the Claimant was forced to stay off work with COVID?

14. The Claimant believes that the appropriate comparators are:
    (vi) Craig Olsen;
    (vii) Jay Patel;
    (viii) Leigh Ward;
    (ix) Stewart Heather;
    (x) Lee Crank.

Harassment on the grounds of sex – section 26 EqA 2010

15. Did the Respondent harass the Claimant by placing her on restrictive duties?

16. Did the Respondent harass the Claimant [by taking her office – **withdrawn**] and forcing her to work in the Operations Room where the Claimant was able to hear meetings where she was clearly being discussed?

17. Did the Respondent harass the Claimant by making it clear that they intended to exit the Claimant from the business?

ANNEXE B

THE RELEVANT STATUTORY PROVISIONS

THE EQUALITY ACT 2010

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.

123 Time limits

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

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

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

(2) [n/a]

(3) For the purposes of this section—

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

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

26 Harassment

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

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

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

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

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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