EMPLOYMENT TRIBUNALS

Claimant: Mrs K Edwins

Respondent: Artem Ltd

Heard at: Watford Employment Tribunal (In Public; In Person)

On: **18 to 31 January 2023**

Before: Employment Judge Quill; Ms S Boot; Mr P Miller

Appearances

For the claimant: Mr Pacey, counsel
For the respondent: Mr Uduje, counsel

RESERVED JUDGMENT

1. By unanimous decision, the Claimant was dismissed, and that dismissal was unfair.

2. By unanimous decision, the Claimant is entitled to damages for breach of contract for lack of notice of dismissal.

3. By unanimous decision, the dismissal was not an act of victimisation or an act of age discrimination.

4. By a majority decision (Ms Boot and Mr Miller), the dismissal was an act of sex discrimination and an act of race discrimination.

5. By unanimous decision all the other complaints fail and are dismissed.

6. There will be a remedy hearing.

REASONS

Introduction

1. This claim is brought by a former employee of the Respondent. The Respondent is a company providing products and services within the special effects and creative model making industry.

2. The Claimant worked for the Respondent from 1996 to 2020, until her employment ended in circumstances which the Claimant alleges was a constructive dismissal.

The Claims and The Issues

3. There are complaints of harassment and of discrimination relating to three protected characteristics: age, race and sex.

4. There are complaints of victimisation.

5. There is also an allegation that the Respondent's conduct led to her resignation on 13 August 2020 and that she has (therefore) been constructively dismissed.

6. The Claimant brings claims of unfair dismissal contrary to of the Employment Rights Act 1996 ("ERA") and dismissal in contravention of the Equality Act 2010 ("EQA).

7. She also alleges breach of contract.

8. There was a document labelled agreed list of issues in the bundle [Bundle 55 to 71]. However, both parties requested that we use, instead, the Events Spreadsheet [Bundle 72 to 94] as the basis for the decision-making, and we have done so.

9. There are some things that were plainly intended to be part of the claim, but not addressed in the Events Spreadsheet, so we have used the "agreed list of issues" for the following:

   9.1. For direct sex discrimination, the alleged actual comparator is Mr Stewart, and the Claimant also relied on a hypothetical comparator who is a man (paragraph 3)
   9.2. For direct age discrimination, the alleged actual comparator is Mr Stewart, and the Claimant also relied on a hypothetical comparator who is 30s or late 20s (paragraphs 4 and 7)
   9.3. For direct race discrimination, the alleged actual comparator is Mr Stewart, and the Claimant also relied on a hypothetical comparator being an employee not of Chinese Caribbean & British Guyanese origin (paragraph 9)
   9.4. The alleged protected acts are those labelled and defined as Protected Act One, Protected Act Two, Protected Act Three, Protected Act Four in paragraph 20.
   9.5. The alleged dismissal is (not only alleged to be direct discrimination and victimisation, but is also) alleged to be unfair (paragraphs 23 to 30) and wrongful (paragraphs 31 and 32).

10. The parties agreed that all those things should also form part of the list of issues. Subject to those observations, we agreed to treat the Events Schedule, rather than the other document, as the agreed list of issues.

The Hearing and The Evidence

11. The hearing took place in person save for one witness (Tobias Stewart) who participated by video.

12. We had the documents electronically and in paper.

13. We had a main bundle numbered up to page 606 (which was around 634 pages, including inserts and index). We had Claimant's Supplementary Bundle of 55 pages. We ordered additional disclosure of statements/meeting notes from grievance investigation which were 60 pages. Where we refer below to:

    13.1. [Bundle XXX] that is to page XXX of main bundle.

    13.2. [Supp YYY] that is to page YYY of Claimant's Supplementary Bundle

    13.3. [Stat ZZZ] that is to page ZZZ of grievance statements bundle

14. We had a written witness statement from the Claimant. We had 3 written witness statements for the Respondent: Mr Kelt, Mr Stewart; Mr Tayler. Each of those witnesses gave evidence on oath and answered questions from the other side and the panel.

The Findings of Fact

<u>Some of the relevant individuals</u>

15. The Respondent began operating in 1988 with 5 shareholders. By the time period relevant to this dispute, 3 of them remained and we will refer to those as the “founding members”. They are:

    15.1. Michael Kelt, who owned 50% of shares

    15.2. Simon Tayler, who owned 25% of shares.

    15.3. Stan, who owned 25% of shares

16. The founding members were each directors. Each of them was also active in running the business as well as being shareholders. Mr Kelt has been the most senior, and, as discussed in more detail below, has acted as Managing Director and as Chairman in particular periods. Stan was Senior Designer and Head of Sculpture.

17. By the times relevant to this dispute Messrs Kelt and Tayler were in their mid-60s and Stan was in his mid-70s. Stan and Mr Kelt had known each other for over 40 years, and their families were friendly with each other, and they had occasionally holidayed together

18. The Claimant was employed by the Respondent from 1 January 1996. She was initially employed part time for 3 hours a day 2-3 days a week as an admin clerk. She was promoted from time to time. In January 2004, Mr Kelt made a recommendation to the board, which was accepted, that she be appointed as Finance Manager. The employment contract for that role, signed by the Claimant and Mr Kelt, is [Bundle 134 to 139]. Later in 2004, she joined the board and became known as Finance Director. The Claimant was in her 30s when she joined. She was in her 40s when appointed to the board. She was in her mid-50s at the times relevant to this dispute.

19. Tobias Stewart first worked for the Respondent while doing his degree, and then joined as an employee, around 2008, after graduation. There was a gap in employment around 2013 to 2015. He was originally a Special Effects Senior Technician. As discussed in more detail below, he was appointed as a director in 2018 and later that year became Managing Director.

20. SB is an employee of the Respondent's. She is described in the Claimant's witness statement as "the only other BAME woman, other than me" working for the Respondent at the time. Her job title is accountants assistant. She has held that job since around 2007, approximately. She started out working on reception. She left the Respondent for a while, and then returned. She reported to the Claimant for her entire career with the Respondent until the Claimant departed.

21. The Claimant is not a qualified accountant and the Respondent used external accountancy advice. At the times relevant to this dispute, they had an accountant, Amanda Shingleton, closely involved in the business. She was not an employee or director, but rather the Respondent was her (or her business's) client. She attended the majority of Board meetings and was frequently included in email correspondence between the directors.

22. The Respondent's auditors were Buzzacott.

<u>The Respondent's workforce</u>

23. The Respondent has produced a staff list dated December 2022 [Bundle 563]. In other words, while we do not doubt its accuracy for that date, that date is more than 2 years after the end of the Claimant's employment, and more than 4 years after the earliest of the complaints.

24. It lists 27 male employees and 9 female.

25. For age it uses the heading "approx. age" and used numbers ending with a "0" or "5" in each case (other than for Mr Kelt). Thus it is not based on accurate data.

    25.1. It lists 2 people (both male) in their 60s, one of whom is Mr Kelt.

    25.2. It lists 8 people aged 50 to 59. (6 of whom are "approx." "50" so may have been in their 40s in 2020)

25.3. It lists 4 people aged 40 to 49. (2 of whom are "approx." "40" so may have been in their 30s in 2020)

25.4. The remainder are between 25 and 39.

26. In the column "other" it uses the phrase "person of colour" for 4 employees; "Scottish" for 4; "also has [another] passport" for 1. The remainder is blank.

27. In the column "ethnicity or country of origin", all bar 5 entries say "British".

28. 4 of the 9 female employees are said to be in their 50s .

29. 1 of the 9 female employees has "person of colour" listed. That is SB who is discussed below.

Allegation of "male dominated industry"

30. The Claimant alleges that it was a male dominated industry. Furthermore, and in any event, she alleges that it was Mr Kelt's perception that it was a male-dominated industry and that this opinion affected the way he treated her and valued her contributions to the business.

31. We take into account the document at [Bundle 153 to 154]. This contained a left hand column of points that had arisen from the questions to staff in 2017, and a right hand column about what had been done in response. Item 30 is that someone had said (and we do not know who, but it was not the Claimant): "male dominated environment". All that was written in right hand column was "Mike to consider further". There was no evidence that the comment was regarded as untrue, or of anything done to either respond to it, or seek to address it.

32. The majority of the Respondent's employees were male.

33. Neither side had introduced any statistical evidence. We do accept that statistical evidence would only be indirectly relevant to whether it was Mr Kelt's perception that it was a male dominated industry, but we do not have the evidence in any event. We assume (though we have not seen the evidence) that the comparative percentages of male/female would differ depending on whether the sample was: all employees of special effects companies; all senior employees of special effects companies; all board members of special effects companies; all chief executives of special effects companies.

34. The grievance investigation report stated [Bundle 522]

> As a side note, while not directly relevant to your treatment and complaints, I wanted to understand for context more about your allegation that the industry is dominated by white men. However, this proved difficult to research as the reports and studies focus on creative roles (the under representation of women directors for example) and technical roles I am therefore unable to comment on this other than to acknowledge that in general women and women of colour are known to be under-represented at senior levels in many industries and therefore I broadly accept your point

35. Our finding is that the Claimant may well be correct that white males are over-represented in the industry. She has not proven that Mr Kelt consciously bases his decisions on a perception that it is a white male dominated industry.

Comments between staff

36. As part of the Claimant's grievance, interviews were carried out.

37. In relation to comments or nicknames or so-called "banter" that might be connected to race, one interviewee, SB, stated:

> Always comments about colours, races, Northern, ginger. They say it without thinking and that Mike and Toby say it a lot. They have said it often enough in the office, about Tom, Toby says 'the ginger nut' SB: On review of this statement amended this to 'ginger nut / nob'.

38. On being asked for specific examples, the interviewee was able to recall comments about "ginger nut" and "Northern", but did not give any specific examples about colour or race.

39. The other interviewees did not say that there were comments, insults or "banter" relating to race.

40. In relation to comments or nicknames or so-called "banter" that might be connected to sex, one interviewee recalled that Mr Kelt had said to her that she had got her "knickers in a twist" and she had found this offensive.

41. One interviewee recalls Mr Kelt using the phrase "pretty young lady", and that, amongst other things, he said that he wanted a "pretty young lady" on reception.

42. As discussed below, there was also the "old nag" comment.

43. The other interviewees did not say that there were comments, insults or "banter" relating to sex.

Office

44. Stan is a highly skilled sculptor. He (along with other technical staff) had use of a workshop when working. Stan had never been allocated his own office, and his duties as an employee did not require him to have one.

45. The Respondent's premises included two offices close together. One was used by the Claimant. The other was one which was not allocated to any employee(s) for regular day to day use, but was available as and when required when someone needed an office for a particular reason. It was where meetings with clients would take place, for example.

46. Mr Kelt noticed that Stan had started using the office more frequently than previously. Furthermore, he was using leaving sculpting tools and materials there too. Mr Kelt did not want this because he was concerned about that it affected the appearance of

the room, and risked creating a bad impression for potential clients who had meetings in the room. He asked Stan to stop doing this.

47. He also made comments to the Claimant on one or more occasions that he did not like Stan using the office in that way. In the course of the discussions, the Claimant expressed that she personally saw no harm in Stan using the office in the way he was using it, and Mr Kelt asked why that was, and there was a two way discussion and exchange of views in which neither of them changed their minds. There was no loss of temper or raised voices. This was a workplace discussion between two senior employees who had known each other for over 20 years. Mr Kelt was not asking the Claimant to do anything about the situation. He did not need to ask the Claimant to do anything, as she had no line management responsibility for Stan, and because Mr Kelt was perfectly capable of speaking directly to Stan, and that is what he did.

48. His purpose in raising the issue about Stan's use of the office was that he thought Stan was using the office for something other than its intended purpose. It was not a means of trying to force Stan to leave the business (as employee, or director, or shareholder). Furthermore, he was not intending to remove from Stan something which Stan had previously had: (i) Stan had never been granted priority rights to use that office in comparison to others; (ii) Mr Kelt was not purporting to say that Stan could never use the office (eg to meet guests, or to do paperwork); he was just requesting that Stan make sure he left the office in a presentable state afterwards, and did not store sculpting materials there.

<u>Stan's opinions about the way he was treated in 2018 and 2019</u>

49. Stan was not called as a witness by either side. He was interviewed on 20 October 2020 as part of an investigation into a grievance brought by the Claimant. The Respondent did not disclose the interview notes (only the outcome) to the Claimant, either as part of the grievance process or as part of this litigation.

50. We accept that the Respondent itself did not have the notes in its possession (until we ordered disclosure during the final hearing). We do not accept that the Respondent did not have the documents in its control. The external contractor who investigated the grievance did so on the Respondent's behalf. She was an employee of or sub-contractor (it does not matter which) of the Respondent's external HR provider, Moorepay, which is the same organisation which has conducted this litigation on the Respondent's behalf. The investigator, Louise Gillibrand, described herself as "HR Consultant, Moorepay" to the Claimant and the interviewees.

51. Stan confirmed that the restructuring of the Board in 2018 was part of a plan for the 3 founding members to step down from the operational side of things, and also a plan to move to Employee Ownership Trust (EOT).

52. It seems to us that (quite understandably given that it was two years later) he was slightly vague in his recollection when seeking to remember what happened when appointing the 3 new directors, as opposed to what happened when appointing the MD.

53. He recalled that the Claimant had made an allegation that Mr Kelt had been bullying him, Stan. (From the context, we are satisfied that he is referring to the email on page 205. Protected Act Two). He did not recall any direct discussion between himself and the Claimant about the Claimant's suggestion that Mr Kelt was bullying him.

54. He believed that he had been badly treated. He believed that there had been a suggestion from Mr Kelt that, he, Stan, could potentially go freelance. However, the company's accountants had advised against that. He seemed to be referring to discussions that he had with Mr Stewart so we infer that he is talking about from later than December 2018. He was concerned about not having work to do and about whether the Respondent had been starving him of work so that they could make him redundant. He said he had been concerned about being a burden on the company given that he was not working. He had suggested going on unpaid leave, and had that suggestion rejected. He believed that Mr Stewart had suggested that he could go onto a zero hour contract, or else could resign and take redundancy.

55. His age had not been specifically mentioned, but he believed the implication during the discussions was that the Respondent was implying it was time for him to step down. It was his intention/preference to remain as a Director, Shareholder and employee until such time as the EOT was up and running (or at least until such time as his shareholder entitlement was clarified and documented).

Succession Planning

56. In around 2018, the founding members had discussions between themselves and decided that they were reaching an age at which they should start contemplating retirement. They decided that they needed to initiate an exit strategy and to start to take more of a back seat.

57. They decided that they needed to establish a new structure to take the business forward and considered creating an Employee Ownership Trust (EOT).

58. Future plans were discussed at a board meeting on 26 June 2018 [Bundle 157]. The Claimant, Stan and Mr Kelt were all present. As stated in the minutes, discussions about selling the company were shelved and:

> After discussion it was agreed that changes were required to the Board to increase its drive and resume growing the company. It was also agreed that the current shareholding directors should retire from the Board over the next 2 years. Mike stated he intended to step down as MD, while remaining as Chairman, and that this would happen not later than January 2019. It is assumed the new MD would be an internal candidate. With this in mind 2 new directors would be appointed to the Board not later than the next Board meeting, and be trained up as required. The posts would be intimated to all staff and anyone interested invited to apply. As the Board changes over time the departing shareholding directors would be able to see how the new Board is working. So long as they are shareholders they would have ultimate oversight of the Board through Shareholders General Meetings.

> This new Board would then be in place should a future purchaser of the company materialise and it would be seen as giving continuity. Alternatively, if a management buy-out or Co-operative arrangement happened this new Board would be key to its potential success. The future roles on the Board and its relationship to a management team, (if still in place) would be left to the new Board. It was agreed that the job description/person spec for the MD be re-examined and modified as necessary before emailing all staff regarding the changes ahead

59. One of the existing directors (Richard Hince) departed and so it became necessary to recruit 3 new directors rather than the 2 mentioned in the minutes. Neither Mr Kelt nor the Board were making these arrangements to try to force Stan out, and Stan was content with the plans as minuted.

MD Role

60. Mr Kelt had acted as managing director for several years, doing all aspects of the role, including HR and Legal (with external advice on those matters where needed). The Respondent had hired an external managing director ("MD") (a white male with no previous special effects experience). This MD left in around 2012. The Respondent did not externally recruit and Mr Kelt resumed the MD role. Around that time, the Claimant agreed to perform the HR and Legal duties (with external advice where necessary) to lighten Mr Kelt's load.

61. Although the minutes of 20 June 2018, imply that the MD job description will be reviewed and updated later than 20 June, the document at [Bundle 155 to 156] is the one that was eventually used. On the face of the document, it was updated shortly before the June Board meeting (albeit as part of the on-going restructuring decisions) on 25 May 2018. It made no specific reference to responsibilities for HR or Legal. Amongst other things, in the part of the person specification dealing with previous experience, it referred to an "essential" need for "Thorough knowledge of Special Effects industry".

Director Appointments

62. The opportunities to join the board were advertised to staff, and 9 people applied. 6 of those 9 were shortlisted.

63. Age was not one of the specified criteria, and Mr Kelt did not attempt to obtain dates of birth of any of the candidates. The Claimant, and not he, was in charge of HR files at the time. In cross-examination, he gave the opinion (and we accept he was doing his honest best to estimate) that only 1 of the 9 was older than 40. That was 1 of the 3 who were not short-listed.

64. On 10 September, the 6 shortlisted candidates did presentations to all staff members (not just the board). Staff who were present were able to vote. The Respondent had no formal policy on conducting votes of this nature, and had not made appointments by this method previously. There was no rigorous checking of exactly what happened. The process was primarily overseen by Mr Kelt, but the voting papers (with a "1" to "5" scoring system) or the counting could have been scrutinised by any of the other board members in as much detail as they wanted to.

65. The three successful candidates were Emily Pooley, Toby Stewart and Richard North. They were welcomed to the Board of Directors at the meeting on 23 October 2018. [Bundle 163]. The Claimant made no objection to any of these appointments. They were all younger than 40 (and younger than the Claimant had been when she joined the Board around 14 years previously).

66. At the same meeting, it was noted that both the Claimant and Mr Stewart had expressed interest in the MD role. It was agreed that they would make a presentation to staff and the Board one evening, after which questions can be asked and a non-binding vote taken. It was ultimately to be for the other 4 members of the Board to select who was appointed, taking into account the staff vote.

MD appointment

67. On 16 November, an email was sent to all staff members, announcing that the Claimant and Mr Stewart would do presentations on 21 November. It said that there would be a 6 month hand over period from the successful candidate to Mr Kelt. In the communication, Mr Kelt said that he thought either one was a capable candidate. That was true. That was his genuine opinion. He had said in the past that he regarded the Claimant as a potential successor to him as MD, and he meant it.

68. During the presentations, each said that they would work under the other if the other was appointed as MD.

69. Of the Board vote (which was the only one that really mattered) one person (Stan) voted for the Claimant, and the remainder for Mr Stewart. (Mr Stewart and the Claimant could not vote, and were not present). We have seen no documentary evidence of the staff vote, but each of Tayler and Kelt believe (and we accept) that it was overwhelmingly in favour of Mr Stewart.

70. The announcement was made on 22 November 2018. [Bundle 169].

71. Because of the salary increase associated with MD, Mr Stewart would now be getting a higher salary than the Claimant (with prospect of further pay rise after the hand over). The Claimant decided that it was not fair for her to continue to do the HR and legal duties which she had taken on in 2012. Her opinion was that these were actually the MD's duties, and she had only been doing them as a favour to Mr Kelt and the Respondent. (Although there is no evidence that she asked for them to be added into the MD's job description when it had been discussed in the summer). For that reason, she informed Mr Kelt that Mr Stewart should do these duties from now on. On 5 December 2018, there was an email trail between Board members about sickness absence in which Ms Pooley asked about how such matters were usually handled. Mr Kelt replied by saying that he and Mr Stewart would meet to discuss and bring forward a proposal. He added: "For general info; Karen no longer wants to deal with HR". [Bundle 171 to 170]. The Claimant replied, on 6 December, to the same recipients (the whole board, but only the board) stating that her reasons for saying that Mr Stewart should do the HR were those we have just mentioned.

72. Mr Stewart took on the HR and legal duties. The Respondent's external HR adviser continued to be Moorepay. Neither Mr Kelt nor Mr Stewart were angry at the Claimant's stance. They regarded it (rightly or wrongly) as a reaction to not being selected as MD and were willing to accommodate it, and hoped (and expected) that the Claimant would shortly come to terms with fact that she had not been selected. Neither Mr Kelt nor Mr Stewart regarded the duties as being unduly onerous for Mr Stewart because of the extent to which the more run of the mill parts of HR functions were done by more junior staff anyway and the extent to which the MD (and potentially whole board) would be likely to involved in any significant legal disputes anyway, and because of the external assistance which the Respondent received for these matters. Furthermore, whereas Mr Kelt had been acting as both chairman and MD for several years, Mr Stewart was to be MD only, whereas Mr Kelt was still continuing as chairman.

73. The Claimant's salary was not reduced, and nor was there any suggestion by the Respondent that it would be or should be, because she ceased these duties.

New Young Team

74. The Claimant alleges that Mr Kelt and Mr Stewart very frequently used the expression "new young team". Furthermore, she alleges that this referred specifically to a group which did not include her (namely the 3 new directors).

75. Mr Kelt denies using the expression.

76. Taking into account what various people said to Louise Gillibrand, who investigated the Claimant's grievance in late 2020, after the end of the Claimant's employment (so two years after this treatment allegedly started), we are satisfied that there was one or more occasions in which Mr Kelt said something similar to "new young team". We are also satisfied that this was said in the context identified in the June 2018 board minutes (and previously discussed between the founding members as a group) that it was necessary to have succession planning, and appoint people to the board who would be able to take over from the founding members. It was not intended as a reference to their age in absolute terms, just the fact that they were expected to be younger than the founding members.. Furthermore, while there was a plan that the founding members would step down, there was no plan or intention that the Claimant, who was more than 10 years younger than Mr Kelt and around 20 years younger than Stan, would be stepping down, and the label was not intended to imply that there was a plan for the Claimant to be replaced.

77. It does not necessarily follow that Mr Kelt was lying when he said he had not used the expression. We accept it is possible that he simply does not remember.

78. In relation to Ms Pooley in particular, we are also satisfied that there was one or more occasions on which Mr Kelt said "here comes young Emily" (or similar). He said it frequently enough for her to describe it as "quite often". [Stat 58]

79. We are not satisfied that Mr Stewart used the expressions "young team", "young generation", "young Emily" or similar.

The Claimant's 17 December 2018 staff review

80. The Claimant's comments in December 2018, in her annual review, included that she wanted to see: "greater understanding by the staff of the purpose of following the procedures that are in place."

81. She also said:

> I think that as previously mentioned I would like the team to understand the finance role better and the problems caused, and genuine financial loss caused, by not following procedure and obtaining documents. The importance should be stressed by the MD backing up finance and treating any misdemeanours with some sort of consequence Maybe when looking at bonuses or salary increases? I think that all of these things should be taken into consideration.
> Frustrated by other people not doing their jobs properly and thereby affecting our work. Then others, complaining about lack of timely information.
> I would also like the environment at Artem to be much more politically correct and colleagues should respect each other. Again this should be reinforced by the MD.

Unpaid leave and Part-Time Arrangements

82. The Board minutes of 26 February 2019 [Bundle 183] record the following, which we accept as an accurate summary of a matter which was discussed and agreed:

> It was agreed that any individual reducing their days worked (eg doing a reduced week) would take the same percentage reduction in benefits, (eg. salary, pension, holiday, etc). Stan reported that he was now doing 2 days a week, however [the Claimant] corrected this saying he was taking unpaid holiday, (Some clarification will be needed to make this official)

83. The Board minutes of 23 April 2019 [Bundle 185] record the following, which we accept as an accurate summary of two matters which were discussed and agreed:

> Mike informed the meeting that he planned to work reduced days from the start of July, (working a 4 day week), and asked if this was acceptable. There were no dissenting voices. It was further agreed that new contracts would require to be signed by those following this route as discussed previously, including a pro-rata reduction in all benefits. Toby would look into getting the paperwork in order for this.
>
> The issue of unpaid leave was discussed and will in future be taken into account when calculating benefits, such as annual leave etc.

84. The Board minutes of 25 June 2019 [Bundle 187] record the following, which we accept as an accurate summary of related matters which were discussed and agreed:

> An updated set of terms and conditions of employment had been drafted by our HR company for those wishing to reduce the number of days a week they work. It follows previous Board discussions and reduces benefits pro-rata to reduction in days worked, and could be applied to anyone in the company. Simon objected to any pro-rata reduction in his pension contributions by the Company. It was agreed to delay a vote on this until Stan and Simon had talked to their financial advisors the following day, after which it

would be resolved by email and added to the minutes. (*Subsequently it was agreed that "Anyone wishing to reduce their days worked would receive a pro-rata reduction in all salary and benefits associated with their employment while fulltime. It will be at the discretion of the Company as to whether an employee can reduce their work days, and by how many, which would require to be agreed in advance*)

Unpaid leave solution - Toby to continue on present course.

85. The italics are ours, not in the original, and our inference is that this is probably something added into the minutes before they were approved, but later than 25 June. The next meeting was 27 August 2019.

86. On 17 July 2019, Mr Kelt sent an email [Bundle 191]:

> Note to all directors;
>
> New contract parameters for those wishing to reduce the number of days worked per week.
>
> Following on from discussion at the last Board meeting it is now time to vote on a resolution to put this into place, or not.
>
> The resolution before the Board is;
>
> "Anyone wishing to reduce their days worked, and effectively work part time, would receive a pro-rata reduction in ALL benefits associated with their employment while fulltime. It will be at the discretion of the Company as to whether an employee can reduce their work days, and by how much, and it would require to be agreed in advance on a case by case basis. It would also be at the discretion of the Company to review the arrangement at any time and if thought appropriate, change it. For the avoidance of doubt; on days off the individual is expected to be available by phone and/or email where a production change occurs or something needs a decision that only they can answer. The Company will endeavour to avoid this situation wherever possible."
>
> As an example: if someone wants to work a 4 day week they would take a 20% cut in benefits. This includes, (but is not limited to), salary, leave allocation, (including any extra leave earned), Company pension contributions, (an individual is still at liberty to pay more into their pensions through salary sacrifice), etc.
>
> As directors you are asked to vote for or against the resolution. Please reply to this email clearly stating which

87. Mr Tayler replied 8 minutes later, expressing some concerns, including pondering why it could not wait until next Board meeting.

88. The Claimant replied in the same trail as Mr Tayler, and started her email: "*I have to agree with Simon that I do not understand the urgency to vote by email and I do not believe that the resolution as it stands is legal in requiring people to be available on days that they are no longer contracted to work*." She expressed some concerns about the motion, some of which were more detailed versions of the concerns raised by Mr Tayler, and some were fresh points.

89. She asked “Would it be possible for us to have some HR legal advice on this resolution while we are all together?” and concluded the email by saying “If I am asked to vote on the resolution as it stands then I vote "No". In between those two comments, she wrote:

> Also I have never seen any resolution regarding rules around salary sacrifice and the Company's contribution to pensions so it would be sensible to lay out the rules in another resolution so that it is clear moving forward. As Toby mentioned, where the Company does not contribute to an individual/s pension, is there to be some sort of payment made to the individual/s to make this more fair?

90. This particular paragraph was on a different subject matter to that which the Motion was about. Although the Motion had mentioned salary sacrifice in passing, it had only been in the context of saying that that option would not be affected by the change in relation to arrangements for reduced hours.

91. The Claimant’s email also asked whether unpaid leave was to be “abolished”. She expressed the view that unpaid leave could be accommodated and that it would be “rather restrictive” not to allow it.

92. Mr Kelt replied 13 minutes later to say that the Motion had nothing to do with unpaid leave (only a reduction in days contracted be worked) and that Mr Stewart was already taking (or had already taken) HR and legal advice. He said nothing about the Claimant’s comments about a motion relating to salary sacrifice.

93. In the same trail, Mr North and Ms Pooley picked up on the points that had been raised by colleagues, and said it would be important to clearly distinguish between whether someone had reduced their hours (and so had non-working days) or else was working from home, rather than the office, on those days. Neither of them commented on the Claimant’s suggestion of a motion regarding salary sacrifice. Both wanted details of the HR/Legal advice.

94. Mr Stewart replied (like Ms Pooley) the following day, 18 July 2019 stating:

> The draft letter, which has been circulated and which was discussed at the board meeting was provided by Moorepay, our HR. services provider. It is not deigned to force anyone onto new terms, it is simply a way for those who wish to reduce the number of days that they work each week to do so. It is nothing to do with unpaid leave, which is a separate issue. Nobody has to sign the letter if they don’t want to, it is simply a mechanism for those that want to reduce their working week to do so.
>
> The draft letter is simply a modification to the terms of existing staff contracts, to reflect the reduction of all benefits in line with a reduction in working days.
>
> The terms in the letter are designed to be fair across all employees

95. In other words, he also did not comment on whether there should be a Motion about salary sacrifice. The Claimant replied 17 minutes later suggesting that, in light of Mr Stewart’s email, no resolution seemed necessary.

96. The Claimant and Mr Kelt exchanged further emails about whether a resolution was necessary or not (he saying it was, she saying she did not think so, subject to Mr Stewart clarifying the HR/Legal advice). [Bundle 188]. She did not comment further on the suggestion of a separate motion about salary sacrifice.

97. The Board minutes of 27 August 2019 [Bundle 193] record the following, which we accept as an accurate summary of related matters which were discussed and agreed:

> Since the last Board meeting it had been agreed that part-time employees take a pro-rata reduction in salary and all other benefits. It was reported that Mike had taken this option as of 1st August
>
> Unpaid leave - The current situation will effectively remain, but requests will only be considered after all other leave has been taken, and requests will be dealt with on a case by case basis Excessive unpaid leave will be turned down and it is felt that 2-3 weeks would be the maximum permitted, with the consequence (which will be explained to the applicant at the time) being a proportionate reduction in bonus or salary increase al the years end. It was agreed Toby would have the ultimate say

98. There was no motion put to the Board (or circulated in between meetings) about a new or revised salary sacrifice policy. The Claimant did not draft such a motion, include the suggestion in her Financial Report to the Board, or raise it when the Board discussed the matters referenced in the last paragraph, under the agenda item "HR & Training".

Kelt's Hours and Pay

99. Around 5 August 2019, Mr Stewart told the Claimant that Mr Kelt was going to be doing 4 days per week. At this time, the Claimant had passed responsibility for HR to Mr Stewart. His reason for giving the instructions to Mr Stewart rather than to the Claimant was that he believed that it was a contractual issue, and the person with HR responsibilities (the MD) should be informed, and make any arrangements for contractual change and informing payroll that there had been such a change.

100. Around 14 November 2019 [Bundle 200B], Mr Stewart informed the Claimant that the change was reversed. In the same email, the Claimant was instructed to let Mr Kelt's pension adviser know that Mr Kelt wished to increase the direct debit for his pension contributions. She did so.

Board Meeting of 27 August 2019

101. The minutes appear starting at page 193.

102. As with each month, there was a report (from the Claimant) which dealt with the most recent monthly profit figures, and the year to date profit. It was recorded that Mr Kelt and Mr Tayler were no longer as essential as previously, and meeting agreed that the Respondent's life insurance policies on them would be cancelled.

103. Although not minuted, we accept that there was a discussion about the overtime for technicians during which Mr Stewart said to the Claimant (something similar to) "you have never done a night shoot, so how would you know". This was in the context of his arguing that the technicians should be paid for the overtime, rather than offered time off in lieu, and that the Respondent would find it difficult to implement time off in lieu. We find that he did not shout.

104. He did not make this remark with the intention of implying that the Claimant did not understand overtime, or the distinction between time off in lieu and overtime. He did not make this remark with the intention of implying that the Claimant could not make suggestions about what pay and overtime arrangements the Respondent might wish to consider. He did make it with the intention of arguing against the proposal, and explaining why he did not want the Respondent to adopt it.

Unpaid leave for NS

105. In around September 2019, a supervisor, NS, requested 15 days unpaid leave.

106. The Claimant's opinion was that the new policy meant that the request should be refused. Mr Stewart informed the Claimant that the request was approved.

Pooley's treatment and resignation

107. In around October 2019, Emily Pooley stepped down as director but remained an employee (in the role of Senior Technician). Mr Kelt informed the rest of the Board and Ms Shingleton [Bundle 195]. He explained her reasons (which were personal) in that email. This is consistent with Ms Pooley's explanation a year later in November 2020. [Stat 54].

108. As well as the particular personal reasons that triggered her decision to resign, she had also come to the opinion that she did not wish to run the company (as opposed to performing her substantive job).

109. Her experience of board meetings was: "*It was all done by pretty much by the book. I don't think I have ever questioned it. No, I think it's all done by the book. There is general conversation at meetings and times when people don't agree. I know there were separate meetings outside of the Board meetings, so I don't know if that is a different story. Within the board meetings OK*." [Stat 56]

110. She did not have concerns about meetings, or votes (or lack thereof) at meetings, and she did believe she could express her own opinions. [Stat 57].

111. In summary she did not resign because she thought she was being badly treated, or ignored. Even the Claimant's written statement did not allege that Ms Pooley thought women on the board were being given less of a voice, or that that was her reason for resigning.

112. Our finding is that issues which Ms Pooley raised were not dismissed by Mr Kelt at board meetings.

"Old Nag"

113. The Respondent had a Production Manager who had worked for them for several years, and whom we will refer to as SW. SW is female and was in her late 40s or early 50s in October 2019.

114. The duties of Production Manager include ensuring that other employees have completed and submitted paperwork in connection with activities on a piece of work. This is an important role for various reasons, including as part of ensuring that staff and freelance contractors were paid correctly by the Respondent, and that the Respondent could demonstrate that it had carried out its contractual and statutory obligations. She, and her role and its importance, were discussed at a Board Meeting in June 2018 [Bundle 158]:

> After discussion it was agreed she should use more authority so that she supervises supervisors more rigorously, dealing with individuals who do not perform, reviewing projects after completion in more detail, and allocating enquiries so they are spread more evenly and dealt with by an appropriate person.

115. The August 2018 minutes [Bundle 163] note:

> [SW] has now returned to the office after remote working during convalescence. MK would now talk to her about being more authoritative as previously discussed.

116. Mr Kelt admits that he called her an "old nag" when speaking to her in around October 2019.

117. This comment was made in the earshot of several employees, and the Claimant was one of those.

118. SW did not like this comment. She spoke to the Claimant about it, and asked the Claimant if the Claimant had heard it, and the Claimant confirmed that she had. SW did not say that she wished to complain, or ask the Claimant whether the Claimant would support her, or be a witness for her, if she did complain. Neither the Claimant nor SW complained to Mr Kelt or Mr Stewart or the Respondent about the remark at the time.

119. Within her grievance submissions, after the end of employment, the Claimant wrote:

> However, this sort of language about female employees was quite common. Worse still none of us thought too much of it as it was the accepted culture; so nothing further came of it

120. The grievance outcome referred to the "old nag" comment as an "unsubstantiated remark". This finding was made despite the fact that the investigator did not speak to SW and does not appear to have asked Mr Kelt about it, and despite the fact that Mr Kelt admits, in his written statement prepared for these tribunal proceedings, that he made the remark.

October 2019 Board Meeting

121. The Respondent's practice was that in advance of Board Meetings a document called "notes" would be circulated (drafted by Mr Kelt). It was an agenda and summary of some of the things that were to be discussed. After the meeting, minutes were circulated by Mr Kelt for agreement. Sometimes, the minutes would not be circulated until shortly before the next meeting.

122. For the October 2019 Board meeting the notes circulated in advance appear at [Bundle 196 to 197] and the minutes circulated afterwards at [Bundle 198 to 199].

123. The October 2019 Board Meeting took place on 29 October. The minutes were circulated around 17 December 2019.

Leases Issue

124. The notes in advance of the October meeting included:

> A couple of financial situations have been dealt with by Toby and Rich. It was discovered that despite what was previously reported we could in fact keep the 3D printer now that it is out of its lease period for a token £50 payment. A letter was received in February to this effect and had it been actioned then we would have saved approx. £3,000. The last lease payment will now be on the 11th Nov. In addition it was discovered we were still paying for the lease on the original haptic arm. We have apparently been paying this lease unnecessarily for at least 4 years at a considerable cost, (approx. £ 18-20k) This has been stopped!

125. In around February 2019, the Respondent had received a letter about its 3D printer and the end of the lease term in June 2019, and the hire cost for renewal. The Claimant had contacted the company and not been able to get a reduction, or an (acceptable) purchase price and reported that to the Board, and so the lease had been renewed. However, Mr Stewart examined the original contract and discovered that that it contained a term allowing purchase of the equipment for £50 at the end of the original lease term. He had contacted the company and arranged for that to be done, instead of continuing with the renewal period.

126. The Respondent had renewed the lease for the haptic arm and had been paying for it for some time (in the renewal phase). Mr North, who was aware that the Respondent was not using that particular piece of equipment much (having access to an alternative), reviewed the documents. The Respondent was able to extricate itself from the lease.

127. The minutes sent after the meeting said:

> it was reported that Toby and Richard had discovered 2 financial anomalies Contrary to a previous report we could in fact keep the 3D printer now that it is out of its lease period A letter was received in February bringing the end of the lease to our attention and when Toby looked into it found we could buy it for a token £50 payment. Had it been actioned back in February we would have saved approx £3,000 In addition, it was discovered by Richard that we were still paying for the lease on the original haptic arm that had been replaced approx. 2 years ago We have been paying this lease unnecessarily at an

> approx, cost of £18-20k This lease has been terminated It was agreed a closer tracking of all leases should take place including a clear understanding from the start of each what the outcome of a lease is going to be with a lease register being kept , probably in the form of a simple spreadsheet.

128. That accurately reflects the discussion at the Board. There is no express criticism of the Claimant in particular in relation to either the 3D printer, or the haptic arm. It is our finding that:

128.1. For the 3D printer, there is an implied criticism of the Claimant because, as all the readers would be aware, it was the Claimant who had received the letter which is mentioned. [The Claimant argues that the letter did not mention the £50 buyout; the minutes do not claim that it does.] Furthermore, it was Mr Stewart's opinion that the Claimant actually was at fault.

128.2. For the haptic arm, it does not seem to us that the Claimant is being singled out. The discussion seems to highlight that there was more than one factor which had caused the unnecessary expenditure: the fact that the equipment was no longer required; the fact that the lease could be ended at no cost to the Respondent. Collectively, there had been a failure. The people who knew the equipment was no longer required had not known that the Respondent was still paying, and/or could cancel the lease; the people who knew the lease could be cancelled had not been informed it was no longer needed. Furthermore the suggested outcome is a means to avoid repetition.

Pension Issue

129. For employees other than the founding members, the Respondent had a particular pension policy. This policy fixed the employer pension contribution rate (for those employees who were part of the scheme). Each month, the employer and employee pension contributions were processed via payroll. Payroll was part of the Claimant's responsibilities, and so, in that sense, ensuring that employer and employee pension contributions were processed correctly, for employees other than the founding members, was part of her role.

130. The founding members had pension arrangements that were separate and different. Mr Kelt obtained his own pension advice, and the Claimant was informed from time to time what the contribution rates would be. She was responsible for ensuring that the payroll reflected the instructions that she had been given, but was not responsible for giving pension advice to Mr Kelt.

131. The notes in advance of October meeting said:

> I am currently looking at pension payments into the shareholders pensions having noticed some inconsistencies. This seems to date back many years, possibly to the beginning of the present set-up in 2006 and has the potential to be a major issue. I have not had enough time to look into this properly, but I propose that Amanda is asked to do an audit to ensure all is in order, or how it could be resolved.

132. The minutes after the meeting said:

> Mike reported he had uncovered an anomaly with pension payments into the shareholders pensions, with payments not being in line with Company policy, which in these cases should be 7% of salary contribution by individual and 7% by Company, but the actual payments made did not align with this. It was recognised that this could be a major issue and needed to be investigated It was agreed that Amanda do an AS independent investigation of these pensions to resolve the issue.

133. Following the meeting, the Claimant wrote to Mr Kelt's pension adviser to say that Mr Kelt wanted the pension provider to start taking a sum equivalent to 7% of his salary from him by direct debit, and that the Respondent would match that. [Bundle 200A].

134. At the December board meeting, it was agreed that the Respondent would make payments to the pension funds of Mr Kelt and Mr Tayler (and to Stan) to reflect what was, according to the decision made at the meeting "sums lost through lack of investment". In other words, the company decided in December 2019, that it had always been the intention/agreement that the founding members were entitled to 7% employer's pension contribution for several years previously, even though that was not what had been paid in practice during those years.

December 2019 invoice request

135. On 16 December 2019, at 22:48, Mr Kelt sent an email to SB which he copied to the Claimant (and another). He forwarded an invoice which the Respondent had received at 16:40. He wrote:

> please pay the attached invoice by bank transfer. They were very helpful in completing this last minute request, and even [delivered] it to Aberfeldy free! (a 2hr drive from Glasgow)

136. His reasons for wanting this to be paid are as stated in that email. His reasons for asking SB to do this are that he believed it was part of SB's job to process payments of invoices (which had been duly authorised) and he was intending that his email be treated as authorisation to pay it.

137. It was not his opinion that payment requests/instructions had to be made via the Financial Director.

The Claimant's December 2019 Staff review comments

138. The Claimant listed that her achievements included, amongst other things:

> Remaining at Artem and carrying on doing my job well despite the CEO trying to force me out of the business by his change of attitude towards me during this last year and trying to undermine confidence in me with colleagues

139. Her objectives for next 12 months included:

> • I would like there to be less inappropriate behaviour internally e.g. general culture of rudeness from colleagues, direct or through being ignored or my advice being disregarded purely to deliberately try to undermine me. More respect for colleagues.

> • Personally I would like to see recognition for the loyalty and excellent work that I have done over the last 20 years
>
> • I would like to educate staff more as to the vial functions of finance and administrative roles.

140. Under difficulties, she referred to:

> • Still frustrated by other people not following agreed Artem process and procedures and thereby affecting our work in finance. Then, to be doubly frustrated by others complaining about lack of timely information. This needs to be supported and reinforced by the MD and CEO
>
> • Delay in receiving paperwork from Scotland still ongoing - timesheets, invoices purchase orders, reconciliations In respect of credit control, lack of compliance with rules we adhere to in London
>
> • Non-compliance with Artem procedure In respect of Sales payments and treatment of expenses being reimbursed This is a risk to Artem which I have pointed out
>
> • I think that as previously mentioned I would like the team to understand the finance role better and the problems caused, and genuine financial loss caused, by not following procedure and obtaining documents The importance should be stressed by treating any misdemeanours with some sort of consequence or this will never change Maybe when looking at bonuses or salary increases? I think that all of these things should be taken into consideration.

<u>18 December 2019 email – Protected Act Two</u>

141. In response to the October board minutes, which were circulated on 17 December 2019 by Mr Kelt, the Claimant sent an email at 11:03 on 18 December 2019 [Bundle 204 to 205]. She replied to the same list of people who had received the minutes, namely all the directors plus Ms Shingleton.

142. She argued that the minutes were misleading in relation to the 3D printer, because they did not report her interaction with the company in 2019 (in which the company had not stated that there was a £50 purchase fee in the lease agreement). She alleged the minutes wrongly suggested that she had misreported (or failed to report) the renewal to the Board. She said the overpayment (if that was the right word to use) was £2602.23 not £3000.

143. For the haptic arm, she said she had chosen to renew the lease in 2017 because she believed the equipment was being used. She said the overpayment for this was £11,640 not £18 - £20k.

144. She said “I appreciate that neither ‘overpayment’ is good but the matter should be reported accurately.”

145. She added:

> I would also reiterate that I do believe the way in which this was minuted is a personal aggressive attack designed to undermine confidence in my work. The minutes infer that

> I incorrectly reported matters to the Board and that this was a deliberate action. As confirmed at the Board Meeting both [Mr North] and [Mr Stewart] confirmed that I have collaborated with them and passed over ALL information; I have not tried to deceive or hide anything. Blame culture is very negative and can stifle positive work.
>
> I also see this attack as being linked to the ongoing bullying behaviour being used to try to force Stan to change his employment contract.
>
> It was also concerning that Mike remarked on Stan's age when suggesting a change to his hours.

146. In relation to pensions, she stated – accurately – that the pension arrangements were the responsibility of the founding members and that instructions to their pension provider had to originate from them, and be communicated via their pensions adviser, and it was not her role to make decisions. She argued that the minutes implied otherwise and (wrongly) sought to attribute blame to her if the payments being made to the pension provider were different to what Mr Kelt and/or other the founding members had thought.

147. Mr Kelt replied to the same group on 21 December.

147.1. He said that no blame was being attributed to pensions issue.

147.2. For the leases, he said that he was glad that the issues had been spotted and rectified (by Messrs North and Stewart) and said the Claimant's figures had not been presented in the October meeting but could be presented in December. He said that he thought the minutes were sufficiently accurate on those points. This was his genuine opinion.

147.3. He denied that there was a blame culture. He stated that he would not discuss Stan's HR issues (Stan, as one of the directors, was being copied in).

147.4. He said he thought the Claimant's "*comment that this comes over as a "personal aggressive attack" is frankly outrageous and I take exception to it, but will let it pass*". In relation to what she had said about Stan, he said "*again the inference about "ongoing bullying behavior" is ridiculous, and leaves me somewhat speechless, which is how it is best left for the time being*."

148. On 7 January 2020 [Bundle 215] he wrote to Ms Shingleton, and, on balance of probabilities, this is an accurate statement of his true opinions when matters were fresh in his memory:

> I have not included your comments regarding Karen's issue with the last Minutes. I think we do blame Karen to some extent for the oversight regarding the 3D printer and Haptic Arm, obviously not a deliberate oversight, but it is her job to keep track of these things. I did not want the meeting to say so outright and tried to avoid going into the issue in more detail as I would then have had to minute that. The compromise is that no blame is mentioned. But it does not exonerate her definitively as there was a concern that she may be looking tor a constructive dismissal situation and such an exoneration would not be correct.

Bonus Calculation and Salary Issue

149. Each year, the Respondent decided what bonuses (if any) would be paid and what pay increases (if any) would be applied from January. As part of the process, each year Mr Kelt asked the Finance Director to supply him with a list of current basic salaries.

150. On around Friday 10 January 2020, the Claimant supplied figures. He checked the figures for his own salary in more detail over the weekend, and emailed the Claimant on Monday 13 January 2020 with his calculations (which showed a difference of around £6000) in a spreadsheet. He concluded: "As you can see this is a considerable difference and I would like you to check your figures".

151. The Claimant replied to say that there had been a salary sacrifice. He replied to dispute whether salary sacrifice should affect salary entitlement figures. He asked her if it was necessary to check the other figures too.

152. The Claimant replied stating, among other things:

> Apologies for this I used the payroll data for the spreadsheet which does not record the salary sacrifice, as you asked for actual salaries. However, I have updated the spreadsheet to show your salary including the salary sacrifice.
>
> There are no other anomalies

153. These emails were all on 13 January and had Mr Stewart copied in.

Start of Covid Pandemic

154. In early 2020, board meetings continued to show the Respondent operating with a year to date profit. There were some discussions about the progress with the EOT plan. The amounts to be set aside for the pension contributions for the founding members were discussed.

155. By the 10 March meeting, there were discussions about Covid and, in the following days there were discussions about the effects on the business, including whether employees would be paid if they had to self-isolate to comply with government guidance.

156. Due to being vulnerable, the Claimant commenced working from home with effect from Monday 23 March 2020. Mr Kelt sent an email to all staff to say that the Respondent was intending to remain open (and commenting on the importance of following distancing etc rules)

157. The Claimant and Mr Kelt had an email exchange about the possibility of deferring PAYE, as per one of the government's measures, and Mr Kelt suggested holding off payment for the time being.

158. The Claimant also emailed to all of the directors (plus Ms Shingleton) some details of the Coronavirus Job Retention Scheme (CJRS) which had been announced the

previous Friday. Ms Shingleton also commented on it. The directors discussed whether it might be possible to use CJRS or not. Mr Stewart said that he understood that individual agreements with employees would be needed. He was checking with the external HR advisers, Moorepay.

159. Amongst other ideas floated, the Claimant suggested:

> if you are furloughed you cannot work, (officially and in principle). Obviously I for example have to continue to work but officially I would not so that Artem can get the relief

160. Mr Kelt commented (8 minutes later) that he thought that was a good idea, and that some of the Respondent's other employees might do the same. The Claimant suggested that her and SB might be needed for certain activities, adding "*officially we need to be furloughed to get the government support*." [As an aside, and based on later announcements, the Claimant became satisfied that she could do certain things while on CJRS furlough due to exceptions for operating payroll and director's duties].

161. Ms Shingleton emphasised that the Respondent must stay within the law. She said there was a lot that was still uncertain and suggested checking with the external HR advisers, Moorepay.

162. On the evening of Monday 23 March 2020, the UK government announced a lockdown. The Claimant sent an email [Bundle 242A] at 21:56 to all the directors to say that she thought the information circulated earlier about remaining open should be reviewed. Mr Kelt did not see the email that evening, and nor did Mr Stewart. Mr Stewart had a long journey to work each morning and set off very early. He did not see the email until after he had arrived in the office.

163. The first person to reply was Mr Tayler, at 6:42am on 24 March. Mr North replied at 7:33am. Like the Claimant, they interpreted the government's advice as being that the Respondent's employees should stay home.

164. The Claimant commented further at 7:58am [Bundle 242] saying that people had contacted her to say Mr Stewart had told them to come in. She asked if that was true. At 8:04am, he said "yes" and that it was because he had interpreted the government's instructions as being that – where working from home was not possible – then travel to work was permitted, and working in an office was permitted. He also said that he now thought that, in fact, the site should be closed, and he was going to arrange that.

165. At 11:33am, Mr Kelt emailed the directors to say that he and Mr Stewart both thought it was necessary to close the site and place all employees on furlough, using CJRS. He asked each director to reply to vote yes or no.

166. His email included: "*that will limit pay to a maximum of 80% of £3,125. (ie max £2,500)*." Six minutes later, the Claimant wrote back (replying all), agreeing to the proposal and adding "*The current thinking is that it is up to 80% of salary with a maximum of £ 2500 gross, not 80% of £3125*".

167. Six minutes after that, Mr Stewart replied all, saying: "*Moorepay have stated that 'The guidance isn't entirely clear, but it appears to be 80% of £3125 per employee per month for wage costs*". After the Claimant's further reply, he replied three minutes later saying: "*I will caveat it in the staff email, as 'subject to confirmation by the UK government'. Actual policy wording' information is still not available*."

168. At 11:55am [Bundle 245], Mr Stewart sent an email to all staff, stating that they were closed down (temporarily) with immediate effect. He included the following:

> As of today we are scheduling all staff 'on leave' unless they have been individually contacted by myself or Mike As of the 1st of April we will be changing the status of the majority of staff to 'furloughed'. A skeleton staff will be kept to ensure the processing of payroll etc.
>
> This is an alternative to redundancies, or unpaid lay off, which allows us to keep employees on the payroll but does not require them to work, it means we can access the Government's COVID 19 job retention scheme which should pay out 80% on salaries of up to £3125 per month. This is subject to confirmation by the UK government,
>
> The details of the government job retention scheme are still not clear, however I will update you as soon as definitive information is available.
>
> You will remain bound by the terms of your employment contract and the Artem Employee Handbook. The Company could, at short notice, require you to return to work.

<u>Furlough arrangements</u>

169. As mentioned in the announcement, the period 24 March to 31 March was going to be treated as leave (either unpaid or part of annual leave entitlement), and staff were going to be officially furloughed from 1 April. As the Claimant and Ms Shingleton had both made clear to the Board, being on furlough meant doing no work at all, whereas doing any work at all meant there was no entitlement to a CJRS rebate for that employee. As all the board members (and Ms Shingleton) understood, the finer details of what would and would not count as work remained subject to further announcements and clarifications from the UK government.

170. On 26 March 2020, Mr Kelt sent a spreadsheet to SW, which SW forwarded to the Claimant. His covering email stated:

> This is what we are going to be keeping up to date. From April 1; everyone will theoretically be on 'furlough' whether here unofficially or not. That is assuming we have the option to put 100% of the workforce into that status, which may not be the case. I will still however keep track of who is here working. We are still getting some enquiries, and there are deliveries, post, and other telephone calls

171. The Claimant replied observing that his spreadsheet showed only himself (Mr Kelt) and Mr Stewart working, with everyone else on furlough. The Claimant said that she thought that herself, SB and SW would also need to be working. Mr Kelt replied, effectively saying that time would tell. He suggested that if anyone was not working

(by implication doing their full duties) but was ineligible for CJRS, then the Respondent would only pay the 80% (max £2500), but that potentially there might be work available, in which case he might want some technicians to work full-time for full pay. [Bundle 250].

172. It was decided that everyone except SB would be officially on furlough.

173. Subsequently, the Claimant wrote to the board plus Ms Shingleton on 16 April 2020:

> I hope that this finds you all well.
>
> Following the latest guidelines published yesterday, it would appear that although Company Directors are obliged to carry out their key legal duties even when furloughed, this will not be interpreted by HMRC to extend to any other work, for example, but not limited to, HR, strategy planning, accounts work and processing payroll.
>
> My personal interpretation has therefore changed and I do not believe that Mike, Toby, [SB] and I can be furloughed from 1st April as initially intended.
>
> Please would you let me have your views

174. The replies the same day included:

From Mr Kelt:

> The guidelines are pretty clear, and have been from the start Anyone in at Artem is doing training! Or possibly directors statutory duties. Otherwise the Company would have to pay them (a vastly reduced salary) rather than the Government scheme.
>
> I suggest we leave it at that meantime
>
> If we end up having to un-furlough someone then discussion will have to take place with Toby about what their pay and conditions are going to be, based on vastly reduced hours.

From Mr Stewart

> As far as I can tell the advice remains consistent with what was published when the scheme was released. My suggestion would be (subject to board approval) that if it is not possible to furlough all staff, those working either take a substantial salary cut to bring them roughly in line with the rate at which furlough would pay to reflect the fact that we are not working full time, and minimise our wage bill, or are furloughed in three week periods each month, returning to work for a week each month to carry out necessary duties at an agreed rate of pay.

175. The exact details of what rebates (if any) were claimed for the work of Mr Kelt, Mr Stewart and the Claimant are not relevant to the matters that we have to decide. Nor do we have to resolve the issue of whether the work (if any) which the Claimant did while she was on furlough was permitted by the rules of CJRS; we accept that – notwithstanding her early comments and her email to Mr North at 16:39 on 16 April 2020 – by the time the scheme was up and running, it was her genuine belief that any work she did while officially furloughed was permitted by the exceptions and she

let the Board know (for example on 16 April) when she had any concerns about the lawfulness of the Respondent's actions.

176. The decision was that, for all but one staff (other than Mr Kelt, Mr Stewart and the Claimant), they would not be working and would be on furlough. The one exception was SB. It was decided that she would work, and that she would work from home part-time. She was to be paid 80% of normal salary. The Respondent would not claim for her under CJRS. There was no specific attempt by Mr Stewart or Mr Kelt to analyse what hours she would need to do in order to carry out the work that was expected of her. In other words, there was no attempt at any kind of rigorous assessment to be sure that she was only working 80% of her full-time hours (or less). Nor did they ask her to keep a record of her working time. At the time they sent their emails on 16 April 2020, Mr Stewart and Mr Kelt did not have SB specifically in mind when they said that anyone who was working (in circumstances which meant that a contribution to their salary could not be claimed as part of CJRS) would need to agree to a pay cut.

177. The decision was that the Respondent would claim CJRS relief for every employee with the exception of SB, and would do so with effect from 1 April 2020.

178. In his email of 19 April 2020 confirming the instructions to the Claimant [Bundle 262], Mr Stewart wrote:

> I agree, it was discussed between Mike and I, and decided [SB] should not be furloughed, contrary to your advice on on the 27th of march suggesting that everyone should be furloughed, as we need her to maintain a payroll function and deal with any invoices which crop up, and any basic admin requirements

179. The email also requested the Claimant supply a signed copy of the furlough letter which had been sent to all staff. He accurately stated the purpose of the letter, which was so that the Respondent had a record that the employees had understood and accepted the variation of their contract.

<u>SB's duties while on furlough</u>

180. On 20 April 2020, Mr Stewart sent an email to the Claimant about the duties which SB would be doing while C was on furlough. These included payroll and CJRS administration. He said that SB would need to be able to perform the duties independently as the Claimant could not assist, given that the Claimant was on furlough. (The advice later changed, and/or the Claimant's interpretation of it did, and the Claimant became satisfied that she could operate payroll, while on furlough, and still be within the CJRS rules.) He told the Claimant he was sending SB a letter about this, and asked the Claimant to confirm SB's salary. [Bundle 268].

<u>The Claimant's duties while on furlough</u>

181. Mr Kelt wrote to the Claimant on 22 April 2020 [Bundle 269]. It was the Respondent's understanding at the time (shared by all of Mr Kelt, Mr Stewart and the Claimant) that, while on furlough, the CJRS rules allowed the Claimant to carry out director duties only (so not employee duties). Mr Kelt's email said that he would need a

finance report for the board meeting and that it was his understanding that this would come under director duties, and that it would not, therefore, be a breach of CJRS rules for the Claimant to prepare it.

182. Although his email did not use the grammar or punctuation of a question, it was open to the Claimant to say "no" she could not do it. The Claimant's complaint about this email, however, is not that he assumed that she would do it, or that he did not give her the chance to say "no". Her complaint is that it was self-evident that the CJRS rules allowed her to do this, and that – therefore – there was no reason for Mr Kelt to check whether the report would be prepared.

183. Our finding is that this was an unprecedented situation. Mr Kelt was confident that the Claimant could write the report without this preventing the Respondent being able to claim a CJRS rebate for her. However, if the Claimant had a different view, then he wanted to know sooner rather than later, and that was why he sent his email.

<u>April 2020 Board Meeting</u>

184. The 28 April 2020 Board Meeting took place by video. The minutes [Bundle 272] include the following extracts, which are a summary (rather than verbatim) record of some things discussed and agreed.

> • Unfortunately due to the Covid crisis profit generating work has currently all but ceased, and from April 1 st all employees (including directors) were put on furlough apart from [SB] who has taken a voluntary pay cut in line with the furlough payments and is working from home It is planned that [two technical staff would resume full-time working on 1 May on a particular project]
>
> • At present the ongoing overheads during furlough, (excluding all salaries), are approx. £30k per month and the bank balance stands at £915k Trade creditors will diminish in line with the reduction in work, and no freelance crew are expected to be employed meantime. It was concluded there was no immediate threat to the Company's existence
>
> • It was agreed that staff will only be brought back to work as they are required, even after furlough ends, which could involve individuals being laid off without pay or employed part time on reduced pay, or made redundant. It was also agreed that there needed to be an m depth look at ongoing costs, with a view to reducing overheads where possible.
>
> • It was agreed to pay trade creditors as they fall due. The first quarters VAT and March's NI had been deferred but it was decided that such payments would in future be made on time as currently there was no great advantage with bank interest being negligible.
>
> • Amanda reported on figures from Standard Life relating to MK's position regarding the lost income on pension underpayments The position with Simon and Stan was unknown but it was agreed the shareholders would have a separate meeting to decide how to proceed, with the suggestion that Amanda takes the Standard Life figures and works out their payments pro-rata so that this matter can be closed and the sums paid into their respective pensions
>
> • it was hoped the furlough scheme would continue as long as possible, to allow the Company the relative luxury of controlling the return to work of staff simply to cover paying

> projects, with technicians returning first It was agreed that anyone declining to return, after the Company had carried out its risk assessment and taken the appropriate safety measures, is likely to be laid off without pay They may simply resign which would potentially raise problems, but it was agreed the Company would not want to be paying people who it does not need, and if the furlough grant ends without work picking up to previous levels it seems that there will inevitably be people laid off or made redundant to conserve cash Reducing salaries may be part of a solution too, but that would depend of individuals agreement.

185. In other words, money was tight, but the Respondent was not insolvent. Everyone knew that SB was working (and no CJRS claim was being made for her). Other than two particular named technical staff (one of whom was Ms Pooley) on a particular project, other staff would come back as and when required, and would not necessarily be on full-time hours or pay. Redundancies might be necessary, as might the opposite (that is dismissing people who would not return to work). The financial implications of the pension issue was still being worked out (and, as had been the case for several months, Ms Shingleton was providing accountancy advice on that). PAYE payment to HMRC for March had been deferred (as the Claimant and Mr Kelt had discussed and agreed) but, in future, they would not be.

CJRS Portal

186. The Claimant and Ms Shingleton continued to exchange emails discussing the finer points of CJRS. From time to time, one of them would circulate something to the entire board.

187. On 15 April 2020, Mr Kelt sent an email to just the Claimant and Mr Stewart.

> on a conference call today it was confirmed the Furlough portal will open on 20 April, and payments are expected to reach company bank accounts within 8 days, (yeh right!) The form needs the usual info, PAYE ref no, No of employees, their NI numbers and names etc. Some Accounts software packages have introduced a Furlough module, (Xero was an example), so you may want to check if SAGE has. It sounds pretty straightforward

188. The conference call mentioned was a group within the same industry. Mr Kelt was expressing scepticism about whether the money would actually be received as quickly as 8 day; he was expressing a genuine belief that the process for actually making the claims sounded straightforward. He acknowledged that he personally did not know whether the Respondent's payroll software provider had provided an update to make the CJRS claim submissions easier.

Pensions – 5 May 2020 email exchange

189. On 5 May, Mr Kelt sent an email about the pension issue to the Claimant and Mr North, and copied in Ms Shingleton. He said that there was now a proposed resolution in relation to pensions that the founding members and Mr Stewart were happy with. He sought the agreement of the Claimant and Mr North.

190. His email included: "*As you know there was a significant underpayment into the shareholders pension pots over the years from 2006 where the amounts were not*

changed in line with salaries and company policy" and "*In the normal course of pension payments the Company matches that put in by the individual (up to certain limits) …*".

191. The Claimant responded to the substance of the question (and agreed with the proposal). Her opening paragraph was as follows, and includes an accurate and truthful summary of the historic situation.

> Thank you for your email regarding the shareholders' pension contributions As you are aware shareholder pension contribution has always historically been adjusted when the pension advisor reviewed the shareholder pension and issued the individual shareholder with a new direct debit mandate so that the pension provider could amend the amounts that they deducted in contributions from Artem's bank account. I would like to reiterate that I have never had any authority to deal directly with any shareholder pension provider. This process was confirmed by Andy Bracken in his email

192. Mr Kelt replied two minutes later to say "*All good*". The Claimant's response, and Mr Kelt's reply to it, were to the whole board, plus Ms Shingleton.

<u>SWOT Analysis – May 2020</u>

193. Mr Kelt sent an email to all staff on 5 May 2020 saying that he and Mr Stewart were starting to formulate a business plan for the future. He said they were doing a SWOT analysis (Strengths, Weaknesses, Opportunities, Threats).

194. He said:

> I have put a few fairly obvious subjects in the table to give you the idea, but I would like everyone to have a go at their own table/list and add what they perceive as relevant in the appropriate box. There are no wrong answers and Toby and I will amalgamate what we think are significant into a main SWOT analysis for the Company as a whole No one will know, apart from us, what you have suggested, and as everyone has a different perspective everyone's views are good.
>
> Please have a go as soon as you can, and certainly by the end of the week. I look forward to your replies.

195. In other words, everyone was invited to contribute, and everyone had the chance for their replies to be confidential. The Claimant sent her replies on 7 May 2020 and copied in all staff. [Bundle 281 to 282]. From Mr Kelt's draft, she crossed out "financial control could be tighter" from the weakness section and included "Good Financial controls and processes" in strengths, along with other comments.

196. On 22 May 2020, Mr Kelt sent an email to all staff about the feedback. [Bundle 329]. He sent a table as an attachment to the email which was headed "SWOT analysis – draft for discussion". His covering email stated:

> This is a draft, and will no doubt change and can still be added to. It will form the basis of a more detailed business plan which will be presented to the Board.

> If you have any additional points you want to make please do I would be interested to know what you think of the document.
>
> Please email myself and/or Toby with any comments.

197. It was a 10 page document which commented on many business areas, and the duties of several individuals.

198. It discussed potential new software for hire and sales, and recordkeeping of freelance contractors. It discussed implementing EOT by the end of 2020. It discussed potentially appointing 2 new, additional directors. It discussed the need for a detailed business plan as part of the move to EOT.

199. It discussed – and placed a lot of weight on – changing the Production Manager role, by freeing that role of some paperwork obligations, and increasing the time for it to be hands on, and closely supervising staff. The method for getting rid of the paperwork obligations was to acquire and use new software, and have the function transferred to the Finance Department.

200. Against "Financial and Profitability", weaknesses were identified as project costs getting out of control, and a lack of up to date work in progress information, and a mismatch between estimates and eventual costs. It also mentioned wastage and over-ordering.

201. There were 5 bullet points as "solutions" for these "weaknesses", and the first of these was:

> Given post Covid pressures a comprehensive review of the finance function to be undertaken by the Finance team and MD to look for efficiencies and cost savings. It should include project financial systems and reporting and overhead costs and should be undertaken by the finance department in conjunction with [Ms Shingleton], an independent accountant. Examples will include potentially automating timesheets and inputting details, considering outsourcing payroll, changing utilities suppliers, reviewing mobile phone contracts, credit card costs etc. and the purchasing process with the automating of POs.

<u>Health and Safety – May 2020</u>

202. At 10.00am on 12 May 2020, the Claimant sent an email to the board about Health and Safety, including a link to the latest government guidance. She said, "*Hopefully only the Covid Secure element will need to be dropped into our existing H&S procedures*."

203. At 13:04, Mr North replied to all, and raised some detailed and specific issues, such as changing terms and conditions, having a covid officer, and the right to cease working if there seemed to be a risk.

203.1. At 13:10, Mr Kelt replied, saying that he and Mr Stewart were having discussions, that they intended to produce a document which addressed what they would be doing on site working on productions and that "We will also ensure the workshops and offices are safe for people to work in". He said "watch this space".

203.2. At 13:22, Mr Stewart replied commenting on, amongst other things, what other businesses were doing, risk assessments and his opinion on the law in relation to an employee stopping work on health and safety grounds. He expressed the view that the Respondent complied with Health and Safety legislation, and would continue to do so, and that he expected their clients and customers would be doing likewise (and that the Respondent would be willing to address any problems which arose about that).

204. Mr Tayler asked for a particular risk assessment to be circulated, and that was done.

CJRS Claim – May 2020

205. At 21:32 on 18 May 2020, the Claimant asked for details of who had been and off furlough, with exact dates, so she could run payroll and make the CJRS claim. [Bundle 290A]

206. Mr Stewart replied a few minutes later to say that SB was doing those things (which is a statement consistent with his 20 April email to the Claimant) and that she had been given the information. He said that he could let the Claimant have the information as well, but not until the following day. A few minutes later, the Claimant replied, without addressing what Mr Stewart had said about SB, but repeating that she wanted the information (and wanted it to be precise).

207. On 21 May, the Claimant emailed that she had spoken to SB and SB did not have all the necessary information. She cited in her email what information SB did have. Mr Stewart replied to say that he could not understand the query, because the information in the Claimant's email was full and correct, save that, earlier the same day, there had been a decision that an employee, RC, would be unfurloughed shortly, and he gave her the details of that. [Bundle 312.] He said that she (or SB) should have spoken to him or Mr Kelt rather than sending the email to the whole board.

208. The following day, 22 May 2020, Mr Stewart sent an email to SB confirming the information, save for correcting the date from which RC would be unfurloughed.

Discussions about SB – 19 May 2020

209. On 19 May 2020, at 9:24am, the Claimant wrote to the Board plus Ms Shingleton. [Bundle 291]. She said that she did not think it was fair that SB was the only person not on furlough and that it was not fair that SB was working but only getting 80% of pay. The Claimant expressed the view that SB was actually working full-time (at home) and should be paid full-time wages.

210. She also said "it became clear that we needed to have an employee who was not furloughed to be **seen to be** carrying out necessary duties" (our emphasis). Our decision is that Mr Kelt and Mr Stewart genuinely believed that SB would be doing payroll and CJRS duties.

211. Mr North and Mr Tayler both replied to say that if it was true that SB was working full-time hours (from home) then she should be paid full-time pay.

212. At 10:41am, Mr Stewart replied in the same email trail saying that he spoke to SB regularly and that she was happy with the current arrangement. He said that she and he and discussed returning to the office and working 5 days per week (for full pay) but that was some way off.

213. At 10:59am, the Claimant invited a Board vote on the issue. Again stating that SB was working full-time at home, and should be paid full-time salary (and, by implication, should remain working from home). She disagreed that SB was "happy" and said SB felt under pressure from Mr Stewart.

214. At 11:15am [Bundle 295], the Claimant sent a further email. Like the whole trail it was sent to the entire board plus Ms Shingleton, and neither SB nor anyone else was copied in.

> And now to bully her further Mike has called [SB]
>
> This behavior is unacceptable
>
> [SB] did not ask for her salary to be increased, I did!
>
> I see it as the right thing for the directors of this company to do, not ask the employee if they are happy working on a reduced salary

215. At 11:34, Mr Kelt wrote:

> Hello all,
>
> It is disappointing to receive such an unjustified email from Karen. Her choice of words in quite frankly outrageous. But I will let it pass for now.
>
> I have spoken to [SB]. The conversation was a private one and I will not go into the detail. I have agreed that she will return to work on Tuesday, (Monday apparently being a holiday- who knew!) and from the Monday she will return to full salary. In preparation we will be moving her computer into the spare office.
>
> At some convenient time I will talk to Karen further.
>
> Best wishes to all, and stay safe,

216. At 12:03, the Claimant replied all. Her email asked questions about the health and safety protocols in the office and about why the Claimant could not remain working from home. It included the sentence: "*People in position should not use their power to coerce staff*". The implication was that Mr Kelt (in particular, and possibly Mr Stewart too) were using a position of power to coerce SB.

217. Mr Kelt's reply about 30 minutes later was to say:

> Your email exchange is unnecessary, unhelpful and wasting peoples time, Indeed I think you are causing most of the alleged pressure. Neither Toby nor myself have any problem with [SB] at all, and look forward to working with her in the office. At no point has anyone being trying to 'coerce' her. It is a management decision not a Board one. it was [SB] who chose to come into the office to work, and said she did not have a problem with doing so.

> It is beneficial for the Company as there are other duties she can perform when here, and discussions she can be involved in.
>
> Obviously we will be working safely and the company's Covid policy will be emailed round this week.

218. The Claimant replied further at 12:37 [Bundle 301]. She used the word "penalized" in relation to SB's opinions of her treatment. In context, this was a reference to the decision made around 19 April 2020 that SB would not be on furlough (and would be working) but would get the same pay as if she was on furlough, rather than a reference to the decisions on 19 May. The Claimant added that the decisions of 19 May were "further reinforc[ing]" SB's opinion.

219. At 14:08, Stan replied to say that he agreed with the Claimant and Mr North.

220. At 14:16, Mr North said that he did not think SB was being bullied or coerced, and he did not agree that the Claimant should have used those phrases. He said he did agree that she should be paid full-time if working full-time, and that he did not think it was necessary for her to be in the office. He added that he agreed that it was not a Board decision, and that it was a management/HR decision, and reminded the Claimant that she had chosen that the HR decisions would be for the MD. That evening, Stan replied to agree with Mr North's assessment. [Bundle 305]

221. None of the Claimant's emails referred to SB's age, sex or race in express terms, or used express words such as "discriminate" or similar. They did talk about bullying and unfairness.

222. Based on the comments made to the grievance investigator, SB did, in fact, feel under pressure to agree to return to the office, rather than to continue working from home. Furthermore, there appears to have been an extreme lack of clear information given to her about her pay for the period she was working from home (1 April to 25 May 2020). She was not told what hours to work, or (at first) that she would be getting reduced pay. She did not necessarily keep an exact tally of her working hours (and no-one told her to), but she accepted that she was not working full-time. [Stat 21-22].

223. We accept that Mr Kelt and Mr Stewart decided that it would be useful to have SB in the office because business was beginning to pick up, and they needed someone in the office to answer the phone.

<u>Call to Simon Tayler – 22 May 2020</u>

224. The Claimant kept a notebook of her discussions with her colleagues. On around 22 May 2020, following discussions with SB, she phoned Mr Tayler to discuss the SB situation. The Claimant has presented notes [Bundle 593 and 594]. These were notes she made at around the time of the conversation. They were probably written after she had decided that she was likely to bring a claim and use the notes in evidence. In any event, they are plainly not notes made during the call itself, but rather a narrative written slightly later.

225. Mr Tayler said that he believed that it would be up to SB to raise the matter if SB believed that her full pay should be backdated to 1 April and/or if she believed that further consideration be given to allowing her to work from home.

226. Mr Tayler said that he did not think any further emails from the Claimant would result in Mr Kelt changing his mind on those points.

227. On the balance of probabilities, Mr Tayler did say something similar to the Claimant's recollection: "Keep your head down and lie low" and "it is obvious that Mike [MK] is after you".

228. In terms of the former, this was his advice to the Claimant, because he believed that the disagreements between the Claimant and Mr Kelt over this issue could be resolved; he thought that each of them needed time to calm down and reflect and move forwards.

229. In terms of the latter, he was not basing this comment on anything Mr Kelt had said to him, but based on reading the same emails which the Claimant had read (some of which are quoted above) including Mr Kelt's comment that he intended to speak to the Claimant about her emails of 19 May at a convenient time in the future.

<u>"Gunning for you" comment</u>

230. In her witness statement, the Claimant says that Stan told her that Mr Kelt was "gunning for her". She refers to her notebook [Bundle 594] where, after writing about the 22 May conversation with Mr Tayler, and saying that she spoke to SB afterwards, she mentioned that she had also spoken to Stan at some point and he had made this comment.

231. In the grievance investigation, in late 2020, Stan said he had no recollection of saying that to the Claimant. He thinks he did say it to Mr Tayler.

232. So we infer that Stan did hold the opinion, and we will take that into account when assessing Mr Kelt's actions.

233. It is less clear whether he actually did say it to the Claimant (and she has remembered correctly, and he has forgotten), or whether actually, he said it to Mr Tayler, and Mr Tayler mentioned to the Claimant that he said it, and the Claimant has misinterpreted her notes, and the Claimant and Mr Tayler have misremembered.

234. In any event, there is no precise date, and no context for the remark and no details of what led Stan to form the opinion.

<u>What SB was told on 26 May 2020</u>

235. On Tuesday 26 May 2020, SB resumed working in the office. She was told by Mr Kelt and Mr Stewart that Mr Stewart would give her instructions. SB said that she had always reported to SB. Mr Kelt informed her that Mr Stewart was in charge of her, not the Claimant.

236. On the balance of probabilities, this was intended to be a description of how the work would be arranged with Mr Stewart, Mr Kelt and SB, and no-one else, regularly in the office, and with the Claimant officially on furlough (albeit, seemingly, in practice working from home, just as Mr Kelt and Mr Stewart were, in practice, working in the office) and seeking to avoid attending the office when other people were present.

Pay Calculations - Overtime

237. An employee, RC, wrote to the Claimant on 21 May to ask whether the sums which the Respondent was paying him (80% pay as he was on furlough) were based just on basic, or included average overtime. [Bundle 311]. The Claimant said that it was just basic, and the employee argued that it should be overtime as well. The Claimant agreed to refer the matter to Mr Stewart. [Bundle 310]

238. The same day, the Claimant forwarded the question to Mr Stewart, who said he would ask Moorepay. [Bundle 353]

239. On 1 June, Mr Stewart told the Claimant that Moorepay had been unable to answer, so he had sought legal advice and done his own research (which he shared with her). (Ms Shingleton also commented on 1 June).

240. On 11 June, he replied to the Claimant, copying in Ms Shingleton and Mr Kelt [Bundle 351].

> [legal advisers] still haven't been in touch. After speaking direct to HMRC, based on the way our employment contract is worded the advice is to claim for 80% of the average of last years wages up to the limit for employees who receive overtime, so this would include [RC and 4 other named employees] and anyone else who receives overtime.
>
> At present there doesn't seem to be a way to correct/modify previous claims, however apparently HMRC are working on this.

241. The Claimant asked if HMRC had put the advice in writing. He replied to say that they had not, but supplied the officer's name.

242. An exchange of emails ensued, with the Claimant disagreeing with the advice, and Mr Stewart engaging with her comments, but ultimately saying, 10:09 on 11 June, that he could "only go on what HMRC told me!"

Ms Shingleton's accounts queries

243. According to the bundle, there were occasions when Ms Shingleton would ask the Claimant questions about the monthly accounts. She raised some questions on 18 June 2020 about the May accounts. [Bundle 359]. Ms Shingleton asked if she could have a phone discussion before commenting in detail to the board. This discussion took place and, as a result the Claimant sent an email to the board, mentioning that the May CJRS funding was not mentioned; it had been received in June, and she supplied the figure. She also supplied a correction to "invoiced sales" and explained how the discrepancy had arisen. Following the Claimant's email, Ms Shingleton added that the same issue might also mean amendments to 2 other items.

244. After the Board meeting, Ms Shingleton and Mr Stewart exchanged a series of emails on 23 and 24 June 2020. [Bundle 377C to 376]. Ms Shingleton said she was concerned that the Claimant was not as on top of the accounts as she should be. She explained that she had first raised an issue about the April accounts, which the Claimant had attempted to deal with in the May accounts, but that in turn seemed to highlight some other issues. Ms Shingleton suggested that the previous year end accounts figures might require an adjustment of around £36K to the profit.

245. Mr Stewart suggested a (remote) meeting to discuss further.

246. On 2 July, after the meeting, and having spoken to the auditors, Ms Shingleton emailed Mr Kelt and Mr Stewart. [Bundle 381]. It seems that the auditors were aware of the Claimant's methodology and were not (by implication) concerned by it. Ms Shingleton stated that for the current financial year, she would get the accounts closed off in the way that she thought was appropriate (rather than leaving it for the auditors to make the correction).

<u>June Board Meeting</u>

247. The "notes" (that is Mr Kelt's document showing what was to be discussed) was circulated on 18 June. The notes include:

> • Toby and myself have been looking at streamlining certain aspects of the accounts processing, (as mentioned in the SWOT documentation) We are proposing that Timesheets. Purchase Orders and Holiday admin are all transferred to electronic systems, accessible online and via mobile phones. Our current SAGE supplier has suggested 3 pieces of software that link direct to 'Sage 200' (our current accounts package) and these are being investigated further. The aim is to rid ourselves of as much paperwork and manual input as possible, freeing up personnel to deal with more important issues and reduce costs. For example; with timesheets, individuals would complete them on a computer or mobile phone, (so no excuse for not doing them if away on a shoot!); they would automatically be routed for approval to supervisors and Toby, then go straight into Sage and set against respective projects, allowing more up to date WIP project figures being available and hopefully allow better control of costs. [SW] would no longer be Involved in time consuming admin. Those that did not complete the data entry in a timely manner would be automatically challenged and potentially penalised. PO's would be limited to certain individuals, go through an approval process and be checked easily online on a daily basis Again they would go straight into Sage avoiding data entry by [SB] and Georgia, and cut dramatically the amount of paperwork being generated and stored. Holidays could be booked by the individual online and the system set up to either pass it to Toby for approval, or reject it if it did not meet certain criteria selected by management, eg. not allowing both Rick and Bailly to book leave at the same time. There is obviously a lot of discussion to go through in detailing all this but hopefully you get the idea.
>
> • HMRC confirmed that past overtime payments should be taken into account when calculating furlough payments I note Karen's ongoing disagreement with this but have to conclude she is wrong as we are not going to argue with HMRC!
>
> • The Business Plan - Everyone has received the extended SWOT analysis, No one has disagreed with anything contained within it, so I propose it is accepted and we can move on to implementation planning. Financial projections will be undertaken next, and it is

hoped the start of an upturn will inform this process more. Currently it would be pure guesswork!

• As mentioned in the BP I propose we offer 2 positions on the Board to staff. These could simply be appointees, but it is probably better if they are voted on by staff, or at the very least staff given the opportunity to approve them. Let's discuss

248. The meeting took place by video on 23 June, 5 days after the notes had been circulated (and a month after the 22 May email circulated the 10 page SWOT analysis).

249. The minutes [Bundle 373] included that:

• The proposal to streamline certain aspects of the accounts processing by introducing online electronic forms connected into SAGE 200, namely Timesheets, Purchase Orders and Holiday admin (accessible online and via mobile phones), was agreed. Further research will be concluded with the plan to introduce this as soon as possible while the company is quiet. The aim is to make the process easier, and reduce the need for paperwork and data entry by accounts staff. It would also help Project cost tracking in a more timely and easier manner. Hire software will be considered for similar attention in time.

• It was agreed TS & RN should be added to the bank mandate, and TS should be able to make payments online KE to organise.

• The Business Plan - Everyone had received the extended SWOT analysis. It was agreed to accept its recommendations and move to an implementation phase. This will be prepared as a time and responsibility plan. Financial projections will be undertaken shortly, but it is hoped the start of an upturn will inform this process more than it being pure guesswork.

250. In other words, the fact that there was to be a review of finance was not announced for the first time at the 23 June meeting. It was proposed in the SWOT analysis on 22 May, and comments were invited on that. Then the 18 June Board Notes mentioned that no comments had been received and they were proceeding as per the 22 May document.

251. At the meeting, it was discussed that the finance review would proceed. The Claimant stated that it was very important that it was necessary to carefully identify exactly what the current processes were, and exactly what people currently did, clear about finding out what work people actually did before getting rid of roles and before changing processes or it could expose the business to significant risk.

<u>Correspondence about, and preparation for, Finance Review</u>

252. As stated in the SWOT analysis, the Finance Team, which included the Claimant, was going to be involved in the Finance Review. The MD was going to take the lead.

253. On 9 July [Bundle 383C], Ms Shingleton asked Mr Stewart if he had spoken to the Claimant about the dates for the review. She asked if the week of 20 July would be suitable for the Respondent.

254. After he said he would propose that to the Claimant, she added:

> I need to update my engagement letter with Artem to cover this work, so at some stage next week maybe we could confirm how we envisage it working, what the respective roles are and what you have already done with [SB]. I also said to Mike that this type of review usually works best in a number of bites, as when trying to do it in one continuous session people typically run out of energy and it becomes less effective.

255. On 10 July, Mr Stewart replied, agreeing about the engagement letter, and about the "bites" and asking for more information on that. He was aware of some personal matters that Ms Shingleton had to prioritise, and offered to delay the review. Ms Shingleton said that week of 20th was good for her if it was good for the Claimant, taking account of the timing of the Claimant's work doing payroll and accounts. Mr Stewart and Ms Shingleton arranged to speak on Monday 13 July, and did so.

256. During the call, it was agreed that Mr Stewart would speak to the Claimant before Ms Shingleton phoned her. He did speak to the Claimant, and told her that the review would be the week of 27 July. He informed Ms Shingleton that he did not think that the Claimant was happy about the review, and said that Ms Shingleton should let him know if there were "any problems or push back". [Bundle 385 to 384].

257. Mr Stewart had informed the Claimant that she would come off furlough (temporarily, at least) to prepare for the review. On 14 July, the Claimant wrote to Ms Shingleton [Bundle 388 to 389]:

> Toby has emailed to advise that I will be taken off furlough in a couple of weeks' time "to begin the accounts review with Amanda, as discussed at the most recent board meeting". I am unaware of any mention at that meeting of you being involved with the accounts review that Mike and Toby had already started. Mike and Toby mentioned at the Board Meeting some technological efficiencies to the accounts procedures that they were looking to introduce, but I pointed out to the directors that while I welcome any efficiencies I had not been included in Mike and Toby's discussions, which is frankly ridiculous.
>
> Kindly advise me what your instructions from Mike and Toby have been to date, the scope of this proposed review and its desired outcomes.
>
> As you know I feel that I run a tightly controlled accounts department, and have been frequently praised by you, your predecessors and the audit teams. My work and the work of the accounts team have helped the company to be in a strong financial position You personally have been involved with the company for over a decade, initially and for numerous subsequent years directly as the company auditor and you are therefore already fully informed of all our processes and procedures.
>
> However, if it is your opinion that the external company audit is not or has not been carried out correctly, please let me know as I believe that Artem would need to make a change there. Personally I have always found the team at Buzzacott to be helpful, thorough and professional.
>
> In all of my years dealing with you I hope that you can confirm that I have always been respectful, open and transparent with you: I have entertained, explained and dealt with any accounts issues you have questioned.

> Even though I have been on furlough throughout the COVID19 period, I have continued to work from home on a full time basis and continued to fulfil all my statutory duties, produce Management Accounts for the Board of Directors, ensure that payroll is done and in addition calculated and submitted the CJRS government grant applications. All of this to help the company to survive. I have also continued to discuss the Management Accounts with you throughout this period.
>
> Many months ago I suggested to you after a Board Meeting that is was clear to me that you were having private discussions with Mike outwith the Board Meeting about me and about the accounts and as Finance Director I found this both unprofessional and unacceptable. At that time you categorically denied this and you assured me that this was not the case. I believed you. These further discussions about the accounts review with Mike and Toby appear to prove otherwise and my opinion that it is both unprofessional and unacceptable remains unchanged.
>
> On another point, I assume that you will not be carrying out this work for free, and I personally find it incongruous that the company should be spending money in this manner while discussing redundancies, lay-offs and while most of the staff is still on furlough, (i.e. reduced wages).
>
> As ever, I value your comments and I look forward to receiving more information from you regarding this proposed review.

258. In other words, the Claimant asked Ms Shingleton, rather than Mr Stewart for details of the review. Quite reasonably, given her role as Finance Director, she asked about cost. She expressed the view that Ms Shingleton was already familiar with the procedures, and hinted that if there was anything wrong with the procedures Ms Shingleton should have said something already. She said that Ms Shingleton had had direct discussions with the Chair, and said this was "both unprofessional and unacceptable." She said that Ms Shingleton had had discussions with the Chair and the MD which confirmed the Claimant's opinion that Ms Shingleton was acting in a way which was "both unprofessional and unacceptable."

259. Ms Shingleton replied the same day (a Tuesday) to say she would phone the Claimant on the Thursday. She explained why (for entirely legitimate personal reasons) she could not send a more detailed response immediately. She said that she had spoken to Mr Kelt and Mr Stewart the previous day (so Monday 13 July 2020) to ask for details of when the Respondent was intending the review would start. She said she believed that Mr Stewart had already had a discussion with the Claimant about it.

260. Ms Shingleton did phone and leave a voicemail message, which the Claimant acknowledged on 20 July, apologising for not responding due to being too busy with other matters, and adding:

> Once again I would ask that you send me a written scoping document with outputs for the proposed accounts review so that I can look at it when I have time.
>
> I have explained my position fully in my previous emails..

261. For personal reasons, Ms Shingleton had to postpone the review. She emailed Mr Stewart, Mr Kelt and the Claimant to say so on 20 July. [Bundle 390]

262. Ms Shingleton sent an email to the Claimant on 27 July replying to the Claimant's emails of 14 and 20 July (mentioned above). [Bundle 392]. For personal reasons, she had not been able to send a substantive response sooner.

> Further to your e-mails of July 14 and July 20, the only 'accounts review' that I have been asked by Toby and Mike to be involved with is the review described under the heading 'Financial and Profitability' in the 'Weaknesses 5 section of the SWOT analysis circulated by Mike by e-mail on May 22, which the Board approved at the Board meeting of June 23.
>
> On July 13, I had a call with Toby and Mike to clarify what they were envisaging from the review and agreed to draft an engagement letter setting out what I believe is the scope of my involvement. Given the issues […] of which you are aware, I have not yet had the chance to prepare this letter. I assume that Toby and Mike will share the letter with you in due course.
>
> I entirely refute your comments that my discussions with Toby and Mike have been 'unprofessional and unacceptable' in any manner.
>
> If you have any issues with the Board's decision to undertake this review, please take these up with Toby, Mike or the Board.
>
> Finally if you would like to discuss any other aspects of your email of July 14, please call me.

263. The Claimant replied, on 29 July, acknowledging that the review had been approved on 23 June, but asserting that she had not been consulted. She said:

> Your role on the Board as an independent adviser covers governance as well as providing overview on financial matters. I do not think it is professional for you to have been discussing a finance review with Mike and Toby without my involvement.
>
> As Finance Director of Artem Ltd I am disappointed with your conduct

264. Ms Shingleton replied later the same morning [Bundle 391] to say she had asked Mr Stewart and Mr Kelt to speak directly to the Claimant about the matter, and adding that she was willing to work with the Claimant constructively to carry out the review.

265. Shortly after that email, she forwarded the emails to Mr Kelt and Mr Stewart saying:

> I tried to diffuse the issues raised by her by phone.
>
> I think you need to take up the issues she raises regarding the proposed finance review directly with her. I leave it to you if you wish to share it with the rest of the Board.
>
> I remain willing to work constructively with Karen to carry out the proposed review.

266. Mr Kelt replied the same day, Wednesday 29 July 2020, saying:

> Karen is out of order. Please do not get stressed by her attitude.

> Toby is off today and tomorrow but I will discuss this with him when he is back and we will arrange to sit down with Karen and explain what we want to see happen in broad terms as well as some specifics. We will also explain that this will be a fairly open review where everything and anything can be considered and discussed, and that she is expected to comply helpfully in carrying it out.

267. It was his plan that they would speak to the Claimant that Friday. However, the Claimant was not working that day and so that did not happen.

268. Mr Stewart replied to Ms Shingleton's 29 July email on 31 July saying, "*Thanks Amanda, I will discuss with Mike and we will have a chat with Karen. I echo Mikes comments*". He also emailed the Claimant to confirm that she would be off furlough for all of "next week" (so Monday 3 to Friday 7 August).

269. On Thursday 6 August 2020, Ms Shingleton said that she was not able to commit to a firm date for the finance review, but asked for an update regarding the "chat" with the Claimant. Mr Stewart replied to say it was going to be that afternoon.

270. The Respondent did not write to the Claimant to formally invite her to a meeting on either Friday 31 July or Thursday 6 August 2020 to say that Mr Kelt and Mr Stewart wanted to discuss the finance review (whether the cost, timing, scope, or any other aspect) in a meeting. The Claimant did know that Ms Shingleton was going to invite them to do so, and she knew that she had been brought back off furlough to prepare, but was not given any advance written information about when the meeting would take place.

12 August 2020

271. There was no discussion about Ms Shingleton's 29 July email on 6 August. On 12 August there was a meeting.

272. The Claimant was working in her office when, around 3pm, Mr Stewart asked if she "could spare ten minutes" (or words to that effect). On their way to the meeting room, she saw Mr Kelt enter it. This prompted her to ask if should bring some paper to make notes, and Mr Stewart said "yes".

273. There is a dispute about what happened during the meeting. In particular, both sides have produced their own notes, and have raised disputes about when the other's notes were prepared.

274. The Claimant's notes are more detailed. [Bundle 403 to 405]. The final version was completed on 3 September, and the drafting of the notes started the day after the meeting. [Bundle 597]. They were started after she had already decided to resign, and finished after she had decided to take things further. Our finding is that the Respondent's notes were prepared after the Claimant had resigned and they were aware that she was likely to take things further. [Bundle 407]

275. Mr Kelt started the meeting by referring to the Claimant's queries to Ms Shingleton about the scope of finance review. He told her that the scope would be unlimited and completely open. He said that Ms Shingleton would review the systems and

processes in accounts. He stated that Mr Stewart would be involved too. He said that Mr Stewart and Ms Shingleton should be shown everything.

276. The Claimant suggested that Buzzacott (the auditors) rather than Ms Shingleton could do a review. Mr Stewart said that the review was intended to be much wider than just the company's accounts, and was to include systems and processes. The Claimant said that Buzzacott did that as part of annual audit.

277. The Claimant asked for a copy of the engagement letter. As mentioned above, the Respondent and Ms Shingleton had discussed that she would prepare one (or amend her existing one); however, as the Respondent knew, for entirely legitimate personal reasons, she had not had the time to do that so far. Mr Kelt did not give that response to the Claimant. He said, instead, that the Claimant did not need to see the terms of the engagement letter in order to understand that the review would be as he was describing, and the scope would be unlimited.

278. Although our findings about these early stages of the meeting are fairly consistent with both sides' versions, what happened as the meeting continued is more hotly disputed.

279. The Respondent's account is that they patiently offered the Claimant the opportunity to ask any questions, and that their intention was to use the meeting to draw up some terms of reference for Ms Shingleton, but the Claimant was obstructive. However, we reject the Respondent's version of events, and find that the meeting more closely matched the Claimant's notes (and her witness statement, but the witness statement is based on the notes). We find that there is inconsistency in the Respondent's oral evidence, which simultaneously sought to suggest that on the one hand, the Claimant's lack of engagement took the form of being unresponsive, and simply sullenly making notes, but, on the other hand, of being argumentative, and unwilling to listen.

280. Furthermore, and in any event, even on the Respondent's own account, "The meeting was called to informally discuss the proposed finance review, but led on to discuss performance concerns". The Respondent's note then say:

> MK explained the purpose of the meeting was to discuss the proposed finance review by Amanda Shingleton following KE's request for clarification of its scope in an exchange of emails between KE and Amanda. MK stated that the review into the finance function, which had been agreed at the previous board meeting, would be exploratory in nature and thus the scope did not have limits, but would be allowed to look at how the Company could embrace new technology, and cut down its finance admin costs, pointing out that no such review had taken place during KE's time in the Company. TS added that it would include a look at processes and the way in which we operate, as the company was seeking to become more efficient. It was stated that the company intended to move forward with both a digital timesheet/leave system and a digital purchase order system, and that KE needed to be onboard with this plan. MK stated that the working relationship with KE was not currently effective and that attitude and communication had to improve. Both MK and TS gave examples of instances over the past 12-18 months where concerns had been raised. KE did not accept there were issues needing addressed.

> As the discussion had moved on from the review, and in response to comments from KE, MK and TS listed some examples; such as the monthly management accounts being regularly questioned (by Amanda) and needing changed, the costs to the Company of the lack of action on the equipment leases last year, the attitude of KE in refusing to accept furlough advice despite it being derived from HMRC and agreed by the Board, the corrosive effect of copying unsubstantiated comments by email to the whole Board, the undermining of management decisions in email chains in the past.
>
> TS stated that he wanted the working relationship to improve.
>
> KE stated that if her competence was being called into question as a director then it should be communicated to the board. Both TS and MK stated that it was not her competence, but their confidence in her which was the issue, and that the cohesion of the executive team of the 3 of them was important to move the Company forward

281. In other words, even based on the Respondent's own notes, our finding is that the Claimant herself (her working relationship, and communication style) seemed to be mentioned as part of the reason that a review was considered necessary. She was not only criticised when "the discussion had moved on from the review".

282. The remark about confidence in the Claimant occurred much earlier in the meeting according to the Claimant. We accept that. What Mr Kelt said about confidence in the Claimant ended the first part of the discussion where he had said the scope of the review was "unlimited", and led into the second part of the discussion where he implied that he had concerns over the Claimant's performance, and whether she was doing well for the company. He said that he had lost confidence in the Claimant, and he said that he and Mr Stewart both thought she was being unhelpful. He said that some things had gone badly wrong, and that, whenever that happened, the Claimant tried to deflect. He said that some of their competitors had no accounts team at all.

283. Mr Stewart did say (both sets of notes agree) that he wanted to carry on working with the Claimant. At the end of the meeting, Mr Stewart asked the Claimant if she had anything to add, and she said she would think things over.

284. That evening, she decided to resign.

285. Her reason for resigning was that the things said at the meeting left her feeling thoroughly demoralised. She believed that the comments were unfair, especially given the hard work she had been doing while on furlough. In particular, the comment that Mr Kelt did not have confidence in her left her feeling that she had no choice but to resign.

<u>Resignation Letter / Grievance</u>

286. Her letter [Bundle 408] was sent early the next morning. She resigned as both employee and director and alleged that she had been "yet again bullied and belittled".

287. Neither in the resignation letter, nor prior, did the Claimant expressly state that any of the alleged bullying or bad treatment was connected to her own sex, age, or race.

288. On 17 August, Mr Kelt wrote to say that the termination of employment took effect from 13 August, and that she would be paid accordingly. He said there would be a grievance meeting on 27 August.

289. On 19 August, the Claimant replied dealing with various matters relevant to the termination of employment, and concluding:

> While I note that you have recognised that I have just cause to pursue a formal grievance against Toby Stewart and you, you have failed to inform me of the person who will be chairing the proposed grievance meeting and the process of appeal. I suspect that the offer of a grievance meeting is solely based on legal advice from Moorepay, Artem's HR advisors, in response to my resignation letter and that Artem has no genuine intent to impartially investigate this matter. Furthermore, the influence Toby and you hold over the Artem business, combined with the culture of bullying and belittling you have both fostered and promoted, leave me in no doubt that I will not receive fair treatment. Toby's and your actions and behaviour have forced me to take the drastic step of resigning immediately and because of this repudiatory breach of contract I do not believe this breach is capable of remedy through Artem's grievance procedure. I therefore decline to participate in the proposed grievance hearing.

290. On 20 August, Mr Stewart wrote to say an "independent party" / "impartial consultant" would be appointed if the Claimant agreed.

291. On 25 August, the Claimant replied, stating:

> With regard to your proposal to appoint an independent party to investigate my grievances I suspect that this is another attempt based on legal advice from Moorepay, your HR advisors, to appear to have some concern about the treatment that I have suffered from Mike and you, I do not believe that anyone appointed by Mike or you would be genuinely independent or impartial and I would therefore not receive fair treatment. The repudiatory breach of my contract of employment resulting from Mike and your intolerable behaviour is not capable of remedy through Artem's grievance procedure. I therefore decline to participate in the proposed grievance hearing.

292. On 4 September, she wrote to say that she had reconsidered, and would agree to appointing an independent party to hear the grievance, provided it was a joint instruction. She offered to pay half.

293. On 11 September, Mr Stewart said that Moorepay would appoint a consultant who was independent and impartial. The Claimant accepted "subject to the verification of the independence of the party appointed".

294. On 22 September, on the Respondent's notepaper, Mr Stewart told the Claimant the time of a video meeting on 29 September, to be chaired by Louise Gillibrand, HR Consultant, Moorepay with Gill Smith Policy Consultant from Moorepay present as a note taker. He said to write to him with queries, and either he or Ms Gillibrand would respond. [Bundle 441]. The Claimant declined on 24 September, citing lack of independence. [Bundle 442]. Mr Stewart disagreed and also sent the Claimant the grievance procedure on 29 September. On 5 October, the Claimant said she would agree to the grievance meeting provided Moorepay sent her written confirmation

that the consultant appointed would be free to be impartial and make a fair and independent decision.

295. In response, on 8 October, Mr Stewart emailed the Claimant am invitation letter [Bundle 446] for a 15 October meeting and a letter from Audrey Robertson of Moorepay [Bundle 447].

296. The Claimant agreed to attend and sent to Ms Gillibrand a two page [Bundle 451 to 452] and a 30 page [Bundle 453 to 482] document detailing her complaints. She also attached 3 pdfs of documents.

297. The meeting went ahead on 15 October. The Claimant was told that the notes would be sent to her within a few days. She was told that Ms Gillibrand had a week's holiday coming up, and that would affect the date by which the outcome would be delivered. The Claimant asked if someone else could work on the investigation in Ms Gillibrand. On 21 October, Ms Gillibrand wrote to say that the notes would be sent the following day and no-one else would carry on the investigation in her absence. [Bundle 483]

298. Following receipt of the notes, the Claimant sent her amendments on 27 October 2020. [Bundle 484]

299. Ms Gillibrand carried out the interviews that appear in the grievance statement bundle. We accept that these interview notes were not sent to any of Mr Kelt, Mr Stewart, the Respondent or the Claimant at the time, or later, until we ordered their production during the course of the hearing. They were in the Respondent's control, and also the control of Moorepay, who has represented the Respondent in the litigation. [Bundle 485]

300. We have noted what questions were asked and will comment in the analysis below.

301. On 3 November, Ms Gillibrand wrote to the Claimant to say that she aimed to supply the outcome by 6 November. On 5 November, Ms Gillibrand wrote to the Claimant to say that she aimed to supply the outcome by 11 November. On 11 November, she said there would be a delay, and on 12 November provided a revised estimate of 19 November. During the exchanges of correspondence, the Claimant asserted both that the delay was unreasonable and that it was distressing. She also alleged that it was a deliberate tactic by the Respondent. Ms Gillibrand denied each of these, asserting that she was seeking to produce a fair and impartial report, and that there was a lot to consider. The Claimant complained to Moorepay about the delay.

302. The outcome was emailed on 19 November 2020 after 8pm. [Bundle 511]. There was a two page letter [Bundle 512 to 513] which said the grievance was not upheld, and supplied appeal process information. There was a 17 page report. [Bundle 514 to 530]. We have taken the contents into account in our fact finding and our analysis.

303. The Claimant appealed on 23 November. Amongst other things, she disputed Ms Gillibrand's and/or Moorepay's impartiality, including taking issue with comments made in Ms Robertson's 7 October letter. She also said the length of time to produce

the report was unreasonable. As per the instructions, the Claimant addressed the letter to Mr Tayler. Paragraph 11 objected to Mr Tayler hearing the appeal.

304. By letter from the Respondent (signed by Mr Stewart) dated 2 December 2020 (sent by email on 3 December), the Claimant was invited to appeal meeting on 8 December. The appeal hearing was to be chaired by Francis Scoon, HR Consultant. Moorepay

305. On 4 December, the Claimant wrote back to say that paragraph 11 of her appeal had been upheld, but that, in the circumstances, she would not attend the hearing (because her opinion was that anyone appointed by Moorepay was not impartial) and that (if the Respondent would not reconsider and appoint someone else) she would supply written representations only, being her 23 November letter, and this 4 December letter. [Bundle 535]. She confirmed non-attendance directly to Mr Scoon in response to his Teams invite. [Bundle 538]. On 16 December, she supplied written answers to his questions [Bundle 541 and 540]

306. On 18 December 2020, the claim was presented to the Tribunal. (There had been ACAS conciliation starting on 25 October and finishing on 20 November 2020.)

307. On 28 December, the appeal outcome was emailed to the Claimant. [Bundle 546] In other words, it was sent after the claim was presented. The outcome was a 10 page letter, on the Respondent's paper, but prepared by Mr Scoon. [Bundle 547 to 556]. The appeal was rejected for the reasons stated.

<u>Leave Entitlement</u>

308. On 25 August, Mr Stewart wrote saying:

> The letter sent to you dated 17/08/2020 incorrectly stated that you had 26 days leave to be paid. The correct figure is 13. I apologise for this error. Payroll will be processed this week, and your payslip and P45 will be forwarded in due course,

309. The Claimant does not dispute the accuracy of the figure, or that it was paid.

310. The Respondent has never supplied a more detailed breakdown of how the entitlement was calculated

<u>Financial Controller / October Board Meeting</u>

311. With effect from around 18 August, the Respondent engaged, via an agency, a Financial Controller. This was because they urgently needed someone to assist with accounts and invoices. This was not a Finance Director, and the agency worker (a female who was younger than the Claimant) did not take on the full range of the Claimant's duties.

312. The Board minutes for October state:

> The final 2019 accounts were prepared by Buzzacott with the invaluable help of Amanda and [agency financial controller] who worked their way through the Sage accounts to

reconcile the figures. Many inconsistencies and mistakes were found that reduced Karen's profit reported at the Board meeting in December [2019] from £165k after bonuses, to £23K. This huge discrepancy would have changed the decisions made at the December [2019] Board meeting regarding bonuses

The Law

Burden of Proof for the Equality Act complaints

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

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

314. It is a two stage approach.

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

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

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

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

319. The burden of proof does not shift simply because, for example, the claimant proves their protected characteristics and/or that there was unwanted conduct and/or that they did a protected act and/or that there was difference in treatment between her

and somebody who did not have the same protected characteristics. Those things only indicate the possibility of discrimination or victimisation or harassment. They are not sufficient in themselves to shift the burden of proof, something more is needed.

320. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

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

Time Limits

322. In the Equality Act 2010 ("EQA"), time limits are covered in s.123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (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.

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

324. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for

presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

325. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

326. The factors that may helpfully be considered include, but are not limited to:

327. the length of, and the reasons for, the delay on the part of the claimant;

328. the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

329. the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

Direct Discrimination

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

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

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

332. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

333. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes

and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

Victimisation

334. Victimisation definition is in s.27 EQA.

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

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

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

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

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

339. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

340. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish

that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

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

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

Harassment

343. Harassment is defined in s.26 of the Act.

> **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.
>
> (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.

344. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

345. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which we can infer that the conduct could be so related then the burden of proof shifts.

346. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appel said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute. When assessing the affects of any one incident of serval alleged harassments then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself but in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Dismissal

347. Section 40 EQA makes it a contravention of the act if (amongst other things) an employer harasses an employee. Section 39 makes it a contravention of the act if (amongst other things) an employer discriminates against an employee. Dismissal is expressly covered under section 39 and section 39(7) reads, as far as is relevant:

> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
> (b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

348. For the unfair dismissal claim, the claimant relies on section 95(1)(c) of the Employment Rights Act 1996 ("ERA") to establish that she was dismissed. It reads:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

349. Section 95(1)(c) ERA (and section 39(7)(b) EQA) refer to something colloquially known as "constructive dismissal". In order to prove constructive dismissal the employee must prove

349.1. that the employer has committed a serious breach of contract and

349.2. that the employee resigned because of that breach (or at least partly because of that breach; it does not necessarily have to be the only reason) and

349.3. that the employee must also prove they has not waived the breach by affirming the contract.

350. In London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493, the court, at paragraph 14, stated that:

> The following basic propositions of law can be derived from the authorities:

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] 1 QB 761*
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 [1998] AC 20* , 34H–35D (Lord Nicholls) and 45C–46E (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] ICR 666* , 672A. 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 page 35C, 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 paragraph [480] of 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."

351. The last straw might be relatively insignificant, but it must not be utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful.

352. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal clarified the analysis in Omilaju and added to it. It reiterated that the last straw doctrine is only relevant to cases where the repudiation relied on by the employee takes the form of a cumulative breach and that the last straw doctrine does not have any application to a case where the alleged repudiation consists of a one-off serious breach of contract.

353. In Kaur, the Court of Appeal made clear that in a last straw case the fact that the employee might have affirmed a contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument and in paragraph 55 of its decision it summarised the correct approach.

    (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (2) Has he or she affirmed the contract since that act?
    (3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)
(5) Did the employee resign in response (or partly in response) to that breach?

354. Where the answer at point (4) is "no" (for example the act that triggered the resignation was entirely innocuous), it is necessary to go back and see whether there was any earlier breach of contract that has not been affirmed, and which was a cause of the resignation. See Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19.

355. In considering whether a contract has been affirmed after a breach, it is necessary to have regard to the entirety of the circumstances. A gap in time between the act relied on and the resignation is a significant factor but it is by no means the only factor; in other words, a delay is not necessarily fatal to the employee's argument for constructive dismissal. The reasons for the delay would be relevant as would consideration of what had happened in the intervening period, such as was the employee working and receiving pay amongst other things.

356. Where an employee alleges constructive dismissal and succeeds in the argument then the dismissal reason for the purposes of the Employment Rights Act is the employer's reason for the conduct which caused the employee to treat themselves as dismissed.

357. It is open to an employer to argue that the dismissal was for a potentially fair reason and was, in all the circumstances, a fair dismissal.

358. Section 98 of the Employment Rights Act 1996 ("ERA") deals with fairness.

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

359. So, in a constructive dismissal case, the employer must also satisfy us that the dismissal reason falls within one of the definitions in either section 98(2) or section 98(1)(b). If so, then the dismissal is potentially fair. That means it is then necessary to consider section 98(4) ERA. In doing so, we take into account the respondent's size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissal.

Dismissal contravening Equality Act vs Unfair Dismissal

360. In considering unfair dismissal arguments, we must take care not to conflate tests for whether a dismissal was a breach of the Equality Act with tests for whether the dismissal was unfair contrary to the Employment Rights Act.

Breach of Contract

361. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives employment tribunals jurisdiction over breach of contract claims (subject to some restrictions and limitations) which arise on termination of employment or are outstanding on termination of employment.

362. The standard common rule tests for establishing whether there has been a breach of contract, and for assessing damages, apply.

363. An employee is entitled to notice of dismissal from their employer, which is either the statutory minimum period, or else a period specified in the contract of employment (whichever is longer).

Analysis and Conclusions

Protected Act One

364. We reject the argument that the alleged events described in paragraph 16 of the Particulars of Complaint amount to a protected act. During her evidence, the Claimant was pressed to be specific about what she said or did in 2018 (paragraph

16 says "at the same time" which means that it is cross-referencing paragraph 15 which is about alleged events in 2018) that communicated that she was suggesting that Stan was being discriminated against (or that she might intend to assert that he was being discriminated against) because of age. Our finding is that she did nothing of that type in 2018. Nor was she supporting Stan (implicitly or expressly) in any complaint of age discrimination that he had made (implicitly or expressly).

365. Alleged Protected Act One is not a protected act.

Protected Act Two

366. This refers to the Claimant's email of 18 December 2019 at 11:03 [Bundle 204 to 205] which we have discussed in the findings of fact.

367. The express words used that refer to age are simply: "*It was also concerning that Mike remarked on Stan's age when suggesting a change to his hours*". An allegation that someone "remarked" on age is not an allegation of a breach of the Equality Act 2010. However, they follow immediately after a paragraph which stated: *"I also see this attack as being linked to the ongoing bullying behaviour being used to try to force Stan to change his employment contract.*" Taking the two paragraphs together there is an implied allegation that the treatment was because of age (generally) and (more specifically) that Mr Kelt was seeking to persuade Stan to leave the business because of Stan's age.

368. Alleged Protected Act Two is a protected act.

Protected Act Three

369. In paragraph 61 of the Particulars of Complaint, it refers to "an" email of 19 May 2020 (about SB's pay) ie singular. In fact, there are several emails sent by the Claimant that day (9:24; 10:59; 11:15; 12:03; 12:37) which are all part of the same discussion by email, with various contributions. It is necessary and appropriate to consider the totality of what the Claimant wrote to decide whether there was a protected act, and it is also necessary, for context, to take into account what other people had written, because some of the Claimant's emails were direct responses to what other people had written.

370. It is clear from the Claimant's emails that she is expressing the following opinions:

370.1. SB is being treated unfairly

370.2. SB is being treated worse than "other individuals" (meaning other employees)

370.3. SB is being pressured to work full-time for reduced pay

370.4. SB is being bullied

370.5. SB is being pressured to work in the office

370.6. SB believes that she is being "penalized" and SB believes that she is not free to object to her treatment

371. There is no express mention of sex. There is no express mention of any race.

372. The Claimant's arguments effectively invite us to decide that one or more of the following is true.

372.1. Since it is factually accurate that SB is female and most of the employees were male it was implicit in the Claimant's emails that SB was being treated worse than other employees because she was female.

372.2. Since it is factually accurate that SB is (in the words used on page 563 of bundle) a "person of colour" and most of the employees were not it was implicit in the Claimant's emails that the Claimant was asserting SB was being treated worse than other employees because of race.

372.3. That because of the Claimant's own protected characteristics it was implicit that she was alleging that SB's treatment was because of sex or race

373. Although it is not necessary to refer to the protected characteristic, there must be something sufficient about the communication to show that it is a complaint to which at least potentially the Act applies: Durrani v London Borough of Ealing UKEAT/0454/2012. We are not confined to simply considering the emails sent by the Claimant on 19 May 2020, because we can also consider the context in which her own words were written. However, there is nothing about the emails, or the background circumstances in which they were written (including what is said in emails from other people that day to which the Claimant replies) which shows that, even potentially, the Claimant was asserting (expressly or by implication) that she was alleging that the Respondent (or anyone else) was discriminating against SB because of sex or race (or contravening EQA in any other way).

374. Alleged Protected Act Three is not a protected act.

Protected Act Four

375. The grievance of 12 October 2020 [Bundle 451 to 452; 453 to 482] was a protected act. It alleged bad treatment and bias because of both sex and race.

Event 1 Michael Kelt's treatment of Stan

376. This is alleged to be harassment. (age)

377. The Claimant's argument is that Mr Kelt's treatment of Stan was because of Stan's age. It is also her suggestion that it made her concerned that the Respondent (and Mr Kelt, in particular) were likely to treat her badly because of age too.

378. Although it is no barrier to a successful harassment claim that the conduct was (allegedly) related to Stan's age, rather than the Claimant's age, our decision is that

the conduct in relation to Stan's use of the office was neither related to Stan's age, or the Claimant's, or anyone else's.

379. More generally, in relation to the alleged conduct categorised by paragraph 15 of the Particulars of Complaint as being "in 2018", Mr Kelt's dealings with Stan did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Event 2. The Claimant expressing views supportive of SM to Michael Kelt.

380. This is not a complaint. This is the alleged Protected Act One.

Event 3 Michael Kelt's reference to the "new young" team

381. This is alleged to be harassment or else direct discrimination. (Age).

382. We have accepted that he probably did, on one or more occasions, use expression "new young team" (or similar), as well as expressions such as "new team" and "new generation" or "next generation" (or similar).

383. We are not satisfied that he was consciously or deliberately referring to the fact that they were in their 30s or 20s. Rather he was referring to fact that himself, and Stan and Mr Tayler were bringing new people onto the board who would, in due course, take over the roles which those three had been doing.

384. We were not satisfied that he was stating or implying, either consciously or unconsciously, that any of the new people would replace the Claimant. However, given the fact that he has referred to them as "young", it seems likely that, unconsciously at least, he was seeing their age as a distinguishing feature between the new directors on the one hand, and the founding members on the other hand.

385. The Claimant's age was somewhere in between. She was older than the new directors, but younger than the shareholder-directors. She was closer in age to the shareholder-directors, being in the region of 10 or so years younger than Mr Kelt and Mr Tayler (Stan being slightly older than those two) but 20 or so years older than the new directors.

386. We have taken the fact that Mr Kelt used the word "young" or "younger" in reference to the new directors into account when analysing all the allegations.

387. The specific allegation in paragraph 18 of GOC was "During 2018, MK started to talk about the "new young" team which he wanted to run the business with him remaining at the head of it." However we reject the part of the allegation which implies that Mr Kelt was intending that the only people involved in running the business would be him and the new directors, and that the Claimant was to be excluded.

388. The comments were not with the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The purpose was to identify the 3 newly appointed directors as a group.

389. We accept the Claimant's evidence that it was unwanted conduct that the expression was used. The expression does relate to age. It was not used with the intention of referring to the Claimant's age at all. It was not used with the intention of referring to Pooley's, North's or Stewart's age in absolute terms, just with the intention of referring to the plan that the founding members were gong to be stepping down in due course and that was why the appointments had been made. The expression was not used with the intention of implying that one of these 3 (or another "young" person) would be the new MD.

390. In all the circumstances, it is our decision that the words did not have the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. She knew that none of the 3 new appointees were intended to replace her as Finance Director, and (whether she liked the expression or not) knew that Mr Kelt was referring to the fact that their appointments had been part of the Respondent's (and the founding members') succession planning. It would be cheapening the words of section 26 EQA to regard Mr Kelt's occasional use of this expression, in 2018, as having the prohibited effect.

391. The harassment complaint fails.

392. Furthermore, the direct discrimination complaint fails. By using this expression, Mr Kelt (and the Respondent) was not treating the Claimant less favourably than it treated Mr Stewart. The expression implied no criticism of the Claimant, and did not imply that she was not a valued employee and Board member.

393. Similarly, by using this expression, Mr Kelt (and the Respondent) was not treating the Claimant less favourably than it would treat any hypothetical comparator, being a Finance Director in their 30s or late 20s.

394. Furthermore, while the direct discrimination complaint does not require that the reason for the treatment was the Claimant's age (as opposed to age more generally), it is true that the reason for the treatment was not the Claimant's age.

395. The direct discrimination complaint fails.

<u>Event 4 The procedure Michael Kelt adopted for the appointment of new directors.</u>

396. This is alleged to be direct discrimination. (Age).

397. The reason why the Respondent decided to have a staff vote to appoint new directors was for the combined reasons that:

397.1. New directors were needed, as the Board decided in June 2018, to plan ahead for the fact that the founding members were planning on stepping down in due course

397.2. The Respondent's (and the founding members') plan was to introduce an EOT.

398. The reason why the Respondent decided to have a staff vote to appoint new directors had nothing whatsoever to do with the Claimant's age, either consciously or unconsciously.

399. To the extent that that the complaint relates to the precise details of the methodology, then there are no facts from which we could conclude that the methodology was less favourable treatment of the Claimant (because of age, or at all).

400. Furthermore, this was a one off act in around September 2018. It was not part of any continuing act. It occurred more than two years before the complaint was presented. It is not just and equitable to extend time, taking account of the fact that the witnesses do not necessarily have a clear and precise recollection of how the staff vote was counted, and taking account of the fact that, at the time, the Claimant – one of the Board members – raised no objection to the methodology.

Event 5 Michael Kelt's belief that Tobias Stewart of the Respondent would fit the 'face' of the Respondents business, as a young white male in the position of Managing Director.

401. This is alleged to be harassment or else direct discrimination. (Sex, Age, Race)

402. This is being pursued as an allegation in its own right. However, our decision is that this is simply an argument that we must consider as part and parcel of our overall decision-making. It will be particularly important for items 6 and 7. For those allegations (in particular), we will have to decide whether Mr Kelt did consciously hold the belief in question (and, if not, did he unconsciously hold it) and, if so, (and assuming he acted as alleged) did that motivate him to act as alleged.

403. For any of the particular allegations, if we decide that Mr Kelt acted in a particular way, and that part of his reason for so-doing was that he believed that the Respondent should have a "young" and/or "white" and/or "male" managing director (whether to fit in with his perception of what clients or "the industry" would expect, or for any reason whatsoever) then that will be highly relevant as to whether the complaint succeeds or not.

404. However, if we decide that none of Mr Kelt's actions (as we find them to be, and as relevant to the complaints) was because of such a belief then it is difficult to understand how the mere fact that he held the (alleged) belief would be less favourable treatment or would have the purpose or effect defined in section 26(1)(b) EQA.

405. We do not uphold complaints in Row 5 of the Events Schedule as freestanding complaints.

Event 6 Michael Kelt conducting a sham election for the post of Managing Director.

406. This is alleged to be harassment or else direct discrimination. (Sex, Age, Race)

407. This allegation fails on the facts, as we are not satisfied that there was a "sham" election. The Respondent carried out a staff vote, and it has not been proven either that the Mr Kelt misreported the results to the Board or that the Board (with the Claimant and Mr Stewart recused) misreported the results to anyone else.

408. In any event, the staff vote was for guidance only. The Board vote (with the Claimant and Mr Stewart recused) was the only one that mattered. The Respondent has

proven that the Board voted for Mr Stewart, and that Stan was the only vote for the Claimant.

409. All these complaints fail.

Event 7. Michael Kelt conducting the selection process for a new Managing Director in private, ensuring the selection of Tobias Stewart

410. This is alleged to be harassment or else direct discrimination. (Sex, Age, Race)

411. It is also alleged to be victimisation. (Protected Act One)

412. The victimisation complaint fails because we decided that alleged Protected Act One was not a protected act.

413. The reason why the Board vote was done in the absence of Mr Stewart and the Claimant was that they had a conflict of interest and were not deemed eligible to vote.

414. It is not our finding of fact that Mr Kelt concealed the staff vote from the other Board members (or manipulated it, concealing the "true" score and revealing a false one).

415. The reason why the exact tally of staff votes was not published at the time was that it was not considered necessary to do so (as opposed to cover up evidence of wrongdoing in the tallying process, and we have found there was no such wrongdoing in the tallying).

416. The harassment and direct discrimination complaints all fail because the Claimant has not shown that the Respondent did act in the way alleged.

Event 8 Michael Kelt believing that the Claimant would undertake the work of de facto Managing Director 'behind the scenes' despite Tobias Stewart's appointment to the role

417. This is alleged to be direct discrimination. (Sex, Age, Race)

418. It is also alleged to be victimisation. (Protected Act One)

419. The victimisation complaint fails because we decided that alleged Protected Act One was not a protected act.

420. This allegation fails on the facts because it is not true that Mr Kelt was expecting or believing that the Claimant would carry out the duties in the MD job description [Bundle 155].

421. It is true that, until around 5 December 2018, Mr Kelt was expecting that the Claimant would continue to perform the HR and Legal duties which she had been performing since around 2012. It had not been suggested otherwise, until then. For example, the Claimant had not suggested (either in her capacity as Board member, her capacity as existing Finance Director, or her capacity as applicant for the role of MD)

that the HR and Legal duties be formally inserted into the written job description for MD.

422. Mr Kelt's belief and expectation (prior to 5 December 2018) that the Claimant would continue to perform those duties was in no sense whatsoever related to, or because of, sex, race or age (or any discussions about Stan). It was because he had not addressed his mind to the Claimant's suggestion that she had only temporarily been looking after those functions, because that suggestion was not made prior to (approximately) 5 December 2018.

Event 9 Michael Kelt becoming 'very angry' with the Claimant, when she told Michael Kelt and Tobias Stewart that she would hand over work she had done since the departure of Mr Frank Steggall (the former MD) to Tobias Stewart.

423. This is alleged to be direct discrimination. (Sex, Age, Race)

424. It is also alleged to be victimisation. (Protected Act One)

425. The victimisation complaint fails because we decided that alleged Protected Act One was not a protected act.

426. As per the findings of fact, we are not persuaded that Mr Kelt was "very angry". On the contrary, we are satisfied that – while he did not necessarily agree with the Claimant's justification for why Mr Stewart, not her, should carry out the functions in future – it was not a particularly big issue as far as he was concerned.

427. To the extent that he was angry or irritated at all, our decision that was because he (whether rightly or wrongly) attributed the Claimant's decision to disappointment at the MD decision and thought it was unreasonable for her to insist that the duties transfer immediately, rather than on some later date during the 6 month handover period from him to Mr Stewart.

428. Even taking into account the burden of proof provisions, we are satisfied that his reaction was in no sense whatsoever because of age, sex, or race.

Event 10 Michael Kelt attempting to undermine the Claimant by sending an email in which he wrote: "For general info; Karen no longer wants to deal with HR".

429. This is alleged to be harassment or else direct discrimination (sex)

430. This is alleged to be direct discrimination. (Age, Race)

431. It is also alleged to be victimisation. (Protected Act One)

432. Mr Kelt was not undermining the Claimant. He was giving information to people (the rest of the Board) who needed to have it. The information was accurate. The Claimant had told him that she no longer wanted to deal with HR.

433. The Claimant asserts that he could and should have given a fuller explanation. In particular that he should have said something to the effect that the Claimant had

been temporarily covering HR (and Legal) pending recruitment of a replacement for Mr Steggal, and/or as a favour to Mr Kelt, and that the duties had always been part of the MD role, and were now reverting to that role, and would be carried out by Mr Stewart in future.

434. There was no need for that level of detail in the email regardless of whether Mr Kelt agreed with it or not. In any event, his reason for wording the email in the way that he did was that he believed it to be accurate (which it was) and that he believed it to contain enough detail (which is a matter of subjective opinion). His choice of words was in no sense whatsoever because of sex, age or race, and was in no sense whatsoever related to sex.

435. Furthermore, the conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. To regard this email as having the effect prohibited by section 26 EQA would be to cheapen the words of that section.

Event 11 Michael Kelt dismissing issues Emily Pooley raised, regarding the procedures and governance at board meetings.

436. This is alleged to be harassment (sex).

437. Our finding was that it was not factually accurate that Ms Pooley's issues had been dismissed.

438. We are also not persuaded that the way in which Ms Pooley was treated at board meetings had the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We are satisfied that it did not have that purpose.

439. This complaint fails.

Event 12 Michael Kelt suggesting that the Claimant had used the wrong figure for his 2019 salary, to undermine the Claimant.

440. This is alleged to be direct discrimination. (Sex, Age, Race)

441. It is also alleged to be victimisation. (Protected Act One and Two)

442. The date of the allegation in the Events Schedule is incorrect. It is supposed to refer to 13 January 2020, not 2019. So this is slightly out of chronological order. It refers to an event that was slightly more than a year after the MD appointment, not a few weeks.

443. The reason why Mr Kelt queried his own salary figure is that it appeared to him to be incorrect (too low) and because he wanted either a correction, or else an explanation of why his calculations (sent to the Claimant as a spreadsheet) were incorrect.

444. The reason why Mr Kelt asked whether the other figures should be checked is that her reply back to him was that she had used payroll figures, rather than contractual

entitlement figures, for his calculation. He did not think that was the correct approach (or, at least, it was not the information that he wanted to receive from the Claimant) and he wanted to receive the details based on what he was treating as the correct approach. In particular, he wanted to receive that information before the Respondent made any decisions about annual pay increases or bonuses to its employees.

445. The reason why he wanted the information, and the reason he asked the Claimant to check it, and confirm it was correct, had nothing to do with sex, age, race or the Claimant's 18 December 2019 email.

446. He was not seeking to undermine the Claimant either by the wording of his emails, or by the fact that he was copying in the MD.

447. There are no facts from which we could conclude that an actual or hypothetical comparator would have been treated differently.

448. These complaints all fail.

Event 13 Michael Kelt ignoring the Claimant's response to an email dated 17th July 2019, in which she highlighted best practice concerning salary sacrifice.

449. This is alleged to be harassment or else direct discrimination (sex)

450. This is alleged to be direct discrimination. (Age, Race)

451. It is also alleged to be victimisation. (Protected Act One)

452. Although the allegation asserts that the Claimant "highlighted best practice concerning salary sacrifice", her email of 17 July 2019 at 11:47 did not specify any particular practice. She just said that she had not seen a resolution about it and asked whether some rules should be drawn up, voted on and publicised. None of the other directors commented, and she did not pursue the matter. If it was her opinion, as Finance Director, that the Respondent was in breach of best practice, she did not communicate that at the time.

453. It is true that Mr Kelt did not specifically reply to that specific comment of hers. She made several comments in her email, and he replied to two of them straight away. Similarly, in her next email in the same trail, he replied straight away (less than 15 minutes each time).

454. We have no reason to doubt the Claimant's argument that it was unwanted conduct that there was no specific reply to this suggestion. However, the conduct did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

455. The purpose of not replying on that point specifically was that Mr Kelt did not intend to propose wording a Motion on salary sacrifice. In considering the effect, we take into account the Claimant's argument that that there are other alleged examples of not replying to her. We have taken into account our decisions on those other

examples as well, when concluding that it is not reasonable to regard a failure to specifically comment on this specific suggestion, in these specific circumstances, as having the prohibited effect.

456. Even taking account of the burden of proof provisions, we are not persuaded that the conduct, consciously or otherwise, was related to sex, or was because of sex, age or race (or anything the Claimant had said or done in relation to Stan). Furthermore, there are no facts from which we might conclude that a comparator would have been treated differently.

457. These complaints all fail.

Event 14 Michael Kelt sending an email to Tobias Stewart with a payroll instruction, when he'd previously sent such instructions to the Claimant.

458. This is alleged to be harassment or else direct discrimination (sex)

459. This is alleged to be direct discrimination. (Age, Race)

460. It is also alleged to be victimisation. (Protected Act One)

461. There was no obligation for the Chairman to directly liaise with the Finance Director about his own pay just because the Finance Director had payroll within her responsibilities.

462. The Chairman believed that it was a contractual issue, and the person with HR responsibilities (the MD) should be informed, and make any arrangements for contractual change and informing payroll that there had been such a change. This was in line with the Claimant's request that she no longer perform HR functions. There is a relevant difference between instructions relating to pay sent in August 2019 (or November 2019) and the period prior to 5 December 2018.

463. We are satisfied that Mr Kelt's actions had nothing whatsoever to do with sex, age or race.

464. The victimisation complaint fails because this allegation pre-dates any protected act, but, in any event, Mr Kelt's actions had nothing whatsoever to do with anything the Claimant had said or done in relation to Stan.

Event 15 Tobias Stewart shouting at the Claimant in an overtly aggressive way, during a board discussion regarding technicians' pay.

465. This is alleged to be harassment or else direct discrimination (sex)

466. This is alleged to be direct discrimination. (Age, Race)

467. It is also alleged to be victimisation. (Protected Act One)

468. This related to board meeting of 27 August 2019. Our finding of fact was that he did not shout. He did utter the words (or something similar to) "you have never done a night shoot, so how would you know".

469. The Claimant was offended by the comment. It was unwanted conduct. She regarded the comment as implying that she did not understand her job and/or the Respondent's requirements.

470. As per the findings of fact, it was not Mr Stewart's purpose to (a) violate the Claimant's dignity or (b) create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

471. Our decision is that the remark did not have that effect either. The context was that the Finance Director and the Managing Director had different views on a particular matter. It was factually accurate that the Claimant was never in the position of needing to persuade staff to start (or continue with) a night shoot. Arguably, the comment was unnecessary because the Claimant was not purporting to have done so, and it was not – of course – part of her job requirements that she do so. However, it would be cheapening the words of section 26 to decide that this conduct (even combined with the other conduct, as we have found it) amounted to harassment.

472. There are no facts from which we could conclude that the conduct may have been related to sex, or because of sex, age, or race. The comparator would need to be a finance director whose circumstances were the same as the Claimant's but for the protected characteristic in question. So the comparator would also have to be someone making the same comments about overtime, and also someone who had not done night shoots.

473. Even apart from our decision in relation to Protected Act One, Mr Stewart's words and conduct at the 27 August 2019 Board Meeting were, in no sense whatsoever, motivated, whether consciously or unconsciously, by anything the Claimant had said or done in relation to Mr Kelt's treatment of Stan.

474. These complaints all fail.

<u>Event 16 Tobias Stewart's decision to authorise NS's request for unpaid leave of 15 days.</u>

475. This is alleged to be harassment (age)

476. We are not persuaded that this was unwanted conduct. In the 17/18 July email exchange, the Claimant had argued in favour, not against, the Respondent granting unpaid leave. Furthermore, while she argues that this was contrary to the new policy, the period was not in excess of the maximum suggested therein, and the new policy said that each time there would be a discretionary decision by the MD.

477. However, even on the assumption that, at the time, the Claimant believed that granting this leave would be a breach of policy, and it was unwanted conduct for the Respondent to breach policy (or do something which the Claimant regarded as a

breach of policy), this decision was in no sense whatsoever related to the Claimant's age or Stan's age.

478. Furthermore and in any event, the approval of this unpaid leave did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

479. We do not accept that the Claimant was particularly annoyed or upset about the decision at the time. Even if we are wrong about that, it would not be reasonable to treat the decision to approve unpaid leave, for this particular employee, in these particular circumstances, as having the effect described in section 26(1)(b) EQA.

480. The harassment complaint fails.

481. To the extent that the Claimant argues that this is an example of inconsistent treatment, we will take that argument into account in our decision making.

Event 17 During a board meeting Michael Kelt fabricating a story that shareholders' pension payments had not been paid correctly, implying that the Claimant had done something wrong.

482. This is alleged to be harassment or else direct discrimination (sex)

483. This is alleged to be direct discrimination. (Age, Race)

484. It is also alleged to be victimisation. (Protected Act One)

485. The board meeting in question was October 2019.

486. We have not seen any evidence that the Claimant was ever given an instruction "pay 7% employers' pension contribution for the founding members" or "for the founding members, match the employers' pension contribution as per the pension policy".

487. We are not satisfied that that there was a clear instruction from the Respondent (or from any of the founding members) to do this. We are also entirely satisfied that it was reasonable for the Claimant to stay out of the precise details of the founding members pension arrangements. It was her role to oversee the payroll function, and to make sure the contribution payments were actioned in accordance with the instructions that she was given. It was not her role to check whether the employer contributions for the founding members matched what they thought their employer had agreed to make. Although we have not seen documentation, plainly the founding members (or Mr Kelt and Mr Tayler, at least) would have received (i) payslips from their employer and (ii) information from their pension fund provider and/or pension adviser. So they had the means to check at any time if they wanted to. If they did not notice a discrepancy between what they thought the Respondent had agreed to contribute to their pensions, and what the Respondent was actually contributing, then that is their fault rather than the Claimant's.

488. However, we are satisfied that Mr Kelt's purpose was not to seek to undermine the Claimant, but was to try to get the pension issue resolved to his satisfaction, and with

an agreement/acknowledgment from the Respondent that it had all along been supposed to be contributing 7% (ie he wanted it recorded that this was not just a new decision being made in the tax year 19/20 for the first time).

489. For similar reasons, we are satisfied that what Mr Kelt said (in Board meetings and elsewhere) or wrote (in Board minutes and elsewhere) about pension was nothing whatsoever to do with sex, age or race (or with anything the Claimant had said or done in relation to Stan).

490. The harassment and discrimination complaints all fail, as does the victimisation complaint.

Event 18 In board meeting minutes Michael Kelt stating that he "had uncovered an anomaly" with pension payments instructing a consultant Amanda Shingleton [AS] engaged by the Respondent, to conduct an "investigation", implying wrongdoing on the Claimant's part.

491. This is alleged to be harassment or else direct discrimination (age)

492. This is alleged to be direct discrimination. (Sex, Race)

493. It is also alleged to be victimisation. (Protected Act One and Two)

494. Our analysis for Event 18 is effectively the same as for Event 17.

495. In relation to Protected Act Two, the comment in question, in the Board minutes for October 2019, was sent to the Claimant on 17 December 2019 (that is, before Protected Act Two). The comment was not made because the Claimant had performed Protected Act Two, or because he thought she was going to do so.

Event 19 Michael Kelt referring to SW an employee of the Respondent as "an old nag".

496. This is alleged to be harassment or else direct discrimination (sex, age)

497. This occurred in October 2019. This is a comment directed at SW, and is not part of a continuing act with any of the other complaints brought by the Claimant. It is out of time, and it would not be just and equitable to extend time, taking account of the fact that no contemporaneous complaint was made, and therefore the Respondent did not have the opportunity to interview Mr Kelt, SW and the Claimant, and any other witnesses at the time. There is no dispute the words were said, but evidence about the tone, the context, the volume, and other surrounding circumstances is relevant to a harassment complaint. Therefore, this complaint is out of time and the Tribunal does not have jurisdiction.

498. For completeness, our comments on the merits are as follows.

499. As per the findings of fact, the Respondent and Mr Kelt had encouraged SW to be assertive and to chase people up in relation to paperwork and compliance issues. Mr Kelt did understand the role of Production Manager, and did understand the

importance of that role to the business. We are not persuaded that he made the remark in anger, or that his purpose was to state or imply that SW was in the wrong.

500. We reject Mr Kelt's argument that he would just as easily have said "old nag" to a male Production Manager. Our unanimous opinion is that this was a gendered comment that was used in a pejorative manner. It was related to sex.

501. We take account of the fact that SW is about 20 years or so younger than Mr Kelt. However, our finding is that he would not have used the exact same phrase to a Production Manager who was, for example, in her 20s. (He might have said "like an old nag", for example, to someone younger but to SW the comment was that she was an "old nag"). The comment was related to age.

502. The comment was unwanted conduct. It was the Claimant's opinion that it should not have been said.

503. The comment did not have the purpose of (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

504. We are not persuaded that it had that effect either. The Claimant kept a record of the exact date of this remark. If there had been frequent similar examples, then she would presumably have kept a record of the dates and details of those remarks too. Although she suggests that this is just an example of a constant state of affairs (creating the offensive and intimidating, etc, environment) there are no other proven examples, and it would not be reasonable to treat this one off remark, made to another person (albeit within earshot of the Claimant) as having the effect described in section 26(1)(b) EQA.

505. For the avoidance of doubt, the panel considers it to have been an unpleasant remark, and the fact that we have not found that the threshold for harassment has been met does not imply otherwise.

506. The direct discrimination complaint (apart from being out of time) would have failed on the basis that the Claimant was not treated less favourably than others (because of any protected characteristic or at all). On her own account, various employees heard the comment.

<u>Event 20 Michael Kelt sending an email requesting SB to pay an invoice instead of the Claimant.</u>

507. This is alleged to be harassment (age)

508. It is also alleged to be victimisation. (Protected Act One)

509. As stated in the findings of fact, Mr Kelt's genuine opinion is that SB, the accounts clerk, was someone who could process invoice payments. According to what SB told the grievance investigator, he frequently asked her to make payments and she frequently told him that it was not her job. However, in any event, Mr Kelt copied in the Claimant, and was not keeping anything from her. If SB and the Claimant were

of the opinion that it was the Claimant's job to process invoice payments, then the Claimant had received the precise same information from Mr Kelt that SB had, and at the same time.

510. Mr Kelt's conduct in sending this email did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

511. His reason for sending the email on 16 December 2019 was in no way whatsoever related to the Claimant's age (or anything the Claimant had said or done in connection with Stan).

512. The complaints of harassment and victimisation both fail.

Event 21 Michael Kelt of the Respondent bullied and humiliated the Claimant when he: (i) Failed to correct the board meeting minutes for the board meeting on 29th October 2019 in respect of shareholder pension payments; and (ii) Took exception to the Claimant's allegation of a 'personal aggressive attack'.

513. This is alleged to be direct discrimination (sex, race, age)

514. It is also alleged to be victimisation.

515. We commented on Mr Kelt's 21 December 2019 reply to all board members (plus Ms Shingleton) as well as his direct reply (not copied to the Claimant) to Ms Shingleton on 7 December 2020.

516. His reason for not correcting the minutes to take account of the Claimant's comments is that he believed them to reflect what he thought had been said about Ms Shingleton and the pension situation in October. As we have mentioned above, he wanted the pension issue to be resolved to his satisfaction, and wanted to avoid the appearance that the Respondent had already paid the correct/previously agreed upon sums to his pension fund.

517. There are no facts from which we could conclude that a comparator would have been treated differently. The comparator would have be a Finance Director, whose functions included overseeing payroll, at a time when Mr Kelt wanted the Respondent to acknowledge and record that its historic employer pension contribution rate for him should have been 7%, not the lower percentage that had actually been paid.

518. We are satisfied that Mr Kelt's reasons had nothing whatsoever to do with sex, race or age, or Protected Act Two (or anything the Claimant had said or done in connection with Stan).

519. The complaints all fail.

Event 22 Michael Kelt reporting matters incorrectly in board meeting minutes for October 2019, to deliberately humiliate the Claimant, and his subsequent refusal to amend the minutes on 21st December 2019.

520. This is alleged to be direct discrimination (sex, race, age)

521. It is also alleged to be victimisation. (Protected Act One)

522. In relation to the leases issue, Mr Stewart and Mr Kelt both thought that the Claimant, as Finance Director, was at fault for the fact that the 3D printer lease had been renewed, rather than the Respondent exercise the £50 buy out. In relation to the Haptic Arm, Mr Kelt (we infer) also thought that she was at least partially responsible for the fact that they had carried on paying for something they no longer used, when they could have ended that without penalty.

523. It is not this panel's role to decide whether the Claimant was at fault or not. She was not disciplined or threatened with disciplinary action. Furthermore, Mr Kelt believed that he had been careful to avoid expressly blaming the Claimant and he thought the minutes were accurate on that point.

524. His reason for not agreeing to a version of the minutes which expressly stated that the Claimant was in no way at fault is that he did not want to say that because (i) he did not think it was true and (ii) he did not think it was reflective of what had been said in the meeting.

525. However, as he said to the whole board in his email of 21 December, the next meeting could be used to record the Claimant's information about more accurate figures.

526. There are no facts from which we could conclude that this might have been less favourable treatment because of sex, race or age. The hypothetical comparator would be a Finance Director who had done the same things. It is not at all surprising or suspicious that the Respondent's Finance Director might be thought to be at fault over the 3D printer issue. It would be harsher if the Finance Director (and no-one else) was blamed over the Haptic Arm issue, but, that is not what the minutes did say. There was no express blame to the Claimant, and no express absolution of anyone else. There was simply a suggested way forward to avoid repetition.

527. The refusal to change the minutes occurred after Protected Act Two, but was not motivated by Protected Act Two, either consciously or unconsciously.

<u>Event 23 Michael Kelt's implication in an email, that the Claimant did not understand leases.</u>

528. This is alleged to be direct discrimination (sex, race, age)

529. This fails on the facts, because what the email actually says is "*No blame has been stated as to why the oversight happened, simply that the main point, as stated, is that this example should not be repeated in future and a clear record of leases, and understanding of them, should be kept*."

530. In other words, it is saying that a record of the Respondent's understanding of each lease needed to be kept. It was making no comment at all about the Claimant's understanding of leases.

531. This was a point that had been discussed in the meeting, and was not being raised for first time in Mr Kelt's email.

532. The Claimant argues that she was already keeping such a record. If so (and we have no reason to doubt her word on oath to that effect), then firstly that undermines any argument that she was only being asked to keep such a record because of sex, age or race (and that a hypothetical comparator would not have had to do it); secondly, since she had the document already, it does not seem that it would be unduly onerous to share with the rest of the Board.

533. The email in question did not treat the Claimant less favourably because of sex, race or age, and nor did the request for there to be a spreadsheet in future (even if she already had made one).

534. These complaints fail.

<u>Event 24 Michael Kelt writing a threatening email in which he wrote "Karen raises the issue of Stan's position and contract," and "the inference about "ongoing bullying behaviour" is ridiculous," that [MK] would let it pass and that it was "best left for the time being".</u>

535. This is alleged to be harassment or direct discrimination. (Sex, Age, Race)

536. It is also alleged to be victimisation. (Protected Act One and Two)

537. We do not characterise this as "threatening".

538. On one view, a better response would have been to say that the email would be treated as a grievance, or at, least, ask her if she wanted it to be treated as a grievance. A better response might have been to ask her to clarify what she meant.

539. However, there two relevant points.

539.1. One part of the Claimant's comments was that she thought the minutes should be corrected. (We have dealt with that in detail above). That was the real context of the discussion, namely Mr Kelt had circulated minutes, and the Claimant had sent a "reply all" to his email, commenting on the minutes. Although it might have been better to decide instigate the grievance process, it is understandable (given the Claimant's seniority, the context of the comments, and the fact that they were sent to whole board, plus Ms Shingleton) that Mr Kelt did not think that what the Claimant said about the minutes should be treated as an employee grievance.

539.2. One part of the Claimant's comments was about Stan. Stan was able to read what the Claimant wrote, and what Mr Kelt wrote back. He was a shareholder and a director, and had worked for the Respondent for decades. It was not unreasonable for Mr Kelt to assume that if Stan wanted to say that there had been bullying (by replying to the Claimant's email, or otherwise) then he would do so.

540. We accept that it was Mr Kelt's genuine and honest opinion that he had not been bullying Stan.

541. We do accept that the tone of the email is somewhat dismissive. It is also true that the Claimant's email gave no specific examples of things that she regarded as bullying. The phrase "for now" is fairly neutral in the context in which it is written. Had he said "that's the end of the matter", he would have been open to potentially greater criticism, as intending to prevent either the Claimant or Stan from sending something further that might require him to respond further. In any event, he was not suggesting that he would later discipline the Claimant for the comments.

542. Even taking into account the burden of proof provisions, we are not persuaded that the comments in the email implied any intention to retaliate against the Claimant.

543. We are entirely satisfied that the comments were not related to sex or race.

544. They were related to age only in the sense that the Claimant had referred (in the email to which Mr Kelt was replying) to Stan's age having been referred to by Mr Kelt.

545. We do not agree that the purpose of Mr Kelt's words was to (a) violate the Claimant's dignity or (b) create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. His purpose was to deny that he had bullied anyone (and/or to place his denial on record).

546. We do not think that it would be reasonable to treat the words "for now" as threatening. We do think that the word "ridiculous" was a bad one to use. However, the context would have been clear to the Claimant and the other readers. Mr Kelt was not saying that the Claimant's opinions in general were "ridiculous" but rather he was claiming that her suggestion that he was bullying Stan was. Given the seniority of the employees in question, and the length of time they had known each other, we do not think it would be reasonable to treat these words, robust though they were, as having the effect of (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

<u>Event 25 Michael Kelt and Tobias Stewart failing to reply to the Claimant's email concerning work attendance during Coronavirus, until Simon Tayler [ST] and Richard North [RN] had replied</u>

547. This is alleged to be harassment or direct discrimination. (Sex, Age, Race)

548. It is also alleged to be victimisation. (Protected Act One and Two)

549. The reason that they did not reply straight away to the Claimant's email of 21:56 on 23 March 2020 is that they did not see the email until the following day.

550. The reason they did not reply until later than Tayler and North is that those two had each replied by 7:33am, which was earlier than Mr Kelt and Mr Stewart had started replying to emails. Mr Stewart had started his long journey from home to the workplace very early that morning and replying to emails was not the very first thing he did on arrival.

551. By 8:04am, Mr Stewart had replied to say that he agreed with North, Tayler and the Claimant (and had already spoken to Tayler) that close down seemed necessary. He started his email "Hello Karen", so was replying to her, not ignoring her.

552. By 11:33am, Mr Kelt also agreed, and asked the directors to vote. By 11:55am, the announcement to staff was made. Prior to that 11:55am announcement, Mr Stewart had also been taking advice from Moorepay, as well as responding to the Claimant's further comments.

553. We do not accept that it is factually accurate that Mr Stewart or Mr Kelt ignored the Claimant's emails, and only replied because North and Tayler chipped in.

554. On any view, an 8:04am reply to a 9:56pm email does not seem like an unreasonable delay. (It was also only six minutes after the Claimant's 7:58am email).

555. In any event, the reason for the timings of Mr Kelt's and Mr Stewart's replies to the Claimant was that they needed time to research and to think. A major decision about whether to close down the business (and use CJRS) was required. The Claimant was involved in the decision making, and the decision was in line with her interpretation of government advice.

556. The Claimant had already started working from home on 23 March 2020. She was going to be away from the workplace on 24 March in any event.

557. We do not agree that there was a delay in replying to the Claimant's email, but, in any event, the timing of the replies had nothing whatsoever to do with sex, or race, or age, or Protected Act Two.

558. These complaints fail.

<u>Event 26 Michael Kelt and Tobias Stewart implying that the Claimant's opinion of the furlough pay cap was incorrect</u>

559. This is alleged to be harassment or direct discrimination. (Sex, Age, Race)

560. It is also alleged to be victimisation. (Protected Act One and Two)

561. This refers to the two emails the Claimant sent, and Mr Stewart's reply to each, between Mr Kelt's email to the Board at 11.33am on 24 March 2020 and the furlough announcement sent to all staff at 11.55am.

562. Mr Kelt had said he thought the CJRS: "will limit pay to a maximum of 80% of £3,125. (ie max £2,500). There are details still to be clarified of course but that is the basic message".

563. The Claimant had said "it is up to 80% of salary with a maximum of £ 2500 gross, not 80% of £3125".

564. As a matter of arithmetic, 80% of £3125 is £2500 (as Mr Kelt had said). If there is any difference at all between what Mr Kelt wrote, and the Claimant's correction it is

a subtle one. It is true that Mr Kelt had not expressly mentioned that it would be 80% of salary, where the salary was less than £3125 per month. It seems unlikely that Mr Kelt and Mr Stewart were unaware of that (and hence the use of "max" and "limit"), given the email discussions from the day before, and the advice from Moorepay, and the general publicity about CJRS. In any event, it was, of course, entirely right and proper for the Finance Director to highlight the actual words which CJRS was using rather than what was (we infer) Moorepay's paraphrasing (or Mr Kelt's paraphrasing of Moorepay's paraphrasing).

565. Mr Stewart replied promptly and politely to each of the Claimant's emails, acknowledging that she was making a relevant observation, and telling her what Moorepay was telling him. He acted on her advice (albeit not by adopting her precise wording) by caveating the advice which Moorepay had given him by saying that the details of CJRS were subject to further clarification.

566. We do not agree that Mr Stewart implied that he personally thought that the Claimant was wrong and Moorepay was right. He simply told the Claimant what (he thought that) Moorepay had told him. He made clear that he thought there might be differing interpretations at that moment in time, and that it would be for the government to clarify in due course. His priority at that time was to circulate the announcement to staff. His email was going to be asking them to reply by email to say whether they agreed to be placed on furlough and to have their pay reduced. He found a solution that was consistent both with what the Claimant was telling him and with what Moorepay was telling him. It was not unreasonable of him to get the email/letter out urgently without further discussion or investigation. The email (we do not have the letter) was entirely consistent with the Claimant's advice about CJRS.

567. Mr Stewart's emails did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

568. Mr Kelt did not respond to the Claimant after his 11.33am email, and before the 11.55am announcement, which was reasonable given that it was 22 minutes, and that the MD had replied (to all Board members). Mr Kelt's attitude did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

569. Even taking account of section 136, we are satisfied that their conduct was in no way related to sex, age, race.

570. For direct discrimination, we do not agree that there has been less favourable treatment. There was nothing improper, unreasonable or suspicious about Mr Stewart's replies. He did not disagree with the Claimant, he simply did not agree with her as fulsomely as she argues that he ought to have done. There are no facts from which we could conclude that the responses to a hypothetical comparator would have been different.

571. Mr Stewart was not motivated (and nor was Mr Kelt) either consciously or unconsciously by the contents of the Claimant's email of 18 December 2019 (or by the Claimant's words and conduct about Stan in 2018).

572. These complaints all fail.

Event 27 Tobias Stewart sending an email in which he wrote, "contrary to your advice…" concerning advice the Claimant had given regarding Company director duties, implying the Claimant had made a wrong decision.

573. This is alleged to be harassment or direct discrimination. (Sex, Age, Race)

574. It is also alleged to be victimisation. (Protected Act One and Two)

575. Mr Stewart's email of 19 April did use those words, and the full paragraph is quoted in the findings of fact.

576. It was a reference to the Claimant's email of 27 March 2020 at 10:45am, which had commented on Mr Kelt's spreadsheet showing him and Mr Stewart working, and everyone else on furlough. In that email, the Claimant had said: "I did suggest that everyone should be furloughed". The context of that remark was that the Claimant had sent emails in the preceding days which spoke about being "officially" on furlough. Her advice had not been that there would be no need for anyone to do any work.

577. It was factually accurate that the Claimant's advice had changed. Her own email of 16 April 2020 expressly said so.

578. It is our interpretation of Mr Stewart's words that there was an element of being slightly sharp. He probably did not need to use the words "contrary to your advice" even though they were accurate. The tone was that he was criticising her, albeit mildly.

579. However, his words did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. This was a discussion about a business decision between board members. He was putting down a marker that he, as MD, had been acting in accordance with the Finance Director's advice when he had (up to 16 April) proceeded on the assumption that the Respondent would be applying for a CJRS rebate for every employee's salary, while confirming that now, when the actual application was about to be submitted, it would only be seeking rebates for 34 out of 35. In all the circumstances, It would not be reasonable to treat the factually accurate words "contrary to your advice" to a Finance Director as having the effect prohibited by section 26 EQA.

580. We are not persuaded that his words were (consciously or unconsciously) related to, or because of, sex, age or race, or motivated by the Claimant's email of 18 December 2019 (or anything else the Claimant had said or done connected to Stan's treatment by the Respondent).

581. These complaints all fail.

Event 28 Michael Kelt sending an email to directors informing them that the CJRS portal was a "pretty straightforward process".

582. This is alleged to be harassment or direct discrimination. (Race)

583. This is alleged to be direct discrimination (Sex, Age)

584. It is also alleged to be victimisation. (Protected Act One and Two)

585. His reason for sending that 15 April 2020 was because he wanted to pass on (to Mr Stewart and the Claimant) some information that he had received about CJRS. At the time, the board members plus Ms Shingleton were discussing it frequently by email.

586. His reason for using the words "It sounds pretty straightforward" are because that was his genuine opinion. As mentioned in the findings of fact: firstly, the email was not to the entire board; secondly, it did not use the exact phrase "pretty straightforward process"; thirdly, the email as a whole included the caveat that he was sceptical about how quickly the government would make the payments following receipt of a claim, and the observation that he did not know whether the Respondent's own payroll software included modifications that would assist.

587. He did not use the words "pretty straightforward" to imply any kind of criticism of the Claimant. He was not intending to imply that the Claimant's job was easy, or that submitting claims for CJRS rebate was the only thing which the Claimant had to do. (The same email trail included discussions about foreign currency hedging for upcoming projects).

588. Even taking into account the burden of proof provisions, we are satisfied that his words "pretty straightforward" had nothing whatsoever to do with sex, age or race, or the Claimant's email of 18 December 2019 (or any of the Claimant's words or actions relating to Stan).

589. These claims all fail.

Event 29 Michael Kelt sending the Claimant an email requesting sight of the March 2020 finance report in advance of a board meeting scheduled for 28th April 2020.

590. This is alleged to be harassment or direct discrimination. (Sex, Race)

591. This is alleged to be direct discrimination (Age)

592. It is also alleged to be victimisation. (Protected Act One and Two)

593. The Claimant's stance is that she was intending to prepare and circulate a report without being prompted, and the email of 22 April 2020 (copied to Mr Stewart) was therefore unnecessary. Furthermore, it was offensive, and a detriment, and an

implication that she was the type of director who needed to be reminded about their basic duties.

594. We do not agree with the Claimant's interpretation of the email. We accept that, as she says in her statement, for 16 years she had always submitted the report on time without needing reminders. However, April 2020 was not a normal month. The UK had never been in lockdown for any of those previous meetings, and the Claimant had never been on furlough as per CJRS rules. In other words, for all the previous meetings, there had never been a need to think about whether she was preparing the report as a company director, or as an employee of the company.

595. The reason for Mr Kelt's email is what it says on the face of it. He was letting her know that he thought that she would be able to do the report without coming off furlough. At least hypothetically, her reply might have been "no, I will need to come off furlough and the Respondent will not be able to claim for me if I do this report". As it turned out, that was not her opinion.

596. The email did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was a polite and straightforward request, which was made for an important and relevant reason.

597. We are satisfied that the request was not connected to sex, race or age, or to the Claimant's 18 December 2019 email.

598. These complaints all fail.

<u>Event 30 Michael Kelt instructing the Claimant to defer March 2020 PAYE & NI contributions on the Claimant's suggestion, in accordance with HMRC "Time to Pay", subsequently changing his position at a board meeting, in order to undermine the Claimant</u>

599. This is alleged to be harassment or direct discrimination. (Sex, Age)

600. This is alleged to be direct discrimination (Race)

601. It is also alleged to be victimisation. (Protected Act One and Two)

602. The decision to resume making PAYE payments as normal (rather than deferring them as permitted by HMRC due to the Covid emergency) was a routine business decision taken by the Board on 28 April.

603. There was no criticism of the Claimant for the fact that she had suggested (a suggestion accepted by Mr Kelt) deferring the March payment.

604. The decision was simply for the reason stated in the minutes, namely that there was no huge advantage to keeping the cash in the bank, as interest earned would be low.

605. The decision to defer the March payment was not unwanted conduct. The Claimant suggested it.

606. Even if it was unwanted conduct that the Respondent did not continue with the use of "Time to Pay", that was a board decision on 28 April 2020, and was a decision about what the company would do. The Claimant, as a member of the Board, and attendee at the meeting, had the opportunity to state her case, but Mr Kelt was not obliged to agree, and nor was the Board. His purpose was to make a decision which he thought was reasonable, and in best financial interests of the company in which he was a 50% shareholder. It was not his purpose to undermine the Claimant.

607. Mr Kelt's stance on this did not have the purpose or effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

608. Even taking account of section 136, we are satisfied that Mr Kelt's stance on this had nothing whatsoever to do with sex, race, age or the Claimant's 18 December 2019 email.

609. These complaints all fail.

<u>Event 31 Michael Kelt deliberately misreporting alleged "shareholder pension underpayments".</u>

610. This is alleged to be harassment or direct discrimination. (Sex, Race)

611. This is alleged to be direct discrimination (Age)

612. It is also alleged to be victimisation. (Protected Act One and Two)

613. The purpose of Mr Kelt's 5 May 2020 email, discussed more fully in the findings of fact, was to obtain the Claimant's (and Mr North's) formal confirmation as Board Members that they were content with the proposal described therein.

614. His 5 May 2020 email did not give a different explanation of the history of the matter than had been given previously. We will therefore not repeat what we have said already about it. In brief, his purpose was not to seek to cast blame on the Claimant, but his purpose did include maintaining the stance that the Respondent's agreement with the founding members had always been (or since 2006, at least) that the pension contributions had been supposed to be at a higher rate than was actually being paid.

615. When the Claimant set out her own stance, he immediately replied "all good", which was confirmation he was not disagreeing. The Claimant's own email made clear that if the Respondent had contributed less to the founding members' pension pots than it had been supposed to be doing, then that was not her fault, because arranging deciding the amount of the payments had not been her responsibility.

616. We do not agree that Mr Kelt's words should be characterised as "deliberately misreporting". In particular, he did not state that the Claimant was at fault, and he did not say anything that was inconsistent with her own reply. He confirmed at the time (two minutes later) that he agreed with her reply.

617. These complaints therefore fail on the basis that the Claimant has not proved that Mr Kelt or the Respondent did do the alleged acts.

618. For completeness, for the reasons mentioned, we are satisfied that the reason for his email was (only) to resolve his and the other founding members pension dispute with the Respondent, and the reason had nothing whatsoever to do with sex, race or age, or any protected act.

619. These complaints all fail.

Event 32 Michael Kelt indicating in a SWOT analysis document that a comprehensive review of the finance function should be undertaken by the finance team led by Tobias Stewart, thereby undermining the Claimant

620. This is alleged to be harassment or direct discrimination. (Sex, Race)

621. This is alleged to be direct discrimination (Age)

622. The Events Schedule dates this at 5 May 2020. However, the SWOT analysis circulated that day did not contain the alleged information.

623. The Events Schedule refers to paragraph 57 of the Particulars of Complaint, which correctly identifies 22 May as the date on which the email with the 10 page version of SWOT analysis/business plan was circulated. That document did say there would be a finance review, and paragraph 57 of the Particulars of Complaint contains an accurate quote. However, the allegation in Event 32 is not accurate, because the document that was circulated to all staff did not say the Finance Review was to be led by Mr Stewart. It said: "a comprehensive review of the finance function to be undertaken by the **Finance team and MD** to look for efficiencies and cost savings. It should include project financial systems and reporting and overhead costs and should be **undertaken by the finance department in conjunction with Amanda**, an independent accountant." Our emphasis.

624. It was unwanted conduct that the Respondent proposed a finance review, and unwanted conduct that a finance review was announced.

625. The purpose of having the review was that Covid was having an effect on the Respondent's business. It also did want to make changes to the Production Manager's role, and the way freelance work was monitored and paid for. As emerged from what was said on 12 August 2020, it seems likely that Mr Kelt's opinions about the Claimant played some part in the decision too. However, the purpose was not (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

626. Furthermore, it would not be reasonable to treat the conduct as having that effect either. A Finance Director should expect that, from time to time, the company might wish to have a finance review, and might wish to have someone external provide advice. The announcement did not say the Claimant would have no role. On contrary, it expressly said (without naming her) that she would have a role. It did not

expressly say that her role in the review would be less than the MD's, and the fact that the MD was going to have a role in the review cannot reasonably be said to have the effect of violating the Finance Director's dignity.

627. The burden of proof does not shift. There are no facts from which we could conclude the decision/announcement was related to sex or race.

628. The harassment complaints fail.

629. The burden of proof also does not shift for the direct discrimination complaints. A hypothetical comparator would be a Finance Director of (as the case may be) a different race, or who was a man, or who was in their 30s (or late 20s), but whose circumstances were otherwise the same as the Claimant's, including the fact that there was Covid and that the Respondent believed some systems might be outdated. There are no facts from which we could conclude that a finance review would not have been done in if a hypothetical comparator was the finance director. We do not believe the Respondent's reasons were sham (although we do think that they had an additional reason, being concerns about the Claimant that were not voiced until 12 August). Furthermore, the Claimant had been in the role for 16 years; while she was older than when appointed, her sex and race were the same as when she was appointed.

630. These complaint fail.

<u>Event 33 Michael Kelt and Tobias Stewart failing to reply to the Claimant's email concerning health and safety procedures.</u>

631. This is alleged to be direct discrimination (sex, age, race)

632. This is not factually accurate. As set out in the findings of fact, on 12 May 2020, the Claimant started an email trail, in which she supplied a link, and made a very general comment. Mr North picked up on the trail and asked some detailed and specific questions. Mr Kelt and Mr Stewart both replied in the trail. Their replies commented fully on everything that had been raised by the Claimant's 10am email earlier that day, and went further. Further, they also replied to Mr Tayler's specific query about a risk assessment for a particular project.

633. It is true that the emails did not say "Dear Karen", but that did not imply that they were ignoring the Claimant's comments, and just reflected the fact that the email trail had moved on since she started it.

634. Mr North (and Mr Tayler) are not actual comparators. They sent emails which were to the email which the Claimant sent.

635. There are no facts from which we could conclude that Mr Kelt's and Mr Stewart's responses on 12 May might have been different if the Claimant was a man, or in her 30s, or a different race. In particular, there is no factual basis for an assertion that they would have replied to a hypothetical comparator before Mr North had made his comments in the same trail, or that, alternatively, they would have sent a specific

email which said "Dear Karen" or directly commented on (and thanked her for) the link which she had sent.

636. These complaints fail.

Event 34 Michael Kelt and Tobias Stewart deliberately withholding information needed to complete a CJRS claim

637. This is alleged to be direct discrimination (sex, age, race)

638. The factual assertion is not correct. They did not withhold information deliberately.

639. Any delays in the CJRS application being processed would be damaging to the Respondent's interests (and therefore to Mr Kelt's and Mr Stewart's). It was their opinion that they had supplied sufficient information to SB by 18 May 2020. When the Claimant raised queries, it was their intention to supply replies as quickly as possible with the intention of as large a rebate as possible being paid to the Respondent as quickly as possible.

640. To the extent that there were any delays in supplying answers to the Claimant's queries, this was not because of sex or age or race. In any event, when the Claimant emailed to say that she and SB did not have all the necessary information, and listed the only information (about people being off furlough) that she did have, the reply was that she did, in fact, already have all the details (with the information about RC being new, and being supplied promptly).

641. These complaints fail.

Event 35 Michael Kelt and Tobias Stewart belittling and humiliating the Claimant in response to her suggestion that her direct report SB receive 100% of her pay

642. This is alleged to be direct discrimination (sex, age, race)

643. This is also alleged to be victimisation. (Protected Act One, Two, Three)

644. We have set out the email exchange of 19 May 2020 in some detail in the findings of fact. As discussed above, we have rejected the argument that what the Claimant wrote that day was a protected act.

645. The points that the Claimant made that SB should be getting 100% of pay if she was working full-time seem reasonable, as Tayler, North and Stan each said. Furthermore, neither Mr Kelt nor Mr Stewart seem to have tried to investigate head on what hours she was doing in response to the Claimant's 19 May assertions (and they had not done so prior to then either).

646. The points that the Claimant made that SB should be getting 100% of pay if she was working full-time when working from home the getting full pay should not be dependent on returning to the office also seem reasonable in principle. That being said, the alternative view – that she should return to normal office hours, and work in the office, and be paid full-time – was not unreasonable either.

647. To decide the complaints about Event 35, however, the issues for this Tribunal, are not about who was "right" or "wrong" about SB's pay, and whether she should have been allowed to continue to work from home. For the complaints about Event 35, it is irrelevant what we would have done had we been SB's employer.

648. All that matters, for this allegation, is how the Claimant was treated when she raised the matter.

649. We think it is important to take into account how the discussion escalated. There was no criticism of the Claimant in Mr Stewart's 10:41am email, for example. This was after the Claimant had said she thought that SB should receive 100% pay.

650. Mr Kelt's emails of 11:34am and 12:31pm were criticising the Claimant. However, they were criticising her for the later comments in her 11:15am and 12:03pm emails. He was criticising her for alleging bullying and coercion, and he was denying these allegations.

651. It was reasonable, in our opinion, for the Claimant's opinion to be that the emails of 11:34 and 12:31 were belittling what she had said. Furthermore, we do not think that Mr Kelt's emails were fair to the Claimant or to SB. The Claimant raised a reasonable point that a junior member of staff might feel coerced, and, rather than try to take that on board, Mr Kelt strongly criticised the Claimant for making the point.

652. We are not persuaded, however, that those emails were less favourable treatment of the Claimant because of either the Claimant's sex, age or race, or because of SB's sex, age or race.

653. The reason why Mr Kelt denied bullying (and made the other comments in the emails) is because he believed it to be true. He would have had the same belief if the Claimant's, or SB's, sex or age or race were different.

654. Mr Kelt's (and Mr Stewarts) emails on 19 May 2020 were in no way whatsoever influenced by Protected Act Two.

655. These complaints fail.

<u>Event 36 Michael Kelt's alleged attitude towards the Claimant as communicated by ST in a telephone conversation with the Claimant, in which ST advised, "Keep your head down and lie low…it is obvious that Mike [MK] is after you"</u>

656. This is alleged to be harassment or else direct discrimination (sex, age, race)

657. This is also alleged to be victimisation. (Protected Act One, Two, Three).

658. As per the findings of fact, we accept the Claimant's evidence that Mr Tayler used words similar to these when she phoned him around 22 May 2020.

659. We have taken Mr Tayler's opinions (as per our findings of fact) into account when we have analysed Mr Kelt's words and actions and motives.

660. However, Mr Tayler's words to the Claimant were not related to, or because of, sex age or race, or because of any protected act. His reason for making those comments was to give what was – in his opinion – good advice.

661. The fact that it was Tayler's opinion (or that he voiced that opinion) that Kelt was "after" the Claimant is not an act or omission by Kelt or by the Respondent that can amount to a contravention of the Equality Act 2010. The allegation is that Tayler was correct, and Kelt actually was "after" the Claimant, but that is too vague to succeed as a complaint in its own right.

662. Furthermore, the communications of 19 May 2020 were not a protected act.

663. There are no facts from which we could conclude that Mr Kelt was "after" the Claimant (if, indeed, he was "after" her, which is an allegation too vague to be meaningful as a complaint in its own right) because of sex, race, age or any protected act.

664. He had said in his own emails of 19 May 2020 that he intended to speak to the Claimant. In context, that means speak to her about the things she said in her email sent on 19 May 2020 at 11.15am. That email, and those she sent earlier that day, did not refer to sex, race, age or any protected act.

665. These complaints fail.

<u>Event 37 Michael Kelt's alleged attitude towards the Claimant (concerning the Claimant's support for her direct report), as communicated by Stan, informing the Claimant that "Mike [MK] is gunning for you".</u>

666. This is alleged to be harassment or else direct discrimination (sex, age, race)

667. This is also alleged to be victimisation. (Protected Act One, Two, Three)

668. We discuss this in the findings of fact. On the assumption that the Claimant is correct, and Stan did say it to her, she does not allege that Stan was discriminating against her or harassing her. On her case, Stan was looking out for her interests, and warning her about Mr Kelt.

669. As we have just said in relation to Event 36, this type of allegation is too vague to succeed as a complaint in its own right. We can take Stan's opinion into account when assessing the other allegations, but we do not know what he thought Mr Kelt was specifically going to do that fell within the description "gunning for" the Claimant.

670. These complaints all fail.

<u>Event 38 Michael Kelt and Tobias Stewart undermining the Claimant by informing SB that the Claimant was not her boss, but Tobias Stewart was</u>

671. This is alleged to be harassment or else direct discrimination (sex, age, race)

672. This is also alleged to be victimisation. (Protected Act One, Two, Three)

673. As mentioned in the findings of fact, as of 26 May 2020, SB, Mr Stewart and Mr Kelt were working in the office. The Claimant was not there at the same time.

674. Whether the precise word "boss" was used or not, it was communicated to SB that Mr Stewart was going to be giving her day to day instructions. We are not persuaded that this was a permanent reorganisation; her job title remained as "accounts clerk". Her duties were affected by the fact that several other employees (especially SW) were on furlough, and that the Claimant was not in the office. For this temporary period, SB was not doing (only) her normal job description.

675. Even if it was a permanent state of affairs (which has not been proven to our satisfaction), then there are no facts from which we could conclude that it was because of sex, age or race. SB had been reporting to the Claimant for more than 10 years, and nothing had changed in relation to sex or race, and there is no reason to infer that the increased age of all the relevant employees (given the passage of time since SB started) was a factor.

676. Even if it was a permanent state of affairs (which has not been proven to our satisfaction), then there are no facts from which we could conclude that it was because of the Claimant's 18 December 2019 email. The line management of SB had not changed in the many weeks after that email.

677. The conversation with SB was not in the Claimant's presence. The Claimant was not told by Mr Kelt or Mr Stewart that there had been a change in line management, or that, when the Claimant returned to the office (or came off furlough) she would not be managing SB.

678. The conversation with SB was not with the intention of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It was with the intention of telling SB what her (temporary) duties and working arrangements were.

679. It would not be reasonable to treat the conversation with SB, reported to the Claimant by SB, as having the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

680. These complaints all fail.

<u>Event 39 Michael Kelt allegedly pressuring the Claimant to calculate furlough pay based on an employee's overtime rather than guaranteed fixed hours of work</u>

681. This is alleged to be direct discrimination (sex, age, race)

682. This is also alleged to be victimisation. (Protected Act One, Two, Three)

683. The Events Schedule refers to Mr Kelt, but also to paragraph 67 of the Particulars of Complaint. The allegation is actually against Mr Stewart, and what he wrote on 11 June, though we also take account of what Mr Kelt wrote in the Board notes circulated on 18 June.

684. The Claimant alleges that Mr Stewart was impatient. We disagree. She raised the issue, and he tried to get HR advice and could not, so he tried to get legal advice and could not. He did his own research, which he shared with the Claimant. He then spoke to HMRC and told the Claimant what HMRC had said. He answered her query about it. When she quoted some guidance which she said contradicted what HMRC had said on the phone, he engaged, showing he understood the point the Claimant was making, and said that it was a matter of interpretation. The Claimant did not accept that answer, and it was only after that that he replied to say that he could only go with what HMRC had said.

685. There is nothing seemingly unreasonable about the words Mr Stewart used, or the number of replies he sent prior to those words.

686. A decision by the MD to approve one particular method of calculating furlough pay (reached after the enquiries just mentioned) does not seem to be a detriment to the Finance Director. For one thing, there was a detailed paper trail. For another, the Claimant's own furlough pay was not affected.

687. Mr Kelt's words in the Board notes are harsher. Unlike Mr Stewart (who said it was a matter of interpretation, and he was happy to rely on HMRC's advice about the interpretation), Mr Kelt said that he concluded that the Claimant was wrong. His reason for saying that was that – as he wrote – he did not think the Respondent should go against the HMRC advice in relation to this government scheme.

688. In any event, there are no facts from which we could conclude that the decision may have been because of sex, age, race or any protected act.

689. These complaints all fail.

<u>Event 40 Michael Kelt and Tobias Stewart stating in board meeting minutes that they had been "looking at streamlining certain aspects of accounts processing", without consulting the Claimant</u>

690. This is alleged to be direct discrimination (sex, age, race)

691. This is also alleged to be victimisation. (Protected Act One, Two, Three)

692. Based on our findings of fact, that extract from the Board minutes does reflect the discussion that took place on 23 June. The minutes fail to include some of the Claimant's comments, such as about the importance of ascertaining fully what the existing processes and job roles were before changing/eliminating them.

693. It is not correct that the Claimant had not been consulted. The 5 May email about SWOT analysis gave everyone, including the Claimant, the chance to contribute. She knew that is said "financial control could be tighter" in the weakness section in the 5 May document, because she crossed it out (and included "Good Financial controls and processes" in strengths) in her reply. Further, she saw the 22 May document which said that there would be a Finance Review when it was circulated

on 22 May. She saw the reference to that when the Board notes were circulated on 18 May.

694. There are no facts from which we could conclude that either the contents of the Board minutes, or the amount of consultation, was because of race, sex, age or any protected act.

Event 41 Michael Kelt and Tobias Stewart enlisting Amanda Shingleton [AS] to assist them in finding fault with the Claimant's work.

695. This is alleged to be direct discrimination (sex, age, race)

696. This is also alleged to be victimisation. (Protected Act One, Two, Three)

697. Mr Kelt and Mr Stewart did not enlist Ms Shingleton to assist them in finding fault with the Claimant's work.

698. She had been an adviser to the Board for many years. On the Claimant's own admission (and as documents in the bundle show), 18 June 2020 was not the first time she had asked for clarification of items in the accounts.

699. It was Ms Shingleton's professional obligation to ask for clarification if she thought it was needed. As a result of her queries, and the phone discussion between her and the Claimant, an item in the May accounts was changed, for the reasons that the Claimant gave.

700. To the extent that the allegation is specifically that Mr Kelt or Mr Stewart asked Ms Shingleton to look for non-existent errors, or to nitpick, the complaints all fail because they did not do so.

701. To the extent that the allegation is specifically that Mr Kelt or Mr Stewart asked Ms Shingleton to check the accounts, that was part of what the Respondent was paying her to do, and had been for several years. She was not given new instructions in June about this.

702. To the extent that Ms Shingleton's queries were unjustified, the evidence does not support that, given that the accounts were amended. However, and in any event, there is no evidence (if it is even alleged) that Ms Shingleton was motivated by the Claimant's sex, age or race, or any protected act. [It is therefore not necessary to comment on whether the Respondent would be liable if Ms Shingleton had discriminated or victimised.]

703. These complaints all fail.

Event 42 AS refuting in an email to the Claimant that discussions with Tobias Stewart and Michael Kelt concerning the proposed review of finance processes without the Claimant's knowledge, had been 'unprofessional and unacceptable'.

704. This is alleged to be else direct discrimination (sex, age, race)

705. This is also alleged to be victimisation. (Protected Act One, Two, Three)

706. This refers to Ms Shingleton's email of 27 July which is quoted in full in the findings of fact.

707. The logic of the allegation appears to invite us to decide that Ms Shingleton actually did believe that her own conduct had been unprofessional and unacceptable, and that she would not have denied those things had a hypothetical comparator pointed them out to her (and/or that the denial was influenced by the Claimant's 18 December 2019 protected act).

708. Ms Shingleton has not given evidence. However, the evidence that has been presented does not persuade us, on the balance of probabilities, that Ms Shingleton did, in fact, believe that her own conduct had been unprofessional and unacceptable. In any event, whether she believed that or not, we are satisfied that the reason for her denial was to defend her own reputation and professional position, and was not because of sex, age, race or any protected act.

709. For the reasons mentioned, all these allegations fail, and it is therefore not necessary to analyse whether the Respondent would have been liable had the allegation been proven.

<u>Event 43 Conducting an unscheduled meeting with the Claimant in the manner alleged:</u>

i. making the Claimant feel physically uncomfortable by disregarding health and safety

ii. Michael Kelt informing the Claimant that AS was to do a review of the systems and processes in accounts and that the "scope would be unlimited"

iii. Michael Kelt behaving in an aggressive, nasty, mocking and frightening way, and informing the Claimant that "there was a question mark that we might need someone else to deal with this stuff"

iv. Michael Kelt informing the Claimant that the review was going to happen whether the Claimant "liked it or not", saying "we are in charge not you", and accusing the Claimant of being "unhelpful"

v. Michael Kelt informing the Claimant that he had a lack of confidence in her, due to a "few things dramatically wrong" and that the Claimant's "attitude and communication had been dire"

vi. Tobias Stewart stating at the end of the meeting, "You're not going to start emailing the directors again…are you?"

710. This is alleged to be harassment or else direct discrimination (sex, age, race)

711. This is also alleged to be victimisation. (Protected Act One, Two, Three)

712. Our assessment is that it was not the Respondent's (or Mr Kelt's or Mr Stewart's) to use the meeting of 12 August 2020 as an attempt to make the Claimant concerned about the risks from Covid. We do not uphold the Claimant's suggestions that seating arrangements, or mask wearing arrangements, or the choice of room were deliberate intimidation techniques. (Roman numeral i).

713. In terms of describing the scope of the review to her, the choice of words was not necessarily unreasonable. The meeting was prompted by the email exchange between the Claimant and Ms Shingleton which Ms Shingleton had forwarded to Mr Stewart and Mr Kelt. Within the emails, the Claimant was challenging the necessity for a review; whereas Mr Kelt and Mr Stewart were of the opinion that it had already been settled that it would take place. (Roman numeral ii).

714. On the balance of probabilities, we are satisfied that the words "there was a question mark that we might need someone else to deal with this stuff" and "we are in charge not you", or similar. We are also sure that the Claimant was told that the review was going to take place whether she liked it or not and that Mr Kelt regarded her attitude to the review as unhelpful.

715. We were satisfied that the Claimant's account of the words used during the meeting was more accurate than Mr Kelt's and Mr Stewart's. We were also satisfied that they displayed anger towards her in the meeting and were critical of her. It was suggested that working relationships needed to improve, and that the Claimant was entirely to blame for poor relationships between her on the one hand and Mr Kelt and Mr Stewart on the other, and that the changes needed to improve the working relationships were entirely from her.

716. Very significantly, she was told by Mr Kelt that he had lost confidence in the Claimant. He was the company chairman, and owner of 50% of the shares. The managing director was present and (at least tacitly) agreed.

717. There was no reasonable and proper cause for this statement. We reject the Respondent's account of what led to (their version of) the comment. We do not accept that, during the meeting, after a patient attempt to engage the Claimant in relation to the finance review, and agree terms of reference for it, the Claimant's refusal to co-operate prompted the comment. Rather, Mr Kelt (in particular) and (to a lesser extent) Mr Stewart went into the meeting with the attitude that they would be laying down the law to the Claimant. They were not trying to make her resign (and they were not contemplating dismissing her in the meeting) but they had decided that they were going to be giving her a telling off for the correspondence with Ms Shingleton. The comment about having lost confidence in the Claimant was based on an opinion Mr Kelt had before the meeting, not one he arrived at during the meeting. He told the Claimant that it was (in part) because of a "few things dramatically wrong" and said this without the Claimant ever having had the safeguards of any performance management process, allowing her to know the specific alleged performance concerns, and the evidence, and the opportunity to give a considered response.

718. The statement was not deliberately calculated to destroy the relationship of confidence and trust between employer and employee, but it was likely to have that effect, and it did so. As a result of what was said to her in the meeting, and as a result of this comment in particular, the Claimant believed that there was no way back for her. She believed that she could not continue as an employee.

719. This was a repudiatory breach of contract by the Respondent. The Claimant resigned in response to it. She did not affirm the contract before doing so. (We therefore do not need to address her alternative argument that the events at this meeting were "the last straw".)

720. The Claimant was dismissed.

Unfair Dismissal

721. The Respondent has not proven the dismissal reason. Although it says in the Grounds of Resistance, "To the extent that there were ever any concerns regarding the Claimant's performance in the role, these concerns were justified", it has not proven what specific performance issues (if any) were the reason for the dismissal. Furthermore, the Respondent has not shown that there was some other substantial reason justifying dismissal; on its own account (and the Claimant agrees), Mr Stewart said that he wanted to, and thought they could, carry on working together.

722. In any event, even if there had hypothetically been a fair reason for dismissal, no fair procedure (or any procedure) was followed. The Claimant was given no advance notification of the meeting, and was not given details of any concerns over particular performance issues, or working relationship issues, that would be discussed.

723. The dismissal was unfair.

Event 44 Dismissing the Claimant in accordance with section 39(7) Equality Act 2010.

724. This is alleged to be direct discrimination (sex, age, race)

725. This is also alleged to be victimisation. (Protected Act One, Two, Three)

726. Protected Act Four occurred after the termination of employment. Protected Act Two was 8 months earlier. We decided that the events of 19 May 2020 (alleged Protected Act Three) were not a protected act.

727. We note that Mr Kelt's comments in the meeting on 12 August included, even based on the Respondent's own note, "the corrosive effect of copying unsubstantiated comments by email to the whole Board" when listing their (alleged) concerns about her attitude. That being said, there was extensive correspondence and interaction between the Claimant, on the one hand, and Mr Kelt and/or Mr Stewart on the other hand since 18 December 2019, about a wide range of topics. We are satisfied that they had in mind the emails which they believed unnecessarily were circulated to the whole board, rather than comments about Board meetings/minutes. We could not safely conclude that the two paragraphs about Stan in the 18 December 2019 email

were part of what was being referred to in the notes, or part of the reason for what occurred during the meeting..

728. In all the circumstances, the burden of proof in relation to victimisation does not shift. The reason why the criticisms of the Claimant were made in the meeting were because of more recent events and emails.

729. In all the circumstances, the burden of proof in relation to age does not shift. There are no facts from which we could conclude that the repudiatory conduct on 12 August 2020 was because of age.

730. The tribunal's decision (by majority, being Ms Boot and Mr Miller) is that the burden of proof does shift in relation to both sex discrimination and race discrimination. The Respondent has failed to show that the repudiatory conduct was in no sense whatsoever because of sex or race, and therefore the (constructive) dismissal was an act of direct sex discrimination and direct race discrimination.

731. The reason that the burden of proof shifts for sex is that the workforce was more than 80% male. Mr Kelt had had this drawn to his attention, and said he would consider it. He had failed to take any action. He made the "old nag" comment. According to the grievance interviews, not disclosed until part way through the hearing, the only two female interviewees each remarked on specific comments he had made which had offended them. (knickers in twist; pretty young lady for reception). These are facts which show that Mr Kelt's actions potentially could be motivated by the sex of the person he was talking to, or talking about and from which the Tribunal could conclude that his words and actions on 12 August 2020 were, at least partially, and at least unconsciously, influenced by the Claimant's sex.

732. The reason that the burden of proof shifts for race is that the workforce was predominantly white. During the first few weeks of the covid lockdown, all the white employees (not counting the directors) were not working and were receiving 80% of pay. One employee, SB, was required to work and received 80% of pay. That is a fact which could indicate that the Respondent (Mr Kelt and Mr Stewart) were capable of treating employees differently where there was a difference in race. They made no attempt to reimburse SB for the hours that she had worked in April and part of May after they were told that she was working full-time, and SB's comments to the grievance investigator do not support their claims that SB was content or that she thought they were being reasonable to her. SB's own opinion was that sometimes remarks were made about colour (albeit she did not give specific examples). These are facts which show that Mr Kelt's and Mr Stewart's actions potentially could be motivated by the race of the employee they were dealing with, and from which the Tribunal could conclude that his words and actions on 12 August 2020 were, at least partially, and at least unconsciously, influenced by the Claimant's race.

733. Furthermore, the Tribunal have unanimously rejected Mr Kelt's and Mr Stewart's account of the facts of what happened in the meeting. They have put forward a false explanation of what happened, and this contributes to there being "something more" than just less favourable treatment and a difference in sex or race.

734. The conduct on 12 August 2020 was suspicious and surprising. With no prior warning, the Claimant was told that the Respondent (Mr Kelt, in particular) had lost confidence in her. She was not called to any formal performance, or disciplinary, meeting, or given any advance notice that the Respondent had lost confidence in her, or the alleged reasons. She was not given the opportunity to prepare a defence or counter-argument.

735. There are facts from which the Tribunal could conclude that the reason for this treatment was her sex, and there are facts from which the Tribunal could conclude that the reason for this treatment was her race.

736. The burden of proof shifts. The Respondent has failed to prove that:

736.1. a hypothetical comparator, being a Finance Director who was a man, and whose performance, attitude and other circumstances were the same as the Claimant's would have been treated the same way

736.2. a hypothetical comparator, being a Finance Director who was a different race to the Claimant, and whose performance, attitude and other circumstances were the same as the Claimant's would have been treated the same way

737. Therefore the sex discrimination and the race discrimination complaints succeed.

738. The minority opinion (EJ Quill) is that the burden of proof does not shift for either sex or race. The reason why the meeting was called was that Mr Kelt and Mr Stewart were annoyed by (what they perceived as) her attitude to the finance review. They had no plans to hide that annoyance. On the contrary, they planned to assert their authority (as they saw it) over her. The reason why they made the comments that they did in the meeting is that they believed that the Claimant was in the wrong, and they planned to tell her that emphatically. It has not been proven (because their account about what happened in the meeting has not been found to be truthful and accurate) whether they planned to tell her before the meeting that they had lost confidence in her, or whether that was more of a spur of the moment remark which happened as the meeting unfolded. Either way, they acted unlawfully, as the Tribunal has explained when determining that there was a constructive dismissal which was unfair. However, there are no facts from which EJ Quill could conclude that a hypothetical comparator might have been treated differently in the same circumstances. For that reason, EJ Quill would have dismissed the complaints that the dismissal was sex or race discrimination. However, had he been persuaded that the burden of proof had shifted, EJ Quill would have agreed with the majority that the Respondent has not shown that the dismissal was, in no sense whatsoever, because of sex or because of race.

<u>Event 45 The appointment of a Financial Controller (approximately mid to late 30s)</u>

739. This is alleged to be direct discrimination (age)

740. This is not an example of treating the Claimant less favourably. Firstly, the Claimant did not apply for this job (or want it). Secondly, it was not the same job that the

Claimant had performed for the Respondent. Thirdly, it was an agency worker role, not an employee contract.

741. Furthermore, the reason why the Respondent appointed someone to this job was that they needed someone to do the work. It had nothing whatsoever to do with the Claimant's age.

742. This complaint fails.

Event 46 Respondent's failure to provide the Claimant with a calculation of leave entitlement.

743. This is alleged to be victimisation. (Protected Act One, Two, Three)

744. It is factually correct that the Respondent failed to provide a breakdown of the calculation.

745. In our opinion, it should have been a very straightforward thing to do. Mr Stewart told the Claimant what the entitlement was (correcting, he said, an earlier error) so he must have done the calculation and it would, therefore, have been easy to send an email to the Claimant showing the calculation.

746. We do think it is a detriment that the Respondent did not supply the calculation after she asked for it.

747. However, the burden of proof does not shift. We decided that Protected Act Two was a protected act, and One and Three were not. However, in any event, there are no facts from which we could conclude that the Claimant's words and actions about Stan in 2018, or the protected act of 18 December 2019, or the Claimant's emails on 19 May 2020 influenced Mr Stewart or the Respondent when they failed to provide the calculation in 2020.

748. We are satisfied that it was an oversight, rather than a conscious decision. At the time, the Respondent was writing to the Claimant to seek to encourage her to participate in the grievance process. As the Claimant was saying herself in her letters at the time, this might have just been for show (although, of course, on the Respondent's case, it was genuinely because they wished to follow their own grievance procedures). However, it would not be logical to go out of their way to appear to be fair and reasonable in their letters about the grievance process while deliberately deciding to ignore the request for a breakdown.

Event 47 The Respondent's decision to appoint an organisation it retained to seek legal advice on HR matters, (an organisation the Claimant considered not to be impartial) to hear the Claimant's Grievance.

749. This is alleged to be victimisation. (Protected Act One, Two, Three)

750. It is true that the Claimant offered to pay half, and that the Respondent said "no".

751. The Respondent's reason for refusing the Claimant's offer that she pay half was, in part at least, the reason that they gave in evidence, namely that they genuinely believed it was inappropriate for an employer to charge an employee for (part of) the costs of dealing with a grievance.

752. We have no doubt that at least part of the reason was that they did not wish to give the employee a say in who would be selected to deal with the grievance.

753. We are satisfied that the Respondent's stance would have been the same for any other employee.

754. The Respondent told her that, in their opinion, the consultant appointed by Moorepay would be impartial and, at the Claimant's request, arranged for her to have a letter from Moorepay. Having read that letter, she attended the grievance meeting.

755. We are not persuaded that an employer's decision that it, and not the employee, will decide who will hear the grievance is a detriment rather than an unjustified sense of grievance.

756. However, even if it was a detriment, there are no facts from which we could conclude that it might have been because of a protected act. No comparator is necessary for a victimisation complaint, but the Respondent refused to agree to a request that they were not obliged to agree to, and that they would have refused for any other employee. Even if they were hopeful that their own choice of decision-maker was more likely to decide in their favour than a decision-maker agreed with the Claimant, that is not a point in the Claimant's favour. Regardless of any protected acts that had happened in the past, or any protected acts that might occur in future, during the grievance process, any desire by the Respondent to have a favourable outcome from the grievance was because they wanted to have a favourable outcome not because of any protected act.

757. This complaint fails.

<u>Event 48 Email from Tobias Stewart with two letters attached, one from Moorepay confirming their impartiality.</u>

758. This is alleged to be victimisation. (Protected Act One, Two, Three)

759. Mr Stewart's 8 October 2020 email is not a detriment. Mr Stewart supplied something which the Claimant had requested (the Moorepay letter) and an invitation to a grievance meeting (earlier invitations for earlier dates having been declined by the Claimant).

760. To the extent that the complaint is that the email came from Mr Stewart, rather than Moorepay, this was not because of Protected Act Two or the other alleged protected acts. Furthermore, the email originating from the Respondent rather than from Moorepay was not a detriment.

761. This complaint fails.

Event 49 The Claimant's Grievance.

762. This is not a complaint in its own right. It is alleged Protected Act Four.

Event 50 The Respondent's decision to reject the Claimant's grievances and to do so 36 days after the grievance hearing.

Event 51 The provision of a report the Claimant believed to be biased in its investigations and findings.

763. Events 50 and 51 are both alleged to be victimisation. (Protected Act One, Two, Three, Four)

764. We do not think that the length of time to produce the outcome (15 October to 19 November) is suspicious given the number of discrete issues raised. We have reviewed the correspondence, and we note that the Claimant was pushing for a reply asap. That was not an unreasonable stance for the Claimant to take. That being said, in fairness to the Respondent, the Claimant had several times declined to attend a grievance hearing prior to agreeing to attend the one on 15 October. Furthermore, her detailed submissions were not sent until 12 October, so two months after the (resignation) letter which the Respondent was treating as instigating the grievance process.

765. It is not our opinion that the grievance investigation was perfect. There are some lines of investigation that the panel believes were worth pursuing that did not seem to have been pursued. More importantly, when we compare the witnesses' answers in the grievance statements/notes to the findings (and the implications about what the witnesses said), our analysis and conclusion is that the colleagues' comments were more favourable to the Claimant's version of events than the grievance outcome report implied. It is unclear to what extent the EHRC Code of Practice was taken into account, and to what extent the possibility of unconscious bias was considered. For the meeting on 12 August, the report fails to analyse that, even according to the Respondent's own notes, Mr Stewart and Mr Kelt are recorded as saying "not her competence, but their confidence in her which was the issue".

766. The fact that the Claimant had done the protected acts did influence the grievance investigation and outcome, because the allegations made within those Protected Act were part of Ms Gillibrand's remit.

767. However, our judgment is that the grievance investigation and report were not intended as any form of retaliation against the Claimant either for the 18 December 2019 email, Protected Act Two, or for the fact that contraventions of the Equality Act 2010 were alleged in the documents sent to Ms Gillibrand on 12 October 2020, Protected Act Four. The burden of proof does not shift. There are no facts from which we could conclude that Ms Gillibrand was motivated, by the protected acts, to delay the outcome, to ignore evidence, to reject the grievance, or to be more favourable to the Respondent (and/or less favourable to the Claimant) in the approach to the task.

768. These allegations fail.

Event 52 An email from Tobias Stewart to the Claimant informing the Claimant that it was the Respondent's intention to proceed with an appeal hearing on 8th December 2020 chaired by Moorepay

769. This is alleged to be victimisation. (Protected Act One, Two, Three, Four)

770. This is not a detriment. The Claimant appealed and the Respondent informed her of the date of the appeal hearing. To the extent that the victimisation allegation is that the Respondent decided to use a Moorepay appointee, even though the Claimant wanted a say in who dealt with the appeal (and even though she did not want a Moorepay appointee) our comments are the same as in relation to the choice of Ms Gillibrand for the first stage of the grievance.

771. These complaints fail.

Event 53 The Respondent's failure to provide a grievance appeal outcome

772. This is alleged to be victimisation. (Protected Act One, Two, Three, Four)

773. An outcome was, in fact, provided. It was provided 10 days after the claim was presented. Thus it is true that, as of the date of the claim form, the Respondent had not provided an outcome.

774. The circumstances are described in the findings of fact. The Claimant appealed on 23 November, which was prompt, after the 19 November outcome. It took the Respondent 10 days (to 3 December) to email her with the appeal hearing date. However, the appeal hearing date was only 15 days after the appeal was submitted.

775. Mr Scoon was not a witness, but, taking account of the questions he asked to the Claimant around 15 December, he had – as requested by the Claimant – started to consider the appeal on the papers, after she declined to attend a meeting with him.

776. There is, of course, no criticism of the Claimant for presenting the claim form on 18 December 2020 rather than a later date. However, for Mr Scoon to have supplied the outcome by 18 December, he would have had to supply it within 10 days of the appeal hearing date.

777. It is not surprising or suspicious, given the volume of material that he had to consider, that it took him 20 days to produce his report, especially taking into account that that included Christmas Day and Boxing Day.

778. Whether the appeal outcome might have been delivered more quickly had the grievance complaints (Protected Act Four, being the documents sent to Ms Gillibrand on 12 October 2020) not included allegations of contraventions of the Equality Act 2010 is an entirely hypothetical question, and is not the right question for us to ask ourselves; it is not a "but for" test.

779. We have not heard from Mr Scoon as a witness. However, there is no evidence that the Respondent sought to persuade him to be slow to supply an outcome (either so that the Claimant would not have the outcome prior to the Tribunal time limit, or for any other reason). Furthermore, we are not persuaded that he deliberately went slow for any reason.

780. The burden of proof does not shift. There are no facts from which we could conclude that he might have been influenced to delay the outcome (or to fail to provide the outcome by 18 December) by the protected acts.

781. This complaint fails.

Breach of Contract

782. As of 12 and 13 August 2020, there was no conduct by the Claimant such that she had breached the employment contract in such a way that she lost her entitlement to contractual notice of dismissal.

783. As discussed above, we have found that the Claimant was constructively dismissed. She was not given notice by the Respondent, or pay in lieu of notice, and is entitled to damages for the breach of contract, being lack of notice period.

Employment Judge Quill

Date: 17 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17 July 2023

FOR EMPLOYMENT TRIBUNALS