EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss N Chaudhry	**v**	Trustmark Plans Limited

Heard at: Reading Employment Tribunal
(Day 1 hybrid and by CVP, Days 2 to 4 by CVP)

On: 30 and 31 May 2023 and 1 and 2 June 2023
Before: Employment Judge George
Members: Mr J Appleton
Ms Sian Hughes

Appearances
For the Claimant: In person
For the Respondent: Mr Neil Briggs, Director

RESERVED JUDGMENT

1. The respondent subjected the claimant to direct sex discrimination contrary to s.13 of the Equality Act 2010 by dismissing her.

2. The respondent subjected the claimant to unlawful harassment contrary to s.26 of the Equality Act 2010 as follows:

    2.1. Sexual harassment contrary to s.26 (2) by:

        2.1.1. Mr L Briggs asking the claimant out on a date on 29 September 2021 and then asking her whether she was married and if not why she could not go out with him;

        2.1.2. By asking her intrusive questions about her relationship;

        2.1.3. By Mr L Briggs subsequently asking the claimant if she was still with her partner stating the invitation was still open and laughing at the claimant's discomfort;

        2.1.4. Mr L Briggs moving from his normal desk to sit at a desk opposite the claimant so that he could stare at her while she worked.

2.1.5. Mr L Briggs invading the claimant's space by standing right next to her and by removing dust from her shoulder or top without being asked to do so.

2.2. In the alternative, the above conduct was unlawful harassment related to sex.

3. The respondent subjected the claimant to harassment related to sex by making comments to her when she returned to work after periods of absence related to childcare by asking why the father of her child could not take time of work for childcare instead of her and saying that "This is the sort of problem an employer has when they hire a mother as an employee".

4. The claim for unauthorised deduction from wages succeeds. The claimant is entitled to a bonus in respect of October 2022. The amount of the deduction will be calculated at the remedy hearing on **6 October 2023**.

5. Compensation for unlawful discrimination and/or harassment will be decided at a remedy hearing on **6 October 2023.** The hearing has been listed as a C.V.P. (video) hearing but it is presumed that the respondent will need access to Tribunal facilities as they did at the liability hearing.

6. The claim for pregnancy discrimination is not well founded and is dismissed.

REASONS

1. Following a period of conciliation which lasted from 9 November 2021 to 29 November 2021, the claimant presented a claim form on 29 November 2021 by which she alleged sex discrimination, sex related harassment, pregnancy and maternity discrimination and unauthorised deduction from wages.

2. The claim arises out of a relatively short employment by the respondent as an Office Manager between 23 June 2021 and the expiry of a notice period on 22 November 2021. The claimant was told that she was dismissed on 9 November 2021 ostensibly because of long periods of absence from work and, it is alleged by the respondent at the hearing before us, poor performance and conduct.

3. The respondent entered a grounds of response by which they sought to bring a counter claim but it was clarified at an early stage that the claimant had brought an unauthorised deduction from wages claim under s.23 of the Employment Rights Act 1996 and had not brought a breach of contract claim. For that reason the Tribunal did not have jurisdiction to consider the respondent's contract claim. There is therefore no employer's contract claim before us.

4. The respondent is a family company run by Mr Neil Briggs as Managing Director and his wife, Angella Salmon. The claimant was the first person from outside Mr Briggs' family to be employed by the respondent. The company started trading in May 2013 and it offers will writing and estate

planning services to the public. Mr Neil Briggs' brother, Mark, is also engaged in the business on a self-employed basis.

5. At this four day hearing we have had the benefit of hearing oral evidence from four witnesses: the claimant, Mr Neil Briggs, Ms Angella Salmon and Mr Leon Briggs - the son of Neil Briggs from a previous relationship, who was also employed in the company at the relevant time. All four witnesses adopted in evidence written statements which had been exchanged in advance and were cross examined upon them.

6. The claimant had also exchanged a statement prepared by Mr Craig Butler who operates a business located adjacent to the offices from which the respondent company traded at the relevant time. Mr Butler has not attended to be cross examined upon his witness statement and Mr Briggs snr. indicated that, had he done so, there were questions Mr Briggs would have asked him.

7. The Tribunal exercised its discretion to admit the statement but stated that we would give it such weight as was appropriate in all the circumstances, including that Mr Briggs has not been able to challenge what has been said. In fact, we do not consider that Mr Butler's statement takes matters very much further. It is to the effect that he saw Leon Briggs at the premises sufficiently frequently that he appeared to be working for the respondent full time during the period of the claimant's employment. Given what Mr Leon Briggs himself says about his attendance at the office and the period during which the claimant makes complaint, the statement by Mr Butler (which is very unspecific about dates) does not help particularly with our decision making process. It does not tell us anything sufficiently precise for us to be able to give weight to it even were it presented to us on an uncontested basis. It does not assist at all with what happened in the office or whether Ms Salmon was in the office at the relevant period which are issues that are more likely to affect our judgment about who is telling the truth about the relevant incidents. Therefore, although we admit Mr Butler's statement on evidence, it is of such limited relevance that we give it little weight.

8. The parties had cooperated on a joint bundle of documents which consisted of 214 pages. Page numbers in that bundle are referred to as page 1 to 214 as appropriate. Both parties had made later disclosures of relevant documents and, for the most part, had agreed that those should go in evidence. After the claimant had been cross examined, on Day 3 of the hearing, Mr Briggs snr. asked for leave to put in evidence the further and better particulars that she had written in response to an April 2022 order of the tribunal. The claimant objected to this late inclusion and we granted the application for reasons given orally at the time and which are set out below. Following these additions the respondent's additional documents were numbered from 215 to 237. However, since the claimant had also numbered her additional documents with the same numbers those are referred to in these reasons as RAB pages 215 to 237 as appropriate. The claimant's additional documents were set out in an index and totalled an additional 18 pages but had not been given page numbers rather than document numbers. Those documents are identified by the number given

to them in the index and referred to in these reasons as CAB page 216 to 229 as appropriate.

9. There had been, if I put it neutrally, some crossed wires, about the arrangements for the start of the final hearing which was due to start on 30 May 2023 and carry on for four days. It appears that, back in April 2022, the Tribunal provisionally listed an in-person hearing with a time estimate of 4 days prior to the preliminary hearing taking place before Employment Judge Eeley in August 2022. It is apparent from paragraph 1 in her record of hearing that that in-person hearing was converted to take place by video. At that point the respondents were represented and Mr McHugh, counsel, attended to represent them at that hearing.

10. Mr Briggs, the Director who is now representing the respondent, was not present at that hearing. He told us, and we accept, that he did not appreciate from the language in that order that this week's hearing was scheduled to take place by video rather than in person. Through what appears to have been an administrative error the change was not reflected on the internal system and so perhaps one or two working days before the start of the hearing a letter was sent out informing the parties that the lift was out of order. This alerted the claimant to the error and the apparent expectation that she should attend in person. The domestic arrangements she had made presupposed a video hearing and she had a telephone conversation with the administration on Friday, following which a video link was sent out to the parties. The respondent had expected the claimant to be present and they and their witnesses attended in person.

11. Both parties were initially comfortable conducting the housekeeping on Day 1 by means of a hybrid hearing. A preliminary matter arose for consideration by us as a Tribunal because the claimant indicated that, on reflection, she felt at some disadvantage by attending by video when the respondents were in person. We invited both parties to explain their views in the situation. The respondent said that they considered that justice would be best served if there was a fully face-to-face hearing. We decided that, in fairness to the importance and sensitivity of the issues in the case to all concerned, we should treat this as an application by the respondents to change the arrangements for the hearing to convert it to a face-to-face or in person hearing.

12. We decided to reject the application for the following reasons. At the start of the hearing, it was listed to be conducted by video; that was the way things were arranged by Judge Eeley in August 2022. The claimant's domestic arrangements had been made based around what she was told at that hearing. The Tribunal is entitled to presume that the respondent's representatives at the time would inform the respondent that it was to be a video hearing although we accept that, as a matter of fact, Mr Briggs did not understand the wording of the order which states "CVP" rather than "video".

13. It is true that the Employment Tribunal roadmap for 2022-23 following the Covid-19 pandemic does envisage that multi-day hearings of this kind

should move to face-to-face as a default and the Presidents state that their "shared view remains that justice is best experienced by the vast majority of individual litigants in a face-to-face environment". That is possibly why the case was originally listed for a face-to-face hearing. However, that is not because there is a presumption that decision making is better done with the benefit of face-to-face evidence.

14. As a Tribunal, we understand why that is a concern that those who are perhaps unfamiliar with the way in which Tribunals make their decisions could have. This is a case where credibility is going to be determinative of at least some of the issues. In other words, whom we believe about a particular incident is going to be determinative of at least some of the issues. However, we find, as an experienced panel, that decisions on who to believe are far more likely to turn on the consistency of the different witness comparing different accounts given on more than one occasions or on the consistency of their accounts with contemporaneous documents, where those exists. In fact, there is considerable guidance in the case law to the effect that decision making done on the basis of a "gut reaction" to a witness is in fact potentially unreliable and can reinforce stereotypes.

15. So, although we do not discount the concerns that the respondents have expressed and the reservations Mr Briggs has expressed about the decision making when we are face-to-face, we have much experience over the last two years of making a lot of facts sensitive decisions at video hearings. The process of deciding credibility where that, as it is in this case, is a very important issue is one which is based on evidence.

16. The claimant's position strongly suggests that if the hearing were converted to a fully face-to-face hearing that would cause significant disruption to her because she had made domestic arrangements in good faith based on the previous Tribunal order. It is certainly not in the interests of the parties for the hearing to be postponed because of the delays, particularly in this region, in getting new hearing dates. On the other hand, the respondent themselves were not able to switch to a fully remote hearing where they dialled into the C.V.P. hearing room remotely. They did not have the equipment needed to do that.

17. The Tribunal then suggested that the respondents could use the tribunal room which was logged into the C.V.P. hearing room as a guest meaning that the administration and the employment judge could control the respondents access to the hearing room. This would provide the respondents with access to the necessary technology. The members of the Tribunal then logged in separately, as did the claimant. The respondents very fairly said that if we used those arrangements they would not be disadvantaged by the technology. The parties would then be on the same footing as each other because both were appearing by video.

18. Those arrangements were put in place and we continued as a fully remote hearing because it was in accordance with the overriding objective of avoiding delay and of ensuring the parties were on the same footing.

19. Another contested matter which the Tribunal had to consider on Day 3 of the hearing was the respondent's application for the further information provided by Miss Chaudhry at some point between April and August 2022 to be admitted in evidence. This had clearly been produced in answer to questions that she had been ordered to answer by the Tribunal.

20. We have decided to grant the application. First of all we decided whether or not we should look at the document before granting the application. We were of the view that we were unable, without reading it, to judge its importance and whether deciding to admit it was proportionate to the small disruption that was likely to result to the timetable. We were mindful that this is a document which should have been on the Tribunal file because it had been sent to the Tribunal in response to Tribunal orders. Had the paper file had been kept in the order that we would expect it to be kept in, then there is every prospect that the employment judge (and potentially the non-legal members) would have read it before the start of the hearing in any event. The claimant was concerned that once we had seen it that we would have difficulty removing it from our minds. However Tribunal panel members are frequently in the position of having to ignore matters that have been excluded from evidence during the course of the hearing. It is very rare that the matters are so prejudicial that an experienced panel is unable to do that.

21. We then took time to read the 3-page response. The claimant confirmed that this was further information that had been in front of Employment Judge Eeley at the preliminary hearing on 3 August 2022 which had been taken into account when the allegations were framed as they are in Judge Eeley's Case Summary and list of issues.

22. The respondent argues that it is relevant cross-examination material because it refers to a specific allegation that was apparently not pursued. It is not covered in the claimant's witness statement and Mr Briggs says he wished to ask the claimant why that is the case. He said the allegation cross refers to Ms Salmon's witness statement; she had dealt with the allegation expecting that it was to be pursued.

23. We had noticed that in paragraph 63 of Ms Salmon's witness statement she says the following:

> "The exact same wording was used in the documents completed by the claimant, **(page 237). I thought he was going to kiss you.** However, I notice that this alleged text message has not been provided by Ms Chaudhry as evidence. Therefore, I know that this text does not exist."

24. When this application was made, we noticed, and it perhaps remiss of us not to have noticed before, that there is no page 237 in the bundle. Ms Salmon, in that paragraph, is referring to a document that has not been put in the bundle. The respondent's additional documents goes up to page 234. There is reference in the further information provided by the claimant to an incident that corresponds to that. So, it seems to us that the respondent is probably right where they say that they have excluded it inadvertently and it

seems to us that it is probable that this document was intended to be in the bundle from the outset.

25. We do not think that the claimant is unfairly disadvantaged by this because it is her own document. The incident and Ms Salmon's account of it has been in AS's witness statement throughout. No doubt the claimant became been aware of it when statements were exchanged. So, Ms Salmon's evidence on the point should be no surprise to the claimant.

26. Given the very fact sensitive nature in particular of the issues in this case, we think there is more prejudice to the respondent if we were not to include the further and better particulars into the documentary evidence available to us than there is to the claimant if it is put in. The respondent suggests that the claimant's credibility is adversely affected by her approach to this allegation and they ought to have the opportunity to make that point. However, the claimant clearly needed to be given the opportunity to answer any questions that Mr Briggs had about the document.

27. We decided that, as a result of including the document, the claimant needed to be recalled to give short further oral evidence. We limited that further questioning to 15 minutes. The claimant quite reasonably said that, as a litigant in person who has had to handle all of her own preparation and was prepared for cross examination, she would be disadvantaged by having to change her focus in the middle of a particular task. She completed the cross examination of the remainder of the respondent's witnesses and then Miss Chaudhry was recalled and questioned about the further information.

The issues

28. The issues in the case remained as set out in the case summary of Judge Eeley as found at pages 70 and following of the file of document for the hearing and are not replicated here.

The law

<u>The Law applicable to the issues</u>

29. The claimant complains of a number of breaches of the Equality Act 2010 (hereafter referred to as the EQA). Sections of that Act which are relevant to the issues in this case include:

30. Section 13 (1) of the EQA, which reads:

> "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."

31. Section 18 which, so far as relevant, provides that:

> "a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
>
> (a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it."

32. The protected period begins when the pregnancy beings and ends at the end of additional maternity leave (if the woman is entitled to additional maternity leave) or if she does not, at the end of 2 weeks beginning with the end of the pregnancy. Section 18 also prohibits unfavourable treatment because a woman has exercise or is exercising or seeking to exercise the right to maternity leave. Direct pregnancy and maternity discrimination is mutually exclusive to direct sex discrimination: s.18(7) EQA. This provides that s.13 EQA does not apply to treatment which falls within s.18.

33. Section 26 which, so far as relevant, provides as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to (…) sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b) and
(c) because of B's rejection of or submission to the conduct, A treats B less favorably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

34. Section 39(2), on the rights of employees and application which, so far as material, provides that an employer must not discriminate against an employee

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

(b) by subjecting B to any other detriment."

35. Section 109 on the liability of employers and principals provides as follows:

> "(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
> (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

36. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

> "(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."

37. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

38. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "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."

39. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
>
> ...

> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned."

40. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

41. The EAT provided guidance on ways in which actions might be "related to" the protected characteristic relied on in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

42. The definition of 'detriment' in s.212(1) EQA means that if particular conduct has been found to be harassment, it is not possible for it also to amount to a detriment within s.39(2)(d) EQA (for example) for the purposes of a direct discrimination claim. In other words, although it can be argued that a particular act is unlawful harassment and, that if it is not it is unlawful discrimination, a claimant will not succeed on both claims in relation to a single act.

43. Although the law anticipates a two-stage test to the issue of direct discrimination, it is not necessary artificially to separate the evidence

adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

44. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

45. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

46. When deciding whether or not the claimant has been the victim of direct sex discrimination, the Employment Tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves by cogent evidence that the reason for their action was not that of sex.

47. The provisions for direct pregnancy or maternity discrimination are similar but there the correct approach is to focus on why the claimant had been treated in the way that they have because if the reasons for the treatment include that of pregnancy then there is no need to consider whether a man would have been treated more favourably. Section 18 EQA does not require a comparator because there is no comparable situation to pregnancy. This is well established by the line of authorities originating in the Court of Justice of the European Union but which include the House of Lords decision in Webb v Emo Air Cargo (UK) Ltd (No. 2) [1995] ICR 1021 HL. These establish that "the dismissal or a worker, or the refusal of employment, because of current or anticipated pregnancy/maternity absence is to be treated as discrimination on the ground of her sex, without the need for the identification of a male comparator in materially the same circumstances." (City of London Police Commissioner v Geldart [2021] ICR 1329 CA). A failure to appoint for fear that the woman who was not then pregnant might become pregnant would not fall within s.18 EQA (because

not within the protected period). The fact that it does not fall within s.18 means that it, potentially, could be direct sex discrimination within s.13 EQA on the basis that that is a reason which could only apply to a woman.

48. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminate but still may have been materially influenced by considerations of, in the present case, sex or pregnancy. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

49. More recently, in Field v Steve Pye & Co (KL) Ltd [2022] EAT 68; [2022] IRLR 948 EAT, HHJ James Tayler addressed the question of whether it is permissible to move directly to the second stage of the test for discrimination. He pointed out that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored and a decision to move directly to the question of the reason for a particular act that should be explained. In effect, the basis for doing so would be that the Tribunal had assumed that the claimant had passed the stage one Igen test. He recommended that where there is evidence that could indicate discrimination, there was much to be said for properly grappling with the evidence and deciding whether it is or is not sufficient to switch the burden of disproving discrimination to the respondent.

50. An unauthorised deduction from wages claim is brought alleging breach of the right not to suffer deductions granted by s.13 of the Employment Rights Act 1996. A deduction is where the total amount of wages paid on any occasion by an employer is less than the total amount of the wages properly payable under (in the present case) the contract of employment: s.13(3) ERA. In the present case this requires us to consider what was properly payable in relation to a bonus. The claimant states that there was a contractual entitlement to a bonus. The respondent states that the bonus was entirely discrimination and therefore was not properly payable as those terms are meant in the section. Alternatively the respondent states that the bonus was conditional upon the claimant being responsible for a particular sales related task and that the discretionary bonus was removed when that task was removed from her.

51. In relation to the breach of contract claim for bonus payments, neither party alleges that the terms and conditions of employment were entirely encapsulated in documents. The first task for the employment tribunal is to find what, as a matter of fact, the claimant's contractual entitlement was in respect of eligibility for a bonus. This involves consideration of a variety of potential evidence of the contractual terms, written terms (where they exist)

and oral evidence of what was agreed and what the parties did or regarded themselves as obliged to do. Contractual terms may be expressly agreed (either orally or in writing), incorporated with reference to rules governing particular aspects of the employment relationship or stem from statutory provisions. They may also be implied into the contract where the parties must be taken to have agreed them because, for example, they are too obvious to need recording, because they are custom and practice, because they can logically be deduced from the conduct of the parties or are necessary to give "business efficacy" to the agreement as a whole.

Findings of fact

52. Mr Briggs jnr.'s employment by the company run by his father started on 8 March 2021 when he was 20 years of age. He initially worked from his paternal home but, at about the same time, the company took on office premises in Woodley. The initial arrangement between the company and Mr Briggs jnr. was that he worked mostly from home, but a few nights a week worked from the office in Woodley. These flexible hours enabled him to combine working with his caring duties for his mother who, sadly, was critically ill. It seems that she had a number of very serious health conditions and has subsequently passed away. From the start of Mr Briggs jnr.'s contract it was agreed that he would combine work with those caring duties for the person who was not only his mother, but the mother of Mr Briggs snr.'s other children and, therefore, we infer, very much part of the extended family.

53. Although the claimant seeks to compare herself with Mr Briggs jnr.in respect of their caring obligations, she accepted in oral evidence that she had no grounds for knowing whether Mr Brigs jnr.'s flexible working arrangements were or were not something that had been agreed with him at the time at the start of his employment. We accept the evidence of both Mr Briggs snr. and his son about that. We also accept Mr Briggs snr.'s evidence that his brother was employed on a self-employed basis and that the respondent therefore was not in control of Mr Mark Briggs' working hours in the way that they would have been had he been directly employed.

54. The building occupied by the respondent company was also occupied by other companies. The estate agent plan is at RAB page 215 and a scaled drawing showing the office occupied by the respondent is at RAB 232. The claimant accepted this to be broadly accurate. It shows a somewhat irregular shaped office that at its maximum was 6.1 meters by 5.6 meters.

55. The plan at RAB page 232 appears to show the situation once some additional desks had been installed at the end of September 2021. It shows the claimant's allocated desk in a corner effectively behind the entrance door (if it were open) with the back toward the access corridor and facing towards the external wall. Between her desk and Mr Briggs snr.'s are some cabinets and someone sitting at the desk of Mr Briggs snr. would be facing towards the claimant. The space between the leading edge of the claimant's desk and the back wall is relatively narrow at an accepted 400mm although, as is common with standard office desks, there is a slight

L shape so that the gap between the desk and the wall opens slightly where the chair is located.

56. For a period of time in August 2021 Mr Briggs jnr. was working jointly for the respondent and another company in the group and it was from approximately 1 September, certainly early September, that Mr Briggs jnr. moved full time to the Woodley office. It seems that the hours he was working did not fully coincide with the claimant's normal hours since he still worked some evenings in order to make calls to prospective clients at that time of day.

The claimant's bonus

57. The claimant's employment started on 23 June 2021 and her role is set out in an offer letter at page 132. A series of bullet points at the bottom of page 132 set out her general responsibilities and they include "Confirming and distribution of sales appointments from incoming enquiries".

58. However, that is not the only responsibility which supports the sales function of the company. We note other activities and responsibilities in those bullet points such as maintaining a sales calendar, recording daily sales and providing an analysis of information that might provide sales leads. The offer letter states that the claimant's salary was to be £35,000 per annum, paid monthly, and "In addition you will be paid a monthly bonus of .5% of the net monthly sales. (after deduction of VAT). This will be paid one month in arrears.".

59. This offer letter does not say that the bonus is to be discretionary. The claimant's contract is at page 134 and at page 135 remuneration is dealt with in paragraphs 10 to 12. Paragraph 10 states that remuneration will consist of a salary "plus a commission according to the following commission formula" which is said to be .5% of net VAT monthly sales. Paragraph 12 says as follows:

> "The Employee understands and agrees that any additional remuneration paid to the Employee in the form of bonuses or other similar incentive remuneration will rest in the sole discretion of the Employer and that the Employee will not earn or accrue any right to incentive remuneration by reason of the Employee's employment."

60. The dispute between the parties about the alleged unauthorised deduction from wages claim hinges upon whether the claimant was entitled to .5% of net VAT monthly sales in respect of October 2021, the final month of her employment. She argues that this was payable under the contract.

61. The respondent complains that the arithmetic by which the claimant's bonus was calculated during her employment incorrectly awarded her 1% rather than .5% that she was entitled to. This was the factual allegation that formed the basis of the attempted employer's contract claim. That is not before the Tribunal. The respondent's defence to the claim for a bonus in October – quite apart from the amount of such a claim – is first, that the payment was a discretionary bonus (in reliance on paragraph 12), and

secondly, that the claimant was told in a face-to-face meeting on 12 August 2021 that this bonus would cease if her sales performance continued to decrease since that performance was affected by poor attendance levels. The respondent states that this was repeated in early September and at about that time, following Mr Briggs jnr.'s move to working full time, responsibility for booking appointments was removed from the claimant. It is argued by the respondent that, this responsibility having been removed from the claimant, the bonus associated with sales was also removed at the same time.

62. We reflect that, for an Office Manager, the salary of £35,000 is, in our experience, at a level which would attract a reasonable number of capable applicants even if it were paid without a bonus or commission. The claimant's clear evidence was that she did not regard the role as being a sales job from the outset. However, her evidence was that the bonus was explained to her to be in the nature of a team bonus because if the sales increased that would benefit all members of the team.

63. The practice for calculation of the bonus paid to the claimant was that she was directed to enter the monthly sales figures into a spreadsheet. That spreadsheet was the means by which the amount of her monthly bonus was communicated to an accountant for payment. Part of the dispute between the parties is about whether the claimant was wholly in control of the spreadsheet in the sense that she designed it and entered the formula into the relevant cells such that she caused the spreadsheet incorrectly to calculate her bonus at 1% rather than .5%. We have not seen the spreadsheet in question and we cannot therefore be satisfied that it was in fact incorrect. The respondent paid that percentage to her without question.

64. Although the respondent relies on the discretionary nature of remuneration "in the form of bonuses or other similar incentive remuneration" from clause 12 of the contract, clause 10 refers to commission rather than to bonus. The original offer letter does not state that the .5% was to be discretionary and in the course of the short employment it was paid without question automatically. There were no personal targets for the claimant to achieve and that is common ground. It seems to us that it is more likely than not that this .5% was payable contractually but, in any event, such discretion as there was about paying it was not to be exercised irrationally.

65. It was put to the claimant in cross examination that it had not been a team bonus but it was supposed to be based on booking appointments and sales that created by the claimant herself. She rejected that. If the respondent had been going to assert that they should have produced figures that demonstrated that this was what was done. She entered the sales figures and they were paid. There is no evidence before us to show that any granular analysis of who was responsible for the appointments was done.

66. In reality, the bonus was calculated on the basis of a team bonus. There is nothing before us that says that records were kept to show that an appointment was made by one person rather than another and an appointment might or might not lead to a sale. Had the arrangement been

for a bonus to be paid because of individual leads that would have required a much more sophisticated commission system and our conclusion is that on balance it was a team bonus and that was how it operated in practice.

67. Had the respondent intended to remove a commission or bonus, even one which was discretionary, that should have been communicated in writing. There is considerable conflict and tension in the respondent's evidence on this point. Their statement evidence is to the effect that the claimant was told that the bonus might be removed and then was told that it was removed. Their oral evidence was much more vague about the date in September when they claim she was told that it was removed. The claimant denies this happened.

68. We also note that the alleged warning letter (page 148) warns that the bonus will be taken away and the alleged final written warning letter (page 150) dated 22 October 2022 states that the task of booking sales enquiries will be removed with immediate effect. These are two of the letters that the claimant states she did not receive contemporaneously but only following a data subject access request.

69. If those letters are genuine and sought to communicate to her decisions made contemporaneously with the letters then they suggest that task of sales bookings was not removed from the claimant until 22 October 2022. That would make it unfair to remove the bonus prior to that date. As a matter of fact the respondent paid the claimant her September bonus in the October payroll. For them to have done so had they told her whether on 1 September or in early September that the possibility of a bonus was being removed from her would require explanation. Mr Briggs snr. claimed that it was paid as a gesture of goodwill.

70. We find that the respondent's evidence about whether the task set out in the first bullet point on page 132 was ever formally removed from the claimant it is conflicting. The witness statements Mr Briggs snr. (para.29) and Ms Salmon (para.22) are categoric that from 1 September the claimant was no longer doing the sales bookings. Their oral evidence was that the date was not clear and they corrected that part of their statements before adopting them in evidence. The evidence of both the claimant and Mr Briggs jnr. was that, as a matter of fact, the claimant continued to do sales appointment bookings after that date and therefore, it seems to be common ground between those two that the end of the claimant doing that role was not a neat specific time. What the claimant actually did was not consistent with her having been given a clear instruction in around early September or indeed at any time, do not do this task anymore.

71. There is then a stark contradiction between that oral evidence (updating the written evidence) and the contents of page 148 and 150 which state that this happened in October 2021.

72. Separately we have to consider whether we accept the respondent's explanation of the reason why the claimant was paid her bonus in October.

73. The respondent's evidence on this point is so contradictory that we prefer the claimant's evidence. We find that she was not at any time told that she was not to do the bookings and was not at any time told she was no longer entitled to the bonus. As a matter of practicality, once Mr Briggs jnr. was working fulltime in the office he probably took on more of the appointment bookings. Indeed, the fact that he was doing so is part of what the claimant relies on as leading to tension between them. The common evidence seems to be that the claimant did in fact continue to do so although perhaps to a lesser extent, right until her dismissal.

74. We think it more likely than not that she was contractually entitled to the bonus for October and that a bonus or commission calculated at .5% was payable under the contract. Alternatively there was no rational basis to exercise their discretion not to pay it during the period of the claimant's employment. The claimant's unauthorised deduction of wages claim thereof succeeds and the amount of that deduction needs to be calculated after disclosure of the sales figure for October 2021.

Other findings of fact

75. The claimant is a single parent with responsibility for a daughter who was aged about seven years at the time in question. The relevant events took place in the second half of 2021. This was the second year of the coronavirus pandemic when the public had continuing obligations to self-isolate if they were contacted as a close contact of someone who had tested positive for coronavirus or tested positive themselves. The effected not only the claimant on occasion, who also contracted coronavirus herself, but also her daughter.

76. On any view, the claimant had a significant amount of absence from her employment at a time when she was a relatively new employee. According to the claimant, her daughter had to self-isolate between 16 and 21 July 2021 - although these are not absences from work that the respondent has noted in their evidence. The claimant was then absent on 27 and 30 July 2021 because her daughter had a stomach bug which she then caught from her. She returned to work in the first week of August. On 13 August 2021 the claimant was absent from work and informed Mr Briggs snr. that this was because her daughter had sprained her ankle and she was taking her to the doctor (page 184).

77. The following Monday the claimant texted Mr Briggs snr. to say that she was unwell. She explains in her statement that she had had symptoms of covid over the weekend and tested positive on 18 August. She discovered this by a PCR test which is at page 173. There may have been some confusion on the part of the claimant or Mr Briggs about communication of the reason for this absence but it appears that the claimant was directed to self-isolate for 10 days from 18 August and she therefore did not attend between 17 and 23 August 2021 for reasons of sickness absence. She then had annual leave between 24 and 31 August 2021. She appears to have sustained attendance in September until 27 September 2021 when she was again absent. It is on this date that the claimant claims a probation review took

place which is considered further below. There were further absences on 5 and 6 October 2021 which the claimant said was because her daughter had sprained her ankle and the text to the claimant's partner at CAB 217 of 5 October 2021 corroborates this because it is a discussion about how to treat a swollen ankle.

78. The claimant's daughter was directed to self-isolate between 13 and 15 October 2021 (see CAB pages 223 and 224) although the claimant does not appear to have been absent throughout the period of her daughter's self-isolation because she was certainly present on 18 October 2021 when there was a discussion about her chair. The claimant was absent on 21 October 2021 she says because of a hospital appointment and then on 1 November 2021 the claimant herself seems to have been told to self-isolate (see page 99: an email from the claimant to Mr Briggs snr.). Although the message the claimant received does appear to be confusing in terms of what it directs the claimant to do, it is clear that the claimant was told to self-isolate and she appears to have been absent from that date until 9 November 2021 when she returned to the office.

79. The dates and duration of absences is not in dispute between the parties and the reasons given at the time were broadly those set out in the foregoing paragraphs.

80. That common ground is in contrast to the large number of evidential contradictions in other parts of this case. Indeed, it is relatively rare for a case to contain quite so much disagreement about whether particular meetings took place at all, whether letters were sent, whether documents were contemporaneous or whether they have been created for the purposes of substantiating allegations or counter allegations.

81. The absence from work by the claimant is quite a significant amount in a relatively short employment. The contract of employment contained a three month probationary period. It is apparent and understandable that the level of absence was of concern to Mr Briggs snr.. Calendar entries from page 153 to 162 also show the extent of the absence. There is correspondence between Mr Brigs snr. and the accountant at RAB page 228 where he details the days that the claimant should not receive pay in full because of sickness absence. On 26 August 2021 (RAB page 231) Mr Briggs snr. wrote to his accountant and said "My thoughts regarding Nadia, is to finish her employment because she struggles to manage more than seven days."

82. This we take as a clear indication that Mr Briggs snr. was seriously considering dismissing the claimant two months into her employment because of poor attendance. It is worth noting that at this point she would not have had the right not to be unfairly dismissed because of lack of two years continuous service and many employers do not follow a full ACAS compliant process when dealing with employees in the early stages of their employment. This is not a course that we advocate and it can often be a risky one for an employer to follow.

83. The claimant has sought to compare her treatment at various points with that of Mr Mark Briggs and of Mr Briggs jnr.

84. We have accepted that Mr Mark Briggs was self-employed and our view is that the amount of his attendance at the office is not something that we can consider at all comparable to that of the claimant. He would have his performance judged by results not by attendance. The activities he needed to carry out required him to be absent from the office for long periods of time. There his position was not a comparable situation. In round terms the claimant also says that his behaviour was worthy of criticism and that she was dealt with harshly for much less serious matters. Again, Mr Mark Briggs' position as a self employed worker and to some extent as Mr Briggs snr.'s brother puts him in a rather different category to the claimant.

85. So far as Mr Briggs jnr. is concerned, there are various reasons why he is not a suitable comparator with the claimant. In the first place he is a family member. Whether or not it is wise for reasons of collegiality to treat a family member differently to others because of their relationship, if that genuine is the reason for less favourable treatment, it is not a difference of sex. Mr Briggs very convincingly explained that he praised his son for looking after his mother because this was a woman who had previously been close to him and was the mother of four of his children.

86. It seems to us that the close family relationship between all those concerned is a distinguishing and material difference between the situation of the claimant and that of Mr Briggs jnr. Furthermore, we accept that flexibility was a contractual entitlement of Mr Briggs jnr. that did not apply in the case of the claimant. He is therefore also not a suitable actual comparator in terms of the way that his caring responsibilities and absence from work was treated comparted with that of the claimant. This does not mean that particular evidential points cannot be relied on as evidence from which it might be inferred that someone who was a suitable comparator would be treated differently to the claimant.

87. We think that a suitable hypothetical comparator to the claimant would have been a man with caring responsibilities who had equivalent periods of absence by reason of their own ill health or requirements to self-isolate and because of the health of their dependent.

88. The respondent argues that poor attendance was affecting the performance of the claimant. They also state that this was dealt with formally in two meetings. They allege that on 6 September 2021 (page 147) the claimant was invited to a meeting which took place on 13 September at which a written warning was given by letter of the following date (page 148). They allege that, by an invite of 11 October 2021 (page 149), the claimant was invited to a disciplinary meeting which took place on 20 October 2021 at which a final written warning was given as confirmed in the letter of 22 October (page 150). The respondent also alleges that when the claimant was dismissed they provided her with a written letter of dismissal by hand (page 151). Then, they state that they noticed after her departure that she had left it behind on her desk.

89. When the claimant asked for reasons for her dismissal (CAB page 216) a letter was forwarded to her the same day which is at page 152 and is in slightly different terms. The claimant accepts that she received page 152 but denies receiving all other disciplinary documents which she states she saw for the first time in response to a data subject access request. She disputes that the documents described in para.88XX above were contemporaneous.

90. Both Mr Briggs snr. and Ms Salmon gave statements and oral evidence about what occurred in these meetings and we note in particular Mr Briggs snr.'s statement evidence at paragraphs 33 to 35 and 44 to 47. Ms Salmon dealt only with the meetings very briefly in a single paragraph, paragraph 41, which states that on 20 October 2021 she attended a second disciplinary meeting "Unsatisfactory work by the claimant was discussed and Ms Chaudhry conduct was also referred to".

91. Both invitations state that Ms Salmon will be in attendance and will be taking notes. Ms Salmon does not refer in her witness statement to her activities at the meetings. Her oral evidence was that she took notes at the first but not at the second.

92. Mr Briggs snr.'s oral evidence about the way in which notes were taken was contradictory. He referred at times to he, himself, having made notes in preparation and then, during the meeting, he merely ticked off as the points were covered. He seemed vague about whether Ms Salmon had taken notes. Neither the notes in preparation by Mr Briggs snr. nor minutes taken by Ms Salmon have been disclosed. It seemed that the respondents' explanation for that was probably that notes had been disposed of once the letters recording the outcome had been sent. Their evidence was that these documents were given by hand.

93. During the course of the preparation for the trial the claimant asked for disclosure of the electronic versions of these letters; by that she clearly meant that she wished to have the electronic originating document by which the document was created (for example, in Word format or whichever application was used). At CAB 218 she has produced a screen shot of the properties of the document that she accepts she received which was attached to the email of 9 November 2021. This shows that page 152 was created on that date by someone who was logged in as Angella Salmon.

94. Mr Briggs snr.'s evidence suggests that he does not understand that it is possible to look at the properties of an electronic document, for example one created using Microsoft Word, and discover this information. The claimant has not gone into the respondent's system in order to obtain this information which was readily obtainable from the file attached to the email at CAB page 216. The claimant made a request of the respondent's then solicitor in September 2022 for the digital files but it is not entirely clear from that email exchange that the claimant then made clear, exactly what she was seeking. She made a request nearer to this hearing in April 2023 directly to Mr Briggs snr. who rejected her request for the original electronic files on the basis that the documents were already in the bundle. The

exchange at CAB page 222 makes clear what she is asking for but does not explain that she is wanting to identify the properties of those documents. We accept that Mr Briggs snr. is not technologically particularly sophisticated in his skills.

95. We consider the competing claims about these documents and the alleged meetings. It is odd that the claimant was, if the respondent witnesses are to be believed, invited to meetings which she was told she might receive a warning and was given the option of a companion at such a meeting but did not get an invitation to the meeting at which she was dismissed. There is a tension between the scrappy notes which are described as having been made at the alleged meetings and the "minutes" which are referred to in the invitation letters. The oral evidence of Mr Briggs snr. and Ms Salmon about what happened at the meeting was particularly vague. We question why Ms Salmon did not make notes at the second meeting when the invitation to that alleged meeting said her purpose for being there was expressly to do so. Their evidence that the claimant said nothing or very little at those meetings is implausible particularly given her response to the reason for her eventual dismissal.

96. The claimant relies upon a text that she sent to her partner (page CAB 220). This was sent 20 minutes after apparently, according to Mr Briggs, she had received a formal warning. In that she simply asks what time it is and sends a crying with laughter emoji. Given what she told her partner about the alleged conduct of Leon Briggs in other texts, it is highly unlikely that this text was sent within half and hour of her receiving a disciplinary sanction.

97. There are differences of significance between the two alleged dismissal letters at page 151 and 152. That which the claimant denies receiving mentions previous disciplinary meetings and gives as a reason for dismissal more than attendance. The letter that the claimant accepts she received says: "The reason for your termination of your contract is non-covid related but is predominantly due to the amount of time which you have been absent since your employment commenced."

98. The other letter says: "The reasons are that despite having two disciplinary meetings your time keeping performance attendance and conduct has not improved." It does go on to say that over 40% absenteeism has had a dramatic effect on her performance and has resulted in clients not receiving their documents in a timely manner.

99. We note that the meeting that the claimant accepts happened, namely that of 9 November when she was dismissed, did not follow any proper procedure. The letter the respondent sent to their accountant say they were thinking of ending the claimant's employment did not sound as though they were worried too much about the niceties of procedure.

100. Taking all that into account we find it wholly implausible that these meetings ever took pace. We find that they did not and that the documents at pages 147, 148, 149,150 and 151 are not contemporaneous documents. They were first sent to the claimant in response to her data subject access

request. In reaching this conclusion we do not give very much weight to the respondent's failure to respond to the claimant's request for the electronic files. The fact that she requested them is consistent with her taking the view that the documents were fake and she wanted to prove that. However, we think it probable that the respondents did not understand why the precise versions the claimant sought were relevant or necessary. Once there had been an exchange of witness statements the respondent should have understood what the claimant was saying. The fact of the request does more to support the claimant's credibility than the failure to respond to it does to damage Mr Briggs snr.'s.

101. The principal reason that we reject the respondent's evidence about this is that there is an inconsistency in their asserted approach to the formalities for meetings of less importance than the meeting at which the claimant was dismissed. Additionally, the explanation for Ms Salmon attending for the purpose of taking notes and then not taking notes was unconvincing. The oral evidence about what happened at the meetings was vague. The assertion that the first meeting took place is inconsistent with the claimant's text to her partner at the same date and time. We reject Mr Briggs snr. and Ms Salmon's oral evidence and statement evidence that they participated in these meetings. That evidence is wholly invented.

102. The claimant's evidence is that a probationary review meeting took place by telephone on 27 September 2021 (see her paragraph 14). That was at about the time when probation in the contract was due to come to an end. She claims that Mr Briggs said that she had passed with flying colours although accepted that those were her words, and relies on a text to her partner at page 169. It is apparent from that text that there was a conversation of some kind between her and Mr Brigs snr. but it could have been about any number of things. For him to have said that she had passed with flying colours is inconsistent with the account he wrote to his accountant (RAB page 231). The alleged meeting took place during a day's absence because of the claimant's illness and one would not normally have a probationary meeting in those circumstances. For Mr Briggs to have conducted a prompt probationary review would be inconsistent with his lack of experience as an employer of non-family members and with the lack of formality used at the time of the dismissal. So, although we accept the claimant's evidence that there was a conversation of some kind, we think that she has exaggerated the importance of that discussion. On the other hand, we do not think that the claimant was given any indication that her employment was under threat by Mr Briggs and indeed, he says that that meeting did not happen at all. So he does not assert that that was the case.

103. The claimant's sex related harassment claims arise out of allegations of misconduct against Mr Briggs jnr.as set out in the list of issues. The first in time reported by the claimant is evidenced by para.20 of her statement and is said to have taken place on 29 September 2021. She states that Angella Salmon had to leave to meet her husband and a few minutes later Mr Briggs jnr. turned around, moved his chair closer to her desk and said "and then there were two so fancy a date". The claimant said she declined and when

Mr Briggs jnr. asked if she was declining she said "Yes, it is a no as I am in a relationship".

104. Mr Briggs jnr. then asked if that was with the individual she had been discussing with Angella earlier on. The claimant states that she deduced from that that he had known from her conversation that she was in a relationship and had asked her on a date anyway. She considered that to be inappropriate conduct. She stated that Mr Briggs then asked if she was married and when she said 'No' implied that a date would not be out of the question and asked if her partner would allow her to have a male friend.

105. She supports her allegation with reference to a text message that she sent to her partner on the same day (page 170). That is timed at 15:43 and she said "Boss son just asked me out: how cringe". We note that in this instance as in a number of the texts produced in evidence by the claimant, she has not included the full run of text messages but only edited highlights. Her explanation was that those that followed were irrelevant to the subject matter of the claim. However, we do take into account the possibility that she has edited them to create a particular effect.

106. Mr Briggs jnr.'s version of events is in his paragraph 14. He accepts that he heard the claimant talking about the person who he now knows to be her partner but because the claimant's partner shares a name with his cousin he stated that this was why he had asked if that was to whom she was referring and mentioned their name. He denies categorically that he asked the claimant on a date and states that she verbally "slapped him down" (our words not his) and regarded her as having responded in a very hostile way. He stated that he assumed that she was unhappy because he had taken over her role of booking appointments.

107. According to the claimant, she text messaged Angella Salmon and told her what had happened. She told us that she had previously had a series of text chats which she had tried to retrieve to put in evidence. However, she told us that she had deleted the texts once she had been dismissed and had only sought to retrieve those that had been backed up some time later. The result of that enquiry had been the limited number of texts at pages 164 and 165 but not the full run of exchanges with Ms Salmon during their work relationship.

108. On a number of occasions the claimant expressed herself very disappointed and finding it hard to understand why such a limited number of texts were available because she stated that she believed the texts that she had received, had they been available, would have demonstrated what she had said. Ms Salmon likewise did not produce any texts at all and claimed that she had deleted texts from her phone and that she had tried but had been unable to retrieve any saved on the Cloud.

109. Ms Salmon denied that the claimant had complained that Mr Briggs jnr. had asked her on a date but did accept that there had been later complaints about Mr Briggs jnr. invading Ms Chaudhry's personal space.

110. That is something that the claimant describes in her paragraph 23. She states that Mr Briggs jnr. used every opportunity to come over to her desk and stand unnecessarily close to her claiming to need assistance in understanding his father's writing, or because he had forgotten something, or in an order to access the whiteboard that was on the wall behind her head. Further evidence is given in paragraph 26 where she states that he would become excessively close and would remove fluff from her shoulder or arm and in a number of ways, be unnecessarily familiar and stand too close to her. She also alleged that he would turn round to look in the direction of the whiteboard when he was not on a phone call or apparently carrying out a task that required him to look at the information on it, to the extent that she felt herself to be stared at, and would pick up his laptop and work on Mr Briggs snr.'s desk so that he was facing the claimant (paragraphs 27 and 28). She claimed that he occasionally asked her if she was still with her partner and made clear that the invitation for a date was still available.

111. Even more overtly, sexual conduct is referred to in paragraph 31. According to the claimant, she told Angella Salmon that she felt very uncomfortable with this behaviour but she had no handbook and had no access to guidance on how to raise a formal grievance. The claimant's version is that Angella Salmon told her that she would speak to Mr Briggs snr.. However, the claimant said that Ms Salmon also relayed Mr Briggs snr.'s response, namely that he had laughed or even been proud of his son's initiative which the claimant stated dissuaded her from making further or more formal complaints.

112. Ms Salmon, in her paragraph 32, corroborates Mr Briggs jnr.'s version about the conversation in which he referred to his cousin who shared a name with the claimant's partner although it is not clear whether she claims to have been present or not. Up to a point Ms Salmon corroborates that a complaint was made and states that the claimant had complained about Mr Briggs jnr. standing behind her to write on the dry whiteboard.

113. Overall, much of the respondent's evidence was directed to argument that the allegations of the claimant could not be true because of the lack of space behind the desk. They also disputed that there was the opportunity. Indeed Mr Briggs snr. said Ms Salmon was never out of the room and the claimant and Mr Briggs jnr. were never together in the room alone. This was contradicted by Mr Briggs jnr. who accepted that there would be occasions when Ms Salmon would go to the toilet or out for a few minutes and it therefore seems to us that in all likelihood there was time available within which the alleged behaviour could have taken place.

114. A part of the reason why Mr Briggs jnr. was asked about this is that he gave evidence that, quite contrary to the allegations that he had behaved inappropriately, in fact the claimant had herself behaved in a bullying and objectionable way to him. Indeed, Mr Briggs snr. claims that there was a meeting on 4 October 2021 resulting from a report from his son that he was being bullied by the claimant which led to a verbal warning being given to

both of them. On Mr Briggs snr.'s evidence the claimant's complaint about Mr Briggs jnr. standing too close came after that.

115. Mr Briggs jnr's allegations of bullying are in his paragraph 23 and 24. According to him, on 1 October Angella Salmon had arranged to arrive later and the claimant started to taunt and mimic what he was saying to clients accusing him of suffering from OCD. Mr Leon Briggs does not refer in his witness statement to any meeting taking place on 4 October and the claimant denied that such a meeting at which she was admonished had happened. It is surprising that Mr Leon Briggs does not include in his witness statement any reference to a meeting at which, according to his father, his son was given a verbal warning. However, Mr Briggs jnr. states that on 7 and 8 October rather more serious behaviour directed towards him by the claimant took place which, if it had occurred, would have been extremely offensive and humiliating for him.

116. We consider the plausibility of the respondent's evidence that there was a meeting either formal or informal on 4 October at which both Leon Briggs and the claimant were admonished on the basis of what he respondents knew at that point which, according to Ms Salmon and Mr Briggs snr., was only the complaint by Leon against the claimant. The complaint by the claimant against Leon came later.

117. It seems odd to us that the respondent's reaction to what they knew at that point would be to have that joint meeting. If it had taken place as alleged, it is, in our view, surprising that Mr Leon Briggs did not refer in his statement to a meeting if it were as formal in tone and led to the use of the word 'warning' directed to him as his father states. If the meeting is supposed to have taken place between the incidents referred to in paragraphs 23 and 24 in Mr Briggs junior's statement then that explanation that he did not think he needed to mention it seems particularly weak and hard to believe.

118. The evidence of Mr Leon Briggs seemed to seek to tread a middle road between that of his father and that of his stepmother who agreed the meeting took place but made it sound very much more like a general telling off to seek to achieve the result that co-workers would work co-operatively. If, as on Mr Leon Briggs account, a few days after this the behaviour of the claimant got so much worse, it would be extraordinary if he did not say something more to his father. He does not have the reason to keep quiet of being uncertain of his position with the management in the company. If the meeting took place after those more serious incidents then the apparently even-handed approach described by Mr Briggs seems even more extraordinary.

119. We have come to the conclusion that this meeting did not take pace not, at least, in any way with the formality described by Mr Briggs snr.. It is possible that Mr Neil Briggs took the opportunity of being in the office to ask people to work together but it cannot have been with any degree of seriousness or with reference to anything in particular.

120. The fact that Mr Leon Briggs was willing to adopt the evidence of a meeting taking place and appeared to seek to tread a middle ground between other witnesses on the respondent's side, undermines his reliability as a witness in general. He appeared to us to be seeking to fit his version of events to the other witnesses' versions. It causes us to doubt his account of the claimant's behaviour. If she actually said something as serious as described in his paragraph 24 his apparent lack of action following it is very difficult to understand.

121. Having set out the parties' respective evidence and our findings about the alleged meeting on 4 October 2021, we turn to our findings in respect of the claimant's allegations of unwanted conduct. As to the incident on 29 September 2021 both Angella Salmon and Leon Briggs appear to accept that some sort of mention of the claimant's partner's name happened on that date. However, since Leon Briggs recalls the conversation because he was being reprimanded in his first week of employment that may not have been the same conversation. The claimant did clearly text her partner to tell him that he bosses son had asked her for a date.

122. We also take into account the paper note left on the claimant's car by her partner the following day.

123. We cannot see any sensible explanation for the claimant's text to her partner on 29 September other than that Leon Briggs had indeed asked her for a date on that occasion. The note left on her car is generally supportive context to the allegation. The claimant's evidence is to be preferred and we accept that Leon Briggs did ask her out for a date. However, for someone merely to ask a co-worker, even one they do not know terribly well, out on a date, speculatively, is not something that we consider is likely to meet the test set out in s.26 of harassment.

124. It is important therefore to consider the claimant's evidence about the detail of the incident and about other incidents.

125. We have found that the claimant exaggerated the detail of a telephone conversation a few days previously which she described as being a probation review. We have rejected the height of her evidence on that and consider whether this damages her credibly sufficiently that we should consider that she had exaggerated her account of 29 September 2021 likewise.

126. She was asked what she had meant by the word "cringe" in her text to her partner and said that she had spoken to her partner about the people who worked at her place of work and the type of person that Mr Briggs jnr. was and considered it to be awkward and embarrassing that that had happened from such an individual. This text supports a finding that the incident was awkward and embarrassing for her.

127. On balance, we consider that Mr Leon Briggs' account of the alleged behaviour is not credible. It is not consistent with his actions or with those of his fathers in the alleged meeting on 4 October. We reject their evidence

that anything like a formal meeting took place on that date. It seems highly improbable that a father in Briggs snr.'s position would have given a verbal warning to a son who was complaining about bullying and recall that Mr Leon Briggs, at the time, was still a very young man.

128. We consider that the damage this does to Mr Leon Briggs credibility means that the claimant's evidence in general terms is more reliable and it is probable that on 29 September Mr Leon Briggs was not simply asking the claimant out but went on to ask intrusive questions about her relationship and implied that a date would not be out of the question since she was not married to her partner. Those are inappropriate and intrusive things to say.

129. However, the text she sent to her partner suggests that notwithstanding the full extent of what Mr Briggs jnr.said this was no more than awkward and embarrassing for her.

130. We accept that, on further occasions, Mr Leon Briggs asked the claimant about her relationship with her partner and asked the sort of intrusive questions that she sets out in her paragraph 28 which also made her feel uncomfortable. So, the alleged conduct as set out in the list of issues 3.1.1 and 3.1.2 is made out in respect of a specific incident on 29 September 2021 and more than one occasion thereafter although this was not frequent.

131. The claimant also sent a text to her partner on 30 September 2023 (page 171) in which she complained that Mr Briggs jnr. was "doing my head in" as they were alone in the office and "he keeps finding excuses to come over to "show" me something", "proper gets in my personal space". This provides some support for her evidence about the allegation that is made in the list of issues 3.1.4. Further details are given in the response to the request for further and better particulars that was inserted in RAB page 235 to 237.

132. Accordingly to Leon Briggs' paragraph 16, a new desk was installed as in the layout at RAB page 232 on 30 September 2021. Prior to that he had a pop-up desk and general permission to use his father's desk when needed. He therefore had a valid reason prior to 30 September to use the desk opposite the claimant. However, her allegation appears to date from early October, to judge by the chronology in her witness statement at paragraph 28 to 30.

133. We consider the claimant's evidence to be broadly credible and accept that there were occasions when Mr Briggs jnr. would deliberately move to work on his father's desk so that he was facing the claimant and stare at her while she worked. We also accept that this was not limited to the occasions in which it was legitimate for him to be looking in the direction of the whiteboard and that he came round to her side of the desk to ask apparently legitimate questions but with a frequency that was not justified by what he reasonably needed and was quite reasonably construed by her to be an invasion of her personal space. We also accept that he would use a pretext to brush dust from her shoulder or top as this is generally consistent with overly familiar intrusive and slightly intimidating behaviour.

134. Although Ms Salmon said that she was aware of complaints by the claimant her evidence was that she knew those complaints to be baseless. The claimant asserts that to the contrary Ms Salmon by her conduct and facial expressions indicated that she sympathised with the claimant's predicament. It is common ground that the whiteboard was removed.

135. We do bear in mind that the claimant stated that right from the outset, even before Mr Leon Briggs had said anything to her, she had a gut negative reaction towards him and Mr Briggs snr. It was put to the claimant that this gut negative reaction caused her to misconstrue perfectly innocent actions.

136. It is of course possible that such a thing can happen and without wishing to minimise how uncomfortable the claimant found things, we have found this a somewhat difficult case to decide because, to some extent, what the claimant describes are the actions of a pest. In part what we have to consider is whether the objective element of the test for harassment, namely that it was reasonable for the actions to have the harassing effect, is met.

137. It is not in dispute that, probably on 13 October, the whiteboard was moved. Angella Salmon's witness statement in paragraphs 32 to 34 broadly mirrors her husband's in this respect. Ms Salmon's oral evidence unnecessarily said that she knew that the claimant was lying in her allegations and so they moved the whiteboard. That was something which we considered made her evidence about the incident questionable.

138. We also thought her response to questions seeking an explanation for the use of language by her in texts to the claimant about Mark Briggs and Leon Briggs was unconvincing. Those texts are at page 164 and 165. It was alleged by the claimant that the texts show a degree of friendly relations between her and Ms Salmon that was particularly marked. We do not consider that the texts necessarily point to them having a friendship outside work and we accept that they did not. The texts do demonstrate that the claimant told Ms Salmon things that were quite private but, taken on their own, the messages about the delivery of flowers around midday on 28 October (page 164), relied on by the claimant, is not strongly indicative of a closer than average working relationship.

139. However, there is an exchange over the course of about 15 minutes from around 4 o'clock in the afternoon on 28 October 2021 where the claimant reports to Ms Salmon comments made by Mark Briggs and Leon Briggs about a client which the claimant describes as disrespectful. Ms Salmon agrees and says "How can they be so unprofessional", "I am so disgusted by them", "Their behaviour is so tasteless", "They're horrible creatures", "both are liars anyway", "I though bloody Leon was sick", "I know he was just trying to bunk a day off and he wants pay too".

140. In her paragraph 48 she accepts that this was unprofessional of her and said there and repeated in oral evidence that her explanation for this language was that she had had a personal row with Mark Briggs. In oral evidence, said she had not been referring to her stepson; it was nothing to do with him. We do not think that this explanation fully accounts for the

words and the language used not only to describe her brother-in-law but also her stepson. In her oral evidence we find that Angella Salmon was happy to say things which fly in the face of the documentary evidence if she thought that that was more consistent with the company case.

141. This affects our view of Ms Salmon's evidence where she seeks to make a positive case that what the claimant says cannot be true or is positively untrue. For example, she decries the probability of Leon Briggs going behind the claimant's desk and states that the frequency and the length of time that she herself was out of the room mean there was no opportunity for Mr Leon Briggs to behave as alleged. We conclude that Ms Salmon is seeking loyally to defend Leon Briggs and the company rather than doing her best to give accurate and truthful evidence to the Tribunal.

142. This also affects our view of the impression she seeks to give of Mr Leon Briggs as a polite individual who always asks the claimant to move so that he could make entries the whiteboard or sought to ask her to make entries on his behalf. Where Ms Salmon gave circumstantial evidence relevant to the question of whether the harassment took place we do not give it weight and do not think it detract from the claimant's evidence at all.

143. We think that the claimant's explanation for the lack of provision of texts was convincing. We accept that the contemporaneous texts supports her evidence that Mr Briggs invaded her personal space and we accept that that happened.

144. Furthermore, the claimant's evidence in paragraph 34 that on 12 October 2021 she managed to ask Mr Briggs to stop doing so in front of Angella Salmon is supported by the text at page 168. It suggests that she was in fact complaining about Leon's behaviour and that Angella Salmon is seeking to downplay that complaint.

145. The behaviour of Leon Briggs included invading he claimant's personal space by unnecessarily coming round the claimant's desk to stand next to where she sat. This made her obviously uncomfortable and that would have been obvious to others. It caused her to tell him on 12 October that she wanted to stop him coming so close whenever he had a question to ask. It was entirely reasonable that she should link that behaviour with his previous request for a date and his intrusive questioning about her personal life.

146. We find that the allegation in list of issues 3.1.3 is proved in that this conduct did take place. Leon Briggs took steps to come unnecessarily close to the claimant, deliberately moving closer to her. He moved so that he could stare at her when he did not need to look in that direction.

147. The more serious allegations that the claimant sets out in her witness statement that go beyond those set out in the list of issues that we do not make findings about. Had those been true they would have been put in in the earlier further and better particulars. In closing, the claimant described the gravamen of Mr Briggs jnr.'s conduct as being that he came over so closely, so frequently; because she had said nothing to him other than

asking him to move away, she inferred that he knew exactly what he was doing; he stood so close to her in a way that meant there was no way he could have misunderstood and it was not possible for him to have been just innocently writing on the board.

148. Following this stance by the claimant the whiteboard was moved and on her return to work on 18 October 2021 it is common ground that there had been a swap of chairs. However, on the claimant's version of events, Ms Salmon had already replaced the claimant's correct chair and told the claimant that she was disgusted that Leon Briggs and Mark Briggs had put a broken chair at the claimant's desk instead.

149. On Ms Salmon's version of events, the claimant was already at work when she, herself, arrived and, although the chairs had been swapped, it was simply putting the wrong chair in place.

150. Even if the claimant is right about this, we cannot see that this was a particularly serios incident. By the time she arrived at work the correct chair was in place, nothing unfavourable or detrimental was done to her at all because the chair had been replaced and, on any view, it seems to have been a silly prank. The evidence does not support a finding that this was done deliberately rather than by accident as part of removal of furniture associated with changing the whiteboard. There is also nothing at all to link this to sex as the claimant herself said in closing. She seemed to relay on this incident more as evidence that she was penalised for minor wrongdoing whereas incidents of this sort by Mr Leon and Mark Briggs led to no action.

151. The final allegation of harassment by the claimant relates to the alleged comments by Mr Briggs when she returned to work after the numerous periods of absence for reasons that we have set out earlier in our findings. Specifically, it is alleged that he asked her "Why can't the father of your child take time of work" and commented "This is what happens when you hire a mother". The first comment, if made, could be regarded as similar to a question as to whether there was anyone else who could take time off to provide childcare and is not necessarily specific to the gender of the individual although the word "father" is used in the comment.

152. The claimant referred in closing to comments that were made by Mr Briggs during the hearing where on a number of occasions in response to a question as to why a meeting had not taken place for example, he said that it was hard to have a meeting with someone who was never there. Although these comments came out in the form of slightly sarcastic comments and displayed irritation with the admittedly lengthy absences and frequent absences that the claimant had, we do not think that they were targeted at the claimant as a mother. Those comments merely expressed frustration because she was, admittedly, absent from work a considerable amount.

153. However, there was a line of questioning by the respondent where Mr Briggs suggested to the claimant that she might have misconstrued innocent behaviour on the part of Mr Leon Briggs because at the time,

although possibly unknown to her and certainly unknown to the respondent, she was pregnant. The reason for the misconstruction was that, he asserted, it was well-known that women who were pregnant had their emotions affected by hormones. As he put it in closing, it was possible that hormones associated with pregnancy may have changed the perception of a conversation where innocent comments were interpreted into something more sinister. This demonstrates to us that Mr Briggs was willing within an Employment Tribunal setting to make a suggestion based on a stereotypical view of the effect of pregnancy on the reliability of women as witnesses of events. This is consistent with a person who has the view that women are unreliable.

154. More than this, his credibility is damaged generally to quite a significant and marked extent by his willingness to have put before the Tribunal wholly invented documents and give oral testimony about meetings which did not take place. We reject his denials and conclude that he probably did make the comments alleged.

155. Moving forward to the decision to dismiss, as a matter of fact it is not in dispute that the claimant was in the protected period at the time she was dismissed. She has produced a MATB certificate in respect of that pregnancy which shows that her expected date of confinement includes 26 June 2022. 40 weeks prior to that is about the middle of September. This accords with her evidence that she discovered that she was pregnant around about the end of October. It is therefore credible that the claimant knew she was pregnant but she did not tell Ms Salmon this.

156. What the claimant relies on is a conversation that she describes in paragraph 47 of her witness statement as being very personal. She states that, during that conversation, she told Angella Salmon that she and her partner had decided that they would start trying to get pregnant because a health condition of the claimants meant that if she wished another child she should not delay.

157. This is denied by Angella Salmon and in her paragraphs 29 and 30 she states that, to the contrary, she was told earlier in the claimant's employment that, although she would like another child, she was not able to conceive. This is not consistent with medical evidence that the claimant had received in about mid-June 2021 although that does not preclude the claimant having given false information to her new employer.

158. There was much in the detail the claimant gave of this conversation that seemed to us to give it plausibility, in particular where she explained that the reason why she limited herself to saying she was trying to get pregnant and not told Ms Salmon the news she already had that she was pregnant was that she had not yet told her own mother. Furthermore, Ms Salmon's credibility is damaged by our earlier findings about her as a witness. On balance, we think it likely the claimant did tell Angella Salmon that she was trying to get pregnant. We also accept that Ms Salmon came across as shocked. That sort of personal news is also consistent with the claimant

sharing information about the prospect that her partner would ask her to become engaged.

159. Mr Neil Briggs states (his statement paragraphs 51 to 53) that he had discovered WhatsApp messages between the claimant and his wife that are at page 164, and considered the claimant's behaviour to have been inappropriate because of the amount of time she spent texting during the working day. He then said that he spoke to his son regarding the contents of the messages and this led to his son complaining about the claimant's behaviour towards him. He states (paragraph 53) that he did not behave as he should have done but said that his son needed to toughen up and try to adapt to the situation.

160. This is further evidence of confusion and inconsistency between the respondent's witnesses about the timeline. Furthermore, Mr Leon Briggs' statement does not refer to this incident from the end of October. Mr Neil Briggs' statement then goes on to detail the level of absenteeism in paragraph 55 and states simply that the claimant was dismissed with two weeks paid because of conduct and performance issues.

161. It was not alleged to Mr Briggs that the claimant's absence was not a reason for dismissal. However, the claimant alleges within these proceedings that concerns on the part of Mr Briggs that she may become pregnant and that this might lead to further absences was part of the reason for dismissal. It seems, perhaps surprisingly, that Mr Briggs snr. does not claim that the alleged behaviour by the claimant towards his son was a reason for dismissal and that is another reason why we conclude that it did not happen. The dismissal happened following a further period of absence because the claimant had been told to self-isolate.

162. It is common ground that Mr Briggs made the decision to dismiss. The claimant put to him that, since Ms Salmon was Mr Briggs' wife, it was reasonable to assume that the information given to Ms Salmon that the claimant was trying to become pregnant would have been passed to Mr Briggs. He denied this, he denied that his wife was the claimant's line manager and said that she was not the type of person who would pass on gossip. Naturally the position taken by Mr Neill Briggs was that this statement had not been made to Angella Salmon in any event.

163. We reject that evidence. The claimant had been absent again because of having to self-isolate to do with the contact of her daughter (page 99). Passing on information that the claimant might become pregnant was not, in those circumstances, likely to be regarded by the respondent as mere gossip since it affected the reliability of an employee's attendance. We think it is probable that this information was passed on to Mr Briggs and he did know before he made the decision to dismiss that he claimant was seeking to have a child with her partner.

Conclusions

164. We start with our conclusion in respect of the harassment claim. In respect of list of issues 3.1.1, 3.1.2 , 3.1.3 and 3.1.4 we have accepted that the conduct occurred and find that it was unwanted. We think that the question of whether this conduct met the test for harassment should be judged by looking at the course of conduct as a whole.

165. We do not wish anything we say to be taken to mean that for one work colleague to ask another work colleague on a date speculatively is necessary harassment or unlawful. However, that is not the totality of what happened in this case. Without repeating the details of what is set out above and having regard to all of our findings, Mr Leon Briggs asked the claimant out for a date, would not take no for an answer, asked prying, personal questions and invaded her space in an unwanted and inappropriate way. We think that it was reasonable for the claimant to regard this as intimidating, humiliating and offensive and we accept that the conduct did have that effect. We reject the allegation that it was intended to have that effect.

166. We accept that the conduct was related to sex because it was motivated by the claimant being a women to whom Leon Briggs was attracted.

167. Alternatively, the claimant argues that this was sexual conduct. The elements that are described where someone becomes unnecessarily and physically close to someone invading their personal space, touching them on the pretext of removing some dust, and the knowledge that this was done because Mr Leon Briggs was attracted to the claimant, that, in our view, makes this sexual conduct. The claim of harassment related to sex is made out in relation to those four allegations.

168. The allegation at 3.1.5 is not well founded. We do not consider that this is a kind of incident that has any similarity with the other four and find that there is insufficient evidence to conclude that it was targeting of the claimant rather than simply misplacing furniture following an office reorganisation. Furthermore, there is nothing from which to infer that this was related to sex.

169. So far as list of issues 3.1.6 is concerned we accept that the comments set out were made. They were unwanted. The claimant argued that they were related to sex because they amounted to less favourable treatment and comments that were equivalent were not said to Leon Briggs.

170. We are of the view that Leon Briggs and Mark Briggs were not in the same situation as the claimant. Mark Briggs was on a totally different contract and had different self-governance. In Leon Briggs' case he is the son of the Managing Director caring for his mother who was the mother of the Managing Director's other children and his contract had been agreed at the outset to have that flexibility in it. We do not think that they are suitable direct comparators. Of course a comparator is not needed for a harassment claim but the basis on which the claimant alleges that these comments were related to sex in particular, are that she said they would not have been made to a man. She relies on the treatment of Mark and Leon Briggs in support of that.

171. Although the first comment does refer to the father of the claimant's child we do not think that it is possible to conclude that a similar comment would not have been made in respect of a man who had similar levels of absence caring for a child were it not for the fact that the second comment was made. The second comment is a gender specific comment in it simply would not have been made to a man. Had it not been gender specific Mr Briggs would have said parent. That is grounds for believing that Mr Briggs would not have made the comment about a father being available to care for the claimant's child to a man. Therefore, we accept that these comments were related to sex in the way that the claimant alleges and those amount to sex related harassment.

172. As a result of the wording in s.212(2) EQA, that unwanted conduct cannot also amount to a detriment within s.39(2)(d). However, had that not been the case we would in the alternative have accepted that the claimant has shown evidence from which it might in the absence of any other explanation be concluded that those comments amounted to less favourable treatment on grounds of sex transferring burden of disproving discrimination to the respondent. Although there is evidence in the form of the respondent Mr Neil Briggs' letter to the accountant to suggest that he was very frustrated with the repeated and lengthy absences from work of the claimant, given the unsatisfactory nature of much of his evidence he has not satisfied us and not discharged the burden showing that those comments had nothing to do with gender. Indeed, he would hardly have been able to do so given the gender specific nature of the second.

173. We then come on to the question of dismissal. We have found that the claimant was dismissed on 9 November 2021. She had confided a day or two before starting a period of absence to Angella Salmon that she was attempting to become pregnant. Neil Briggs made the decision to dismiss but we have accepted that it is probable on the balance of probabilities that his wife told him of this conversation.

174. The claimant did not initially allege that pregnancy discrimination had anything to do with the decision to dismiss. She now alleges that this was pregnancy and maternity discrimination and the issues were clarified that way at the preliminary hearing. We consider that this particular claim fails for the following reasons.

175. The wording of s.18 EQA requires that the action complained of should take place within the protected period. As a matter of fact, the claimant was pregnant at the time of dismissal but this was not known by the respondent. The connection with pregnancy is said to be that a fear that she might become pregnant and have further periods of absence either to do with maternity leave or because of caring responsibilities for children was part of the reason for dismissal.

176. It seems to us that this does not amount to a reason within s.18(2)(a) which states that the unfavourable treatment needs to have been because of the pregnancy in relation to which the claimant is in the protected period at that point in time. The claimant's allegation amounts to her being in a protected

period for a pregnancy but the action of the respondent being in respect of a putative potential future pregnancy.

177. By reason of s.18(7), if conduct falls within s.18 it does not also fall within s.13 EQA. However, since we have decided that this conduct cannot fall within s.18 we go on to consider whether it falls within s.13.

178. We therefore consider whether it was less favourable treatment on grounds of sex (LOI 1.1.2). The claimant explained that she had not made the accusation originally that pregnancy or risk of pregnancy had been part of the reason for her dismissal because she thought she had no right to claim that as she knew she had not communicated the fact of her actual pregnancy to the respondent. This seems to us to be an understandable lack of knowledge of the legal niceties that she might, in the alternative, be able to claim sex discrimination.

179. The following factors seem to us to be matters the claimant can rely on as tending to show, in the absence of any other explanation, that the decision to dismiss was less favourable treatment on grounds of sex:

    179.1 The conversation between the claimant and Angella Salmon at the end of October when she told the latter that she was trying to become pregnant.

    179.2 The fact that that was probably relayed to Neill Briggs.

    179.3 Although there had been a lot of absence prior to the absence which ended with her dismissal, other than a letter from August sent to his accountant there was no indication that Mr Briggs was about to take action in October.

    179.4 In particular, he failed to follow any appropriate procedure and it was not asserted before us that the lack of continuous service and the lack of right to claim unfair dismissal was an explanation for that lack of procedure.

    179.5 The respondent's witnesses have consistently lied before this Tribunal. In particular, Neil Briggs and Angella Salmon lied about the process that they claimed to have followed to deliver formal warnings to the claimant about performance and attendance.

    179.6 We have found that Mr Briggs snr. made comments that amount to less favourable treatment on grounds of sex that display a concern about employment in particular of mothers.

180. The burden of disproving sex discrimination therefore transfers to the respondent who must show that the concern that the claimant, who had had a lot of absence, would have more if she became pregnant with another child was not more than a trivial influence on the decision to dismiss. This they have failed to do given the lack of weight that we feel able to give to

their evidence and the extent to which that evidence has been rejected. It falls far short of cogent evidence that is demanded by the authorities.

181. Nevertheless, there was evidence that the claimant's absence had an impact on the business and, in particular, on Angella Salmon, who had to come in early in order to cover the claimants work. We accept that absence was a real matter of concern. That is something which will need further investigation at a remedy hearing when one issue will be whether, had this dismissal not taken place, the claimant would nevertheless have been dismissed for a non-discriminatory reason at some point in the future.

182. There seemed to us to be other possible circumstances supported by evidence we have already heard that might tend to suggest circumstances in which the employment might come to an end. In particular the claimant accepted in her cross examination that she was not happy in that employment and had been thinking of leaving as was indicated by some of the documentary evidence. It is possible that the knowledge that she was pregnant might have affected that decision and we will also need to consider the prospects that the claimant would have returned to that employment after having a second child. There are therefore a number of variables which impact on remedy which will be considered at a separate hearing.

183. We have already decided for reasons set out above that the unauthorised deduction from wages claim succeeds.

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Employment Judge George

Date: …24 August 2023……..

Sent to the parties on: 30 August 2023

For the Tribunal Office