



# EMPLOYMENT TRIBUNALS

**Claimant:** Debbie Jacka

**Respondents:** Steren Surveyors Limited (1), Emma Rowson (now Ellicock) (2), Jason Ratcliffe (3), Peter Ellicock (4)

**Heard at:** Exeter **On:** 25, 26, 27, 28, and 29 September 2023

**Before:** Employment Judge Volkmer  
Ms Clarke  
Mr Launder

## Representation

Claimant: in person  
Respondent: Mr Sayers (Solicitor)

JUDGMENT having been sent to the parties on 23 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Introduction

1. By a claim presented on 30 March 2022, the Claimant brought the following claims:
  - 1.1. direct sex discrimination;
  - 1.2. harassment related to sex;
  - 1.3. victimisation;
  - 1.4. wrongful dismissal;
  - 1.5. unauthorised deduction from wages.
2. The Tribunal heard oral witness evidence from:
  - 2.1. Mr Jacka and the Claimant;
  - 2.2. Mr Ratcliffe, and Mr and Mrs Ellicock.
3. The Tribunal also considered witness statements from Jean Winter, Sophie Ratcliffe, Shirley Birch and Daniel Mayho who did not attend the hearing, and a hearing bundle of 511 pages.

## The Issues

4. The issues to be determined in the case were set out in a case management order dated 3 January 2023, as amended by the determination of Employment Judge Livsey in a hearing which took place on 12 April 2023 regarding the Claimant's amendment application. They are as follows:

### 1. **Time limits**

- 1.1. *The claim form was presented on 30 March 2022.*
- 1.2. *The claimant commenced the Early Conciliation process with ACAS about the First Respondent on 3 February 2022 (Day A) and the Early Conciliation Certificate was issued on 16 March 2022 (Day B). Accordingly, any act or omission which took place before 4 November 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.*
- 1.3. *In respect of the other Respondents the claimant commenced the Early Conciliation process with ACAS on 10 February 2022 (Day A). The Early Conciliation Certificate was issued on 23 March 2022 (Day B) Accordingly, any act or omission which took place before 11 November 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.*
- 1.4. *Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
- 1.4.1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?*
- 1.4.2. *not, was there conduct extending over a period?*
- 1.4.3. *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
- 1.5. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
- 1.5.1. *Why were the complaints not made to the Tribunal in time?*
- 1.5.2. *In any event, is it just and equitable in all the circumstances to extend time?*

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

- 2.1. *The Claimant is female.*
- 2.2. *Did the Respondent do the following things.*
- 2.2.1. *On about 9 August 2021, Emma Rowson accused Peter Ellicock of having an affair with the Claimant. The Claimant was not present (R2)*
- 2.2.2. *On 10 August 2021, Peter Ellicock told the Claimant that his fiancée, Emma Rowson, had "accused" him of having an affair with the Claimant. She was told that she could not speak with Emma Rowson about the alleged affair, even to reassure her. She was told the Claimant that she had to be extra nice to Emma Rowson and make allowances (R1 & R4).*
- 2.2.3. *In about the first week of September 2021, Emma Rowson told Peter Ellicock that he could no longer go out on appointments with*

*the Claimant because it made her uncomfortable, that he could no longer speak with Claimant about anything other than work, that he could no longer meet with the Claimant outside of the office, even if Jason Ratcliff was present (R2).*

- 2.2.4. *In the beginning of September 2021, Peter Ellicock told the Claimant that he could no longer go out on appointments with her because it made Emma Rowson uncomfortable, that he could no longer speak with her about anything other than work, and that he could no longer meet with her outside the office, even if Jason Ratcliffe was present (R1 and R4).*
- 2.2.5. *At the beginning of September 2021, Peter Ellicock stopped the Claimant's training and his support of it and stopped going on appointments with her (although he continued to do so with male colleagues) (R1 and R4).*
- 2.2.6. *In about early/mid-September 2021 Mr Ellicock and Mr Ratcliffe started to exclude the Claimant from directors' meetings by arranging discussions when they were on appointments together. This continued to the end of her employment (R1, R3 & R4).*
- 2.2.7. *Peter Ellicock stopped going on appointments with the Claimant, but he continued to go on appointments with other male colleagues (R1 and R4).*
- 2.2.8. *Peter Ellicock became hostile and aggressive towards Claimant, namely. He shouted at the Claimant in the office on three or four occasions in September and October 2021 (R1 ad R4) namely:*
  - 2.2.8.1. *on about 1 September 2021 after he had picked up or returned the wrong keys for an appointment in Exeter;*
  - 2.2.8.2. *after having asked when Ms Rowson was coming into the office and she shouted with words to the effect that he could not talk about it.*
- 2.2.9. *In late September/October 2021 Peter Ellicock, with Jason Ratcliffe agreeing, picked faults in the Claimant's work that were not actually faults/gaslighted her, namely (R1 and R4) as follows.*
  - 2.2.9.1. *Saying that she was using the term 'bell joints' incorrectly.*
  - 2.2.9.2. *In late October 2021, the Claimant conducted an inspection for a homebuyer survey at a property called "Awen". She was surprised to find high damp meter readings around the dormer windows as the property was a new build and asked R3 and R4 for advice, showing them the photographs of the readings. At this stage R3 and R4 could not come to a conclusion as to why the readings were high and instructed the Claimant to report it as a defect. R3 then authorised the sign off for the report, as the Claimant was not qualified at that time. When the client disputed this defect, R4 met with the client and the seller at the property (without wishing to discuss it with the Claimant first). He returned to the office very flustered saying it was "embarrassing" and that he would have to give the client a full refund, accusing the Claimant of getting the report fundamentally wrong.*
- 2.2.10. *Peter Ellicock used the WhatsApp chat group for "toxic and discriminatory rants" as follows.*
  - 2.2.10.1. *In May 2021, about a female colleague, 'fuck me we need a word with Charlotte tomorrow, I may shoot her, fucking fucktard, I think I will sack her shit tomorrow and get some decent staff*

- fucking idiot. Fire the bitch I say sack her.'* (R1, R4).
- 2.2.10.2. 6 October 2021, after forwarding a recording of a proposed radio advert Mr Ellicock said, 'just heard that, don't give up your day job, what the fuck, fuck me my windows have cracked. Do you want us to bust Rewind Radio fatboy fucker hang on the foundations have cracked sent fallen. My foundations are shattering the house is falling down. Why do we want to support that fat fuck. Don't like him or his radio station he is going to die soon of a coronary.' He continued in a like manner (R1 and R4).
- 2.2.10.3. On 15 October 2021, about sacking a female member of staff, 'sack the bitch I say' with offensive social media images. 'sack the fucker who gives a fuck she is a stupid useless lazy bitch'. Mr Ratcliffe replied with a smiley face and said I agree. Mr Ellicock ended the conversation with further disparaging remarks (R1, R3 and R4).
- 2.2.10.4. On 3 November 2021, Mr Ellicock in response to the Claimant and Mr Ratcliffe discussing a training course, said 'I think you should concentrate on upping your building pathology and read those books (R1 and R4).
- 2.2.11. From mid/late September 2021 onwards Peter Ellicock and/or Jason Ratcliffe excluded the Claimant from social meetings which Mr Ellicock was attending. (R1, R3 & R4).
- 2.2.12. In November 2021 Emma Rowson put pressure on Peter Ellicock to dismiss the Claimant and/or remove her as a director (R2).
- 2.2.13. On 11 November 2021:
- 2.2.13.1. Peter Ellicock and Jason Ratcliffe told the Claimant that the quality of her work was not good enough (R1, R3 & R4);
- 2.2.13.2. Peter Ellicock said to the Claimant, "Clearly you and Emma despise each other. I can't work with you anymore" (R1 and R4);
- 2.2.13.3. Peter Ellicock gave Jason Ratcliffe an ultimatum regarding the Claimant's employment namely if he did not go along with what he said he would close the company down. Mr Ratcliffe told the Claimant that he did not have an option (R1, R3 and R4);
- 2.2.13.4. on 11 November 2021, Peter Ellicock told the Claimant that she should go home and that he would speak with her about the purchase of her shares (R1 and R4).
- 2.2.14. On 12 November 2021, blocking the Claimant's computer and/or email access (R1, R3 and R4).
- 2.2.15. On 17 November 2021, Peter Ellicock and/or Jason Ratcliffe offered to purchase the Claimant's shares for a figure "well under market value" in exchange for her resignation as a director (R1, R3 & R4).
- 2.2.16. In November 2021, cancelling the Claimant's private healthcare with BUPA (R1, R3 and R4).
- 2.2.17. On 3 December 2021, Peter Ellicock and Jason Ratcliffe informed the Claimant that they would take steps to remove her as a director if she did not accept their offer (R1, R3 and R4).
- 2.2.18. On 24 December 2021 the Claimant discovered that Peter Ellicock and Jason Ratcliffe had on 13 December 2021 set up a new company under a slightly different name to R1 (R3 and

R4).

- 2.2.19. On 19 January 2022 Peter Ellicock and Jason Ratcliffe filed a TM01 with Companies House in order to remove the Claimant as a director of the First Respondent, (R1, R3 and R4).
- 2.2.20. Peter Ellicock and/or Jason Ratcliffe fabricated documents in order to try and remove the Claimant as a director, including a letter backdated to 15 November 2021 inviting her to an emergency meeting on 20 December 2021, the agenda and minutes for that meeting. The Claimant says this happened in January 2022 after the Claimant asked to see the accounts. (R1, R3 and R4).
- 2.2.21. Failing to pay the Claimant's basic salary and/or car allowance from January 2022 onwards (R1, R3 and R4).
- 2.2.22. Failing to pay the Claimant's share dividend/bonus from November 2021 onwards (R1, R3 and R4).
- 2.2.23. Failing to give the Claimant notice and/or pay her in respect of her notice period (R1, R3 and R4).
- 2.2.24. Failing to inform the Claimant with regard to the "current position of employment" until the response was received (R1, R3 and R4).
- 2.2.25. Dismissed the Claimant on about 11 November 2021.
- 2.2.26. Reported her to Action Fraud.

2.3. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than Jason Ratcliffe, Dan Mayho and/or a hypothetical comparator. The Tribunal will need to determine whether Jason Ratcliffe and/or Dan Mayho are appropriate comparators and will need to determine who the hypothetical comparator should be. The Respondent asserts that the correct hypothetical comparator is a homosexual man.

### **3. Harassment related to sex (Equality Act 2010 s. 26)**

- 3.1. Did the Respondent do the following things:
  - 3.1.1. The matters relied upon (and proceeding as above) as direct discrimination.
- 3.2. If so, was that unwanted conduct?
- 3.3. Did it relate to the Claimant's protected characteristic, namely sex?
- 3.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

### **4. Victimisation (Equality Act 2010 s. 27)**

- 4.1. Did the Claimant do a protected act as follows:
  - 4.1.1. Bringing this claim
- 4.2. Did the Respondent do the following things:
  - 4.2.1. reported her to Action Fraud; and/or
  - 4.2.2. on 8th August 2022 R4 falsely stated that R1 had entered into

liquidation and is currently with an independent liquidator for the company's closure, and asked the Employment Tribunal if the case needed to continue (the Claimant asserts that this was to dissuade her from continuing with her claim).

4.3. By doing so, did the Respondent subject the Claimant to detriment?

4.4. If so, was it because the Claimant had done the protected act?

**5. Wrongful dismissal; notice pay**

5.1. What was the Claimant's notice period?

5.2. Was the Claimant paid for that notice period?

5.3. If not, was the Claimant guilty of gross misconduct or did she do something so serious that the Respondent was entitled to dismiss without notice?

**6. Unauthorised deductions (Part II of the Employment Rights Act 1996)**

6.1. Were the wages paid to the Claimant for November and December 2021 and January, February and March 2022 less than the wages she should have been paid (the Claimant says this includes dividends/bonus and car allowance and notice pay)?

6.2. Was any deduction required or authorised by statute?

6.3. Was any deduction required or authorised by a written term of the contract?

6.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

6.5. Did the Claimant agree in writing to the deduction before it was made?

6.6. How much is the Claimant owed?

**7. Breach of Contract (Extension of Jurisdiction Order 1994)**

7.1. Did this claim arise or was it outstanding when the Claimant's employment ended?

7.2. Did the Respondent do the following:

7.2.1. Fail to pay the Claimant her dividend/bonus, car allowance for

7.2.2. November and December 2021

7.3. Was that a breach of contract?

7.4. How much should the claimant be awarded as damages?

**8. Remedy**

Discrimination or victimisation

8.1. What financial losses has the discrimination caused the Claimant?

8.2. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.3. If not, for what period of loss should the Claimant be compensated for?

8.4. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

8.5. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

8.6. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.7. Should interest be awarded? How much?

**Credibility**

5. The Tribunal found the Claimant to be credible in the evidence she gave. In

general the Claimant answered questions from her own recollection, and was clear and consistent in the answers she gave. The Claimant's account was consistent with contemporaneous documentation, in particular text messages, both with Mr Ellicock (page 441) and contemporaneous messages to friends (page 450).

6. Mr Jacka was a credible witness, although occasionally straying off topic. He answered questions from his own recollection and was clear and straightforward in the answers he gave.
7. Mr Ellicock was not a credible witness overall. He was uncertain in giving his evidence. He made frequent reference to his written witness statement rather than answering from his own recollection. Occasionally he was evasive, for example when asked about the meaning of certain text messages he answered that he agreed the wording of the text message and would not be drawn to answer substantively regarding its meaning. Certain answers he gave were completely at odds with the contemporaneous documents (such as page 441, 450), which very much undermined his credibility.
8. Mrs Ellicock was also a less credible witness, who seemed reliant on her witness statement rather than recollecting matters herself. There were discrepancies in relation to key facts (the date on which Mr Jacka's salary reference letter had been discussed between Mr and Mrs Ellicock and her attendances at the office) in her initial Grounds of Resistance and her witness evidence, which appeared to have changed after seeing key documents. Her explanation that her memory had been prompted was not convincing in light of the alleged important and significant emotional impact on her of discovering that the reference letter had been sent from her email address. Her description of her feelings in witness evidence appeared to be contradicted by contemporaneous documents (page 459).
9. The Tribunal considered that Mr Ratcliffe appeared to try to buy time to consider what the best answer would be by talking off topic before coming back to the answer, and on occasion needing to be asked a question a second time in order to prompt an answer. The Tribunal preferred the Claimant's evidence in key areas because it was consistent with the contemporaneous documents (page 450).

## **The Facts**

10. The First Respondent is a company which undertook private and commercial surveys ("**Steren**"). Mr Ratcliffe (the Third Respondent) and Mr Ellicock (the Fourth Respondent) were both directors of Steren. The Second Respondent was Mr Ellicock's partner at the time of the allegations, and is now his wife.
11. Before working for Steren, the Claimant was an estate agent. She and Mr Ellicock had previously worked together for around five years and were joint owners of another business, Hus Estate Agents Ltd. The Claimant owned 25% of Hus Estate Agents Ltd. Steren was incorporated on 21 August 2020, with Hus Estate Agents Ltd owning 75% of the shares and Mr Ratcliffe owning 25%. Later, the shareholdings were changed so that the Claimant owned 10%, Mr Ratcliffe 40% and Mr Ellicock 50% of Steren.

12. On 6 April 2021 the Claimant registered with the Royal Institution of Chartered Surveyors (“RICS”). The Claimant became an employee of Steren on 10 April 2021 in the role of a trainee surveyor. The Claimant did not have a written employment contract. The Respondents’ position was that the Claimant started in an administrative role, but the Tribunal preferred the Claimant’s account as it was more consistent with the contemporaneous email showing Mr Ratcliffe copied to an email registering the Claimant as a trainee surveyor (page 141), her salary and status as a director. However she did at first undertake administrative work.
13. The Claimant, Mr Ellicock and Mr Ratcliffe organised a trip to the National Self Build and Renovation Centre on 17 April 2021. All three spouses were invited to attend, and Mr Ratcliffe and Mr Ellicock were keen that Mr Jacka attended as they sought to persuade him to join Steren and this would be a good opportunity to introduce him to surveying.
14. In May 2021 the Claimant was appointed as a statutory director of Steren along with Mr Ratcliffe and Mr Ellicock. The Claimant’s salary was confirmed at £60,000 per year on 1 May 2021 (page 143).
15. A WhatsApp group was set up between the Claimant, Mr Ratcliffe and Mr Ellicock. Various work and personal matters were discussed in this WhatsApp group. On 25 May 2021 Mr Ellicock sent a WhatsApp saying: *“fuck me we need a word with Charlotte tomorrow. She’s a fuck yard [sic]. Client rang wanting survey ASAP willing to pay whatever it takes and turned them away as no time. Could have tripled out [sic] pay. I may shoot her, fucking fuck yard”* (Page 393). The Claimant responded a minute later saying *“Wtf!! How do you know? Can’t you go back to them?”* after some discussion, Ellicock stated *“I think I will sack her shit tomorrow and get some decent staff fucking idiot...”* The Claimant responded *“Maybe training and a clear written job description”* (page 394). Mr Radcliffe responded *“I agree with debts on that one lol”*. Mr Ellicock said *“fire the bitch I say”*. Whilst clearly there is use of foul language Mr Ellicock’s evidence was that he used this type of foul language in relation to males and females, and the Tribunal consider that this was not intended by Mr Ellicock to be offensive. The Tribunal notes Claimant’s response of “WTF” meaning “what the fuck”. At this time the relationship between Mr Ellicock and the Claimant was by all accounts close and harmonious, as such the Tribunal consider that on the balance of probabilities, these texts did not have any particularly upsetting effect on the Claimant at the time. The subsequent events may have cast a different light on them in her mind.
16. The Respondents position was that Mr Jacka joined Steren in an administrative role for £12.50 an hour, 16 hours per week. This is the same arrangement as had been agreed for Mrs Ellicott and Mr Radcliffe’s wife, Sophie. The Tribunal preferred the Claimant’s and Mr Jacka’s account that in late May the parties agreed that Mr Jacka would join Steren as a Trainee Surveyor at a salary of £40,000 per year. The reason for this finding is because of the comments on overall credibility set out above. In addition, whilst it was higher than the £32,000 per year paid to Mr Nathan Bennett-Glew, the relevant salary seemed credible taking this and the salaries for the Claimant, Mr Ellicock and Mr Ratcliffe at £60,000 per year (given neither the



Claimant nor Mr Ellicock were qualified surveyors). Further the Tribunal considered Mr Jacka's explanation that he would not have left his previous role, in which he was paid a similar sum, for a significantly lower paid role to be credible notwithstanding certain disagreements or concerns in relation to his previous employment. The Claimant's and Mr Jacka's accounts were also consistent with a text message on 16 May 2021 (page 391) in which Mr Ratcliffe suggested that Mr Jacka did a couple of days to experience a valuation, some office work and a survey. The fact that Mr Jacka initially undertook administrative work was consistent with the way in which other trainee surveyors (such as the Claimant) had started working at Steren. Mr Jacka also did not have a written point contract.

17. Mr Jacka gave notice to his previous employer, his last day being 11 June 2021. On 7 June 2021 the Claimant's and Mr Jacka's daughter's nursery was closed by the police. This gave rise to some childcare issues. Mr Jacka worked at Steren on 21 and 24 June 2021. On 24 June 2021 Mr Ratcliffe tested positive for COVID on 24 June 2021. This meant that Mr Jacka was required to isolate. He could not work from home because he was so new and had not gained experience in the administrative side of the business. This combined with childcare issues and a holiday at the end of July meant that Mr Jacka did not work during July 2021.
18. From July 2021 the Claimant accompanied Mr Ratcliffe and Mr Ellicock on site visits. These were predominantly with Mr Ellicock as Mr Ratcliffe was able to do the full survey writing role, whereas Mr Ellicock has dyslexia and it therefore assisted him for the Claimant to be there to assist with the report writing side. This finding is based on the Claimant's evidence which the Tribunal found to be more credible than that of the Respondents for the reasons set out above.
19. During this time the Claimant and Mr Jacka were applying for a mortgage in order to buy the remaining share of their family home, which they had initially bought on a shared ownership basis due to high childcare costs. The mortgage broker asked for a reference from Mr Jacka's new employer, i.e. Steren. On 23 July 2021, the Claimant discussed this with Mr Ellicock and they wrote the reference letter together. The mortgage broker had advised the Claimant that it was better if the reference letter did not come from her email account. Initially Mr Ellicock had said that he would send it from his email account. Mr Ellicock then needed to leave the office early and told the Claimant to send it from Mrs Ellicock's email account, which she did because it was time sensitive.
20. The Tribunal made this finding based on the Claimant's evidence which it found to be more credible than Mr Ellicock's overall for the reasons set out above. Specifically in relation to this point, the Claimant's account was supported by a text message exchange between the Claimant and Mr Ellicock on 18 August 2021 (page 441). In this exchange Mr Ellicock said that Mrs Ellicock was unhappy that the Claimant had sent the reference from Mrs Ellicock's email address saying she thought it was fraud. The Claimant said to Mr Ellicock: "*she doesn't think I did it without you agreeing or knowing does she?*" And Mr Ellicock's response was "*no not at all just pissed sent from her*". This was clear evidence of Mr Ellicock's knowledge and agreement to the

Claimant sending the reference. In the face of this exchange of messages the Tribunal did not find Mr Ellicock's evidence credible. Mr Ellicock's protestations that he did not really know the contents of the reference were not credible in the face of these messages. Further, Mr Ellicock and Mrs Ellicock account was that due to Mr Ellicock being stressed, tired and intoxicated, Mrs Ellicock had mentioned it but there had been no detailed discussion about it on 18 August 2021. This was simply not credible given the reference in Mr Ellicock's WhatsApp message to Mrs Ellicock considering it "fraud". If Mr Ellicock had been told this, and had had no knowledge of the Claimant's actions, the Tribunal did not find it credible that he would not have made further enquiries of his partner in the face of such a serious accusation being raised. If not that evening then certainly in the morning, when on his account he would get up early to catch up with work. There was no permission to adduce expert evidence but the Tribunal took account of the letter from a handwriting expert (pages 344), placing weight on it as a document rather than an expert report. This determined that Mr Ellicock had not signed the letter. Even taking this document into account, and in particular because of the message exchange on 18 August 2021, the Tribunal found the Claimant's account to be more plausible.

21. In August 2021, for tax efficiency reasons, all three directors changed their monthly income structure to a reduced salary of £1,047.50, car allowance of £380 and a director's loan of £3,500. The idea was that dividends would be declared by the company at the end of the year to extinguish the directors' loans. The parties intended to change the shareholding to equal shareholding between the three parties in order for the dividends to be equally divided. It was intended that Mr Ellicock would retain majority voting rights. A draft shareholders agreement was prepared, but this part of the arrangement was never concluded.
22. It is an agreed fact between the parties that the Claimant and Mr Ellicock had had a close and harmonious professional relationship for around six years by summer 2021. There was no relationship of a romantic or sexual nature between them at any point.
23. Early in the summer Mr Ellicock confided in the Claimant regarding his relationship with Mrs Ellicock, referring to jealousy and trust issues. He told the Claimant that Mrs Ellicock was not happy with the amount of time Mr Ellicock and the Claimant worked together on appointments but said that it was working well for the company so would continue. On 9 August 2021 the Claimant and Mr Ellicock spent most of the day together undertaking homebuyer surveys. Mrs Ellicock became unhappy because Mr Ellicock was not answering his phone. Mr Ellicock told the Claimant that she did not trust him. On the evening of 9 August 2021 Mrs Ellicock accused Mr Ellicock of having an affair with the Claimant. This is disputed by Mr and Mrs Ellicock, who say that Mrs Ellicock asked Mr Ellicock whether the Claimant and Mr Ellicock had previously had a relationship. The Tribunal nevertheless considered that it was likely to have happened as alleged by the Claimant on the balance of probabilities. This is because of the overall credibility of Mr and Mrs Ellicock's evidence and because it was consistent with the agreed discussion which took place the following day, in which Mr Ellicock told the Claimant that Mrs Ellicock had accused him of having an affair.

24. On 10 August 2021 Mr Ellicock told the Claimant that Mrs Ellicock had accused him of having an affair with the Claimant. He told the Claimant that she could not discuss their conversation or the accusation with Mrs Ellicock. He said that the Claimant should be extra nice to her. The Claimant felt distressed and humiliated at this accusation which she considered to be very serious and clearly untrue.
25. The week following this, the Claimant was on annual leave. On her return Mr Ellicock told her that he could no longer go out on appointments with her, talk to her about non work matters or meet with her outside of the office even if Mr Radcliffe was present because Mrs Ellicock was not comfortable with him doing so. It is agreed between the parties that Mr Ellicock stopped going on site visits with the Claimant from the beginning of September 2021. The Respondents' explanation for this is that they considered that the Claimant had reached a level of competence and experience which meant that she could go on site visits on her own. The Tribunal considered that the reason for this sudden change in approach was Mrs Ellicock's suspicion regarding an affair. The Tribunal found the Claimant's account to be more credible for general reasons of credibility as set out above and also because it was more consistent with the overall timeline of events. Whilst it is clear the Claimant and Mr Ellicock went out for coffee in early September (page 459A), the Tribunal did not consider this to undermine the Claimant's account of what had been discussed.
26. Whilst the Tribunal consider they have enough evidence, based on the Claimant's account, to conclude what Mr Ellicock told the Claimant regarding appointments and meeting outside of the office, there is no evidence from which the Tribunal could make a finding that Mrs Ellicock had told Mr Ellicock this. This differs from the affair accusation which Mr Ellicock had informed the Claimant originated from Mrs Ellicock. In this case it is an assumption that Mrs Ellicock had given such an active instruction. It is equally possible that this could have been because of Mr Ellicock's perception that Mrs Ellicock would be uncomfortable as a result of the previous accusation of an affair.
27. On 1 September 2021 Mr Ellicock returned the wrong set of keys to an estate agent after a site visit. A discussion between the Claimant and Mr Ellicock about this ensued and Mr Ellicock shouted at the Claimant. This was witnessed by Mr Ratcliffe who told the Tribunal that it was only Mr Ellicock shouting, but nevertheless sought to maintain that it was a mutual disagreement. Mr Ellicock's behaviour came as a shock to the Claimant who found it intimidating and upsetting. She was brought to tears. The Tribunal preferred the Claimant's evidence on this for overall credibility reasons and its consistency with contemporaneous messages from former colleagues in a nearby office (page 457A and 457C). The Respondents sought to explain Claimant upset by reference to an email regarding her daughter's nursery not reopening. However the Tribunal was satisfied by the Claimant's and Mr Jacka's explanation that they had already found alternative childcare given the nursery's closure on 7 June 2021, such that the Claimant would not have been upset by this email, and in any case had not seen it until coming home from work. Mr Radcliffe's evidence was that Mr Ellicock had indeed shouted at her, and the Tribunal considered it was more plausible that she had been

upset by the shouting.

28. On 3 September 2021 the Claimant asked to meet Mr Ellicott for coffee, he apologised and they agreed to move on. However later in early/mid September Mr Ellicock again lost his temper and shouted at the Claimant in response to her asking what time Mrs Ellicock was due to be coming in. The Claimant found this to be intimidating and aggressive. This finding is based on the Claimant's evidence.
29. In relation to both instances of shouting, the Tribunal considers on the balance of probabilities that the explanation for Mr Ellicock's behaviour was the background pressure being put on him by Mrs Ellicock, which meant after a long and harmonious working relationship, he was now treating the Claimant in this manner which was intended to be hostile towards her.
30. The Tribunal does not uphold the Claimant allegation that Mr Ellicock and Mr Ratcliffe excluded the Claimant from directors meetings. Although there was a convention of keeping Fridays free so that the directors could discuss, there were no formal regular arrangements which ceased. The Tribunal accepts the evidence of Mr Ratcliffe and Mr Ellicock that it was simply the case that they were going on appointments and happened to discuss certain matters, rather than there being any exclusion.
31. In late September/October 2021 Mr Ellicock told the Claimant that she had used the term bell joints incorrectly. The Claimant conducted an inspection by herself in relation to which she had incorrectly reported damp, this was not flagged by Mr Ellicock and Mr Ratcliffe in discussing the matter and reviewing the report. After feedback from the client and a further visit by Mr Ellicock, the error was discovered. This was fed back to the Claimant. On balance taking into account the evidence on this, the Tribunal considered this was reasonable feedback in relation to a Trainee Surveyor. However against the background of the facts already outlined, it was understandable that the Claimant may have perceived it differently to the way she might have done when relationships within Steren were more harmonious.
32. The Claimant alleges that from mid-to-late September 2021 onwards Mr Ellicock and/or Mr Radcliffe excluded the Claimant from social meetings which Mr Ellicock was attending. No evidence was put to the Tribunal of an example of this occurring, and the Tribunal did not therefore uphold this allegation.
33. On 6 October 2021, after the Claimant forwarded a recording of a proposed radio advert, the following interaction occurred in the group WhatsApp chat between the three directors (page 429):  
  
Mr Ellicock: *"just heard that, don't give up your day job, what the fuck, fuck me my windows have cracked."*  
Claimant: *"Did they catch your reflection?!"*  
Mr Ellicock: *"no I'm vampire but still stick to writing reports"*  
Claimant: *"Ha ha"*  
Mr Ellicock: *"Do you want us to bust Rewind Radio fatboy fucker hang on the foundations have cracked fence fallen."*

Claimant: *"you're hilarious... (crying with laughter face emoji)"*

Mr Ellicock: *"My foundations are shattering the house is falling down emergency counsel rewind immediately (crying with laughter face emoji). Why do we want to support that fat fuck. Don't like him or his radio station he is going to die soon of a coronary. I just shat myself due to vibrations (crying with laughter face emoji)"*

Claimant: *"Charming!! Free advertising :)"*

34. The Tribunal find that Mr Ellicock commonly used this type of language. However given the tone and content, consider that Mr Ellicock did intend this to be hostile towards and a put down to the Claimant. After a long and harmonious working relationship, because of the suggestion of an affair, his treatment of the Claimant had changed. Based on the Claimant's witness evidence at paragraph 59, the Tribunal find that these comments made the Claimant feel humiliated.
35. On 15 October 2021 Mr Ellicock sent messages in the group WhatsApp chat in relation to a female staff member saying *'sack the bitch I say'* (page 443), *'sack the fucker who gives a fuck stupid useless lazy bitch'*. Mr Ratcliffe replied with a smiley face and said he agreed. Mr Ellicock responded *"lazy useless self-important judgemental fat bitch. Fuck her and fuck right off"*. The Claimant did not engage with this part of the conversation although did respond in relation to a discussion about the timing of any discussion in which to dismiss the staff member. The Tribunal find that despite the use of swear words this was not unusual for Mr Ellicock, who also used similar offensive language in relation to males (as already discussed in relation to the radio DJ). The Tribunal finds that it was not intended by Mr Ellicock or Mr Ratcliffe to be offensive. The Tribunal take into account the timeline of events and in particular Mr Ellicock's actions before this message, and make a finding based on the Claimant's evidence that the Claimant found Mr Ellicock's messages to be hostile, offensive and sexist. The Tribunal notes that the Claimant's evidence refers only to Mr Ellicock's language as being offensive, and inconsiderate, which is consistent with the evidence overall that at this point she was getting on well with Mr Ratcliffe, and the fact that his interaction was minimal. The Tribunal find that the Claimant did not find Mr Ratcliffe's interaction to be hostile or offensive.
36. On 3 November 2021, Mr Ellicock in response to the Claimant and Mr Ratcliffe discussing a training course, said *"I think debs you should concentrate on upping your building pathology and read those books"*. The Tribunal consider, given the tone and content, that Mr Ellicock did intend this to be hostile towards and a put down to the Claimant. After a long and harmonious working relationship, because of the suggestion of an affair, his treatment of the Claimant had changed. The Tribunal take into account the timeline of events and in particular Mr Ellicock's actions before this message, and based on the Claimant's evidence make a finding that the Claimant found Mr Ellicock's messages to be hostile, offensive and sexist.
37. On 11 November 2021, Mr and Mrs Ellicock say that in the morning before work they finally discussed the email attaching the salary reference in relation to Mr Jacka. The Claimant says that Mrs Ellicock put pressure on Mr Ellicock to dismiss her and/or remove her as a director. The Tribunal did not find Mr

and Mrs Ellicock's account of the conversation on that day to be credible for the overall credibility reasons given above. The Tribunal has already made a finding that Mr Ellicock was fully aware and agreed to the Claimant sending the letter on 23 July 2021. Mrs Ellicock in particular seem to struggle to recall comments set out in her witness statement as having been made in the alleged conversation, at one point asking "*was that in my witness statement?*", pausing and then when asked by the Judge if she could recall making the comment, answering that yes she had said it. Further given the Tribunal's findings in relation to the content of the meeting with the Claimant on this date, which I will come onto, it did not seem likely that this form to the topic of the conversation between Mr and Mrs Ellicock. The Tribunal also had no evidence upon which it could conclude that it was Mrs Ellicock who had suggested the dismissal/removal of the Claimant.

38. That day Mr Ellicock and Mr Ratcliffe, without prior warning, asked the Claimant to come to the meeting room and told the Claimant that the quality of her work was not good enough, Mr Ellicock said to the Claimant "*Clearly you and Emma despise each other. I can't work with you any more*". Mr Ellicock told the Claimant that she should go home and that he would speak to her about her shares.
39. At this point the Respondents had not in fact reviewed her work in detail, the Tribunal consider that this took place on the following day based on emails sent by Mr Ratcliffe on 12 November 2021. The Tribunal prefer the Claimant's account of Mr Ellicock leaving the room, and Mr Ratcliffe saying that he had been given an ultimatum by Mr Ellicock who had said he would close the company down if he did not comply. The reason for this finding is because of overall credibility as already set out above and because the Claimant's account was consistent with her account in contemporaneous text messages to another employee the same day (page 451).
40. The Tribunal find that there was no mention of mortgage fraud in this meeting. This finding is based on preferring the Claimant's account for overall credibility reasons and because it is consistent with a contemporaneous text message to another employee on the same day (page 450 and 451). This is also consistent with the Claimant not referring to this matter in her claim form.
41. The Tribunal consider that all of the parties understood that it had been communicated on 11 November 2021 that the Claimant's employment would end, i.e that she was being dismissed. This finding is based on the Claimant's contemporaneous account to her friend Mrs Tinn as well as the Respondents' evidence. However it is clear that the situation was not assisted by complete lack of any written follow-up to make clear that the Claimant had been dismissed and on what day her employment ended. The Tribunal find that her employment ended on 31 December 2021, the last day in relation to which her salary was paid. The Tribunal consider that this period (11 November 2021 to 31 December 2021) reflects a reasonable period of notice for an employee in the Claimant's role as a trainee surveyor (by reference to statutory notice only in the contract of other trainee surveyors) and her status as a director.
42. On 12 November 2021 the Claimant was blocked from her computer and

email access. On 17 November 2021 Mr Ellicock and Mr Ratcliffe offered to buy the Claimant's shares in the First Respondent in exchange for her resignation as a director (page 220). The Tribunal has no evidence on which to base a finding that the figure was below market value as alleged by the Claimant. The Claimant's BUPA health care was cancelled with effect from 21 November 2021 (page 250). On 3 December 2021 Mr Ellicock and Mr Ratcliffe emailed the Claimant saying that if she did not accept their offer to buy her shares they would take steps to remove her as a director and close down the company (page 225).

43. On 13 December 2021 Mr Ellicock and Mr Ratcliffe set up a new company under slightly different name. On 19 January 2022 Mr Ellicock and Mr Ratcliffe filed a TM01 with Companies House to remove the Claimant as a director of Steren. The Tribunal found that this behaviour was motivated by the Claimant's departure from the First Respondent, and considered that Mr Ellicock and Mr Ratcliffe would have treated any dismissed director in the same manner.
44. The Claimant alleges that Mr Ellicock and/or Mr Ratcliffe fabricated documents, namely a letter dated 15 November 2021 inviting her to an emergency meeting on 20 December 2021 and the agenda and minutes for that meeting. The Claimant believes that these documents were only created after the Claimant asked to see the accounts in January 2021. The Tribunal is somewhat sceptical about the Respondents' explanation for failing to provide meta data in relation to these documents. Mr Ellicock and Mr Ratcliffe say that Mr Ellicock's computer was lost in a service station. However the Tribunal does not consider it has sufficient evidence to conclude on the balance of probabilities that there was fabrication of these documents.
45. The ACAS conciliation period with Steren was between 3 February 2022 and 16 March 2022, and between 10 February 2022 and 23 March 22 with the individual Respondents (pages 115 to 118). Her claim was presented on 30 March 2022.
46. On 7 March 2022 Mr Ellicock made a report to Action Fraud alleging that the Claimant had committed mortgage fraud. The Tribunal considers that this report was made because Mr Ellicock was aware that the Claimant would soon be bringing a discrimination claim. The reason for this finding is that the Tribunal considers that Mr Ellicock had been aware of the letter since 23 July 2021 and had not taken any action in relation to it whatsoever, and had then made this report during the ACAS conciliation period. The Tribunal considers that against this timeline and knowledge, on the balance of probabilities the motivation was connected to the impending proceedings.
47. On 8 August 2022 Mr Ellicock wrote to the Employment Tribunal saying that Steren had now entered liquidation and that the firm was currently with an independent liquidator for its closure. He asked whether this would have a bearing on whether the case needed to proceed (page 303). Whilst it is clear that the liquidators had not been formally instructed yet, there had been discussions with the accountants and this was the intended course of action. Since there were three individual Respondents, this would only have affected the claim in relation to Steren. As such the Tribunal does not consider this

correspondence to be unreasonable or detrimental.

## Discrimination Complaints

48. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (the “EqA”). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, harassment; and victimisation.
49. The protected characteristic relied upon is sex, as set out in sections 4 and 11 of the EqA.
50. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
51. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
52. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
53. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
54. Employers are liable for the acts of their employees under section 109 EqA, which sets out that “*Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*”. Individuals can also be personally liable for discrimination under section 110 EqA:
- (1) *A person (A) contravenes this section if—*
    - (a) *A is an employee or agent,*
    - (b) *A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be),*
  - and*



(c) *the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).*

Duplication of Direct Discrimination and Harassment Complaints

55. The Claimant has duplicated a number of her specific complaints as both harassment and/or direct discrimination. The Tribunal will determine these allegations in the following manner. In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.
56. If the factual allegation is proven, then the Tribunal will apply the statutory test for harassment under section 26 EqA. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under section 212(1) EqA the definition of detriment does not include conduct which amounts to harassment.
57. If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

**Harassment**

58. Turning now to the complaint of harassment under section 26 EqA, a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
59. The Tribunal also has regard to the Equality and Human Rights Commission (EHRC)'s Code of Practice on Employment (2011) (the "EHRC Employment Code").
60. Unwanted conduct means conduct which is 'unwelcome' or 'uninvited' (EHRC Employment Code paragraph 7.8). Unwanted conduct means conduct that is unwanted *by the employee* (Thomas Sanderson Blinds Ltd v English EAT 0316/10).
61. Section 26(1) EqA requires that the unwanted conduct in question has the purpose or effect of: violating the Claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Claimant only has to show one of these two strands, i.e. that the conduct had the purpose or effect either of violating dignity or of creating the proscribed environment. The Court of Appeal gave guidance on determining whether this part of the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and

Nottingham [2018] EWCA Civ 564: “In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (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 other circumstances - subsection (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.”

62. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: “one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.”
63. Whether unwanted conduct has the proscribed effect is question of fact to be determined objectively by the Tribunal. Although the Claimant’s subjective perception is relevant if it is not reasonable for the conduct to have the proscribed effect, that will effectively determine the matter Ahmed v Cardinal Hume Academies EAT 0196/18.
64. Not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. This is the case even if it may have caused the recipient to be upset. Grant v HM Land Registry [2011] EWCA Civ 769 “Tribunal’s 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.”
65. Other circumstances of the case must also be taken into account under S.26(4) EqA. These will inevitably vary from case to case, and may assist the Tribunal to determine the Claimant’s perception and the reasonableness of it. The EHRC Employment Code at paragraph 7.18 sets out that such circumstances can include the claimant’s health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place.
66. The unwanted conduct must be “related to” the protected characteristic, here the Claimant’s sex. In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor 2020 IRLR 495, EAT, His Honour Judge Auerbach made clear that the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is “because of” a protected characteristic, it is a broader, and, therefore, more easily satisfied test. Whether or not the conduct is related to the characteristic in question is a

matter to be determined by the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. Whether the complainant considers that the conduct related to that characteristic is not determinative.

67. The Tribunal notes at paragraph 7.10 of the EHRC Employment Code also sets out that harassment can occur where unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic. The example given is: *“A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex.”*

### **Discussions and Conclusions**

68. Allegation 2.2.1 is factually made out. This was a private conversation between Mr and Mrs Ellicock in Mr and Mrs Ellicock’s home about their relationship with one another (i.e. an allegation of infidelity) of which the Claimant was not aware at the time. The Tribunal considers that this conduct was not conduct during the course of employment. Therefore Tribunal considers that this conduct does not fall within section 109 EqA. This means that the Second Respondent also cannot be personally liable as section 110 EqA liability is dependent on section 109 being made out. This allegation of harassment is dismissed.
69. Allegation 2.2.2 involves Mr Ellicock conveying the above conversation to the Claimant. This conduct was not because of the Claimant’s sex, it was because of Mrs Ellicock’s accusation that Mr Ellicock and the Claimant were having an affair, and is therefore related to sex. The Tribunal find that it in the Claimant’s perception did have the effect of violating the Claimant’s dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. The Tribunal find it reasonable that it had this effect. This allegation of harassment is therefore upheld.
70. Allegation 2.2.3 has not been factually upheld and is dismissed.
71. Allegations 2.2.4, and 2.2.5, Mr Ellicock telling the Claimant he could not go on appointments with her or meet her outside the office, and in fact stopping going on appointments with her were factually upheld. This conduct was not because of the Claimant’s sex, it was because of Mrs Ellicock’s accusation that Mr Ellicock and the Claimant were having an affair, and is therefore related to sex. The Tribunal find that it in the Claimant’s perception did have the effect of violating the Claimant’s dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. The Tribunal find it reasonable that it had this effect. These allegations of harassment are therefore upheld.
72. 2.2.6, relating to exclusion from meetings, has not been factually upheld and is dismissed.

- 73.2.2.7 is considered to duplicate 2.2.5 and is therefore not upheld as a separate allegation of harassment.
74. In relation to 2.2.8, the Tribunal has found that Mr Ellicock shouted at the Claimant on 1 September 2021 and in early/mid-September 2021. This conduct was not because of the Claimant's sex, it was because of Mrs Ellicock's accusation that Mr Ellicock and the Claimant were having an affair, and is therefore related to sex. The Tribunal find that it in the Claimant's perception did have the effect of violating the Claimant's dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. The Tribunal find it reasonable that it had this effect. These allegations of harassment are therefore upheld.
75. In relation to 2.2.9 regarding work feedback, is found not to be related to sex. This conduct took place because they had been a genuine error by the Claimant's part, and reasonable feedback was being given. It is not related to sex.
76. In relation to 2.2.10.1, the May WhatsApp regarding another employee, the Tribunal considers that the language in itself relates to sex, however has found that it was not intended to nor did have the effect of violating the Claimant's dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. This allegation is dismissed.
77. In relation to 2.2.10.2 and 2.2.10.4, derogatory comments in relation to the Claimant's signing and attending a training course, the conduct on its face was related to sex. However, the motivation (the "reason for") was Mrs Ellicock's accusation that Mr Ellicock and the Claimant were having an affair, and is therefore related to sex. The Tribunal find that it in the Claimant's perception did have the effect of violating the Claimant's dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. The Tribunal find it reasonable that it had this effect. These allegations of harassment are therefore upheld.
78. In relation to 2.2.10.3, the October WhatsApp regarding another employee, the language itself relates to sex, through the use of gendered derogatory language "*bitch*". This conduct was not intended to be offensive however the Tribunal find that it in the Claimant's perception did have the effect of violating the Claimant's dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. The Tribunal find it reasonable that it had this effect. This allegation of harassment is therefore upheld.
79. Allegations 2.2.11 (regarding social exclusion) and 2.2.12 (regarding Mrs Ellicock putting Mr Ellicock under pressure to dismiss the Claimant) have not been factually upheld and are dismissed.
80. Allegation 2.2.13. these allegations were factually upheld. This conduct was not because of the Claimant's sex, it was because of Mrs Ellicock's accusation that Mr Ellicock and the Claimant were having an affair, and is therefore related to sex. The Tribunal find that it in the Claimant's perception did have the effect of violating the Claimant's dignity and creating an intimidating, degrading, humiliating and offensive environment for the

Claimant. The Tribunal find it reasonable that it had this effect. These allegations of harassment are therefore upheld.

81. Allegations 2.2.14,15,16,17,18,19,21, 22 and 23 were factually upheld. The conduct is on its face not related to sex. The Tribunal considers that these actions were motivated by the Claimant leaving the business and were not related to sex in that they would have been taken against a male leaver. These allegations of harassment are therefore dismissed.

82. Allegations 2.2.20 (fabricating documents) was not factually upheld and is dismissed.

83. Allegation 2.2.24 failing to inform the Claimant with regarding to the “current position of employment”, by failing to put the dismissal into writing was factually upheld. However the Tribunal considered that this was because of incompetence and is not therefore related to sex. This allegation of harassment is dismissed.

84. Allegation 2.2.25 (dismissal) is factually upheld, save that the Tribunal considers that the date on which the Claimant’s employment was terminated was 31 December 2021. This conduct was not because of the Claimant’s sex, it was because of Mrs Ellicock’s accusation that Mr Ellicock and the Claimant were having an affair, and is therefore related to sex. The Tribunal find that it in the Claimant’s perception did have the effect of violating the Claimant’s dignity and creating an intimidating, degrading, humiliating and offensive environment for the Claimant. The Tribunal find it reasonable that it had this effect. This allegation of harassment is therefore upheld.

85. Allegation 2.2.26 (the report to Action Fraud) is factually upheld but the Tribunal considered that it was because of the Claimant making the Respondent aware of her intention to bring a claim, and that it is therefore not related to sex. This allegation of harassment is dismissed.

## **Direct Discrimination**

86. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of her sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different.

87. As set out in *Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913*, the following three issues may arise in respect of any specific complaint of discrimination:

*“(1) Did the alleged act occur at all?”*

*“(2) If it did occur, did it amount to less favourable treatment of the claimant when compared with others?”*

*“(3) If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?”*

*Accordingly, there may be cases in which the tribunal never has to*

*address question (3), because it is not satisfied that it has been proved on the evidence that the alleged act took place at all; or it may not be satisfied that there was less favourable treatment.”*

88. Igen v Wong [2005] EWCA Civ 142 remains the leading authority in relation to the application of the burden of proof set out in section 136 EqA in relation to discrimination cases. In that case it was clearly set out that it is not that it was sufficient for the Claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. It is clear that the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent did commit an unlawful act of discrimination it can. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination.
89. It is not sufficient to shift the burden of proof for a Claimant to show only a difference in status and a difference in treatment. These are bare facts which only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. (Madarassy v Nomura International Plc [2007] EWCA Civ 33).
90. Where the claimant has proven facts from which conclusions may be drawn that the respondent has treated the claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.
91. Direct discrimination is based on comparative treatment. It must be established that the claimant was treated “less favourably” than someone else, who will be either an actual person or a hypothetical person. Either way, a comparator must be in materially the same circumstances (see section 23(1) EqA which provides: “on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case”).
92. Even if the claimant is treated less favourably than an appropriate comparator, it must have been “because” of the protected characteristic. This requires the Tribunal to determine the reason why the claimant was treated less favourably. This is not to say that the comparator issue is a threshold to be crossed before “the reason why” is addressed. This sequential analysis can give rise to problems because sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.
93. Discrimination is only made out if the protected characteristic had a

“significant influence on the outcome”: Nagarajan v London Regional Transport [1999] 4 All E.R. 65. In a case related to the protected characteristic of disability, it was found that the disability itself must be the reason for the treatment, not something related to a disability (Cordell v Foreign and Commonwealth Office [2012] I.C.R. 280).

94. In every case the Tribunal has to determine the reason why the Claimant was treated as they were. The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).
95. The Tribunal was referred to the case of B v A UKEAT/0450/06/RN, in which it was made clear that in finding the “reason why” it was not a “but for” test. In that case, the breakdown of the relationship was the reason for the unfavourable treatment, this was inconsistent with a finding that the reason for the treatment was the Claimant’s sex.
96. There was much discussion in submissions regarding the correct comparator for the purposes of the direct sex discrimination claim. Section 23 EqA stipulates that there must be no material difference between the circumstances relating to each case. The Tribunal is comparing the Claimant with a comparator who does not share the protected characteristic, this flows from the wording of section 13 EqA. It is clearly explained in Shamoon that this means that the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class’.

## Discussion and Conclusions

97. The following deals only with the allegations which were not upheld as harassment complaints.
98. Allegations 2.2.1 of direct discrimination is dismissed for the same reason as in relation to harassment, it was not done in the course of employment.
99. Allegation 2.2.9 was factually upheld, however the Tribunal considers that this was reasonable feedback which was not motivated by the allegation of the affair or the Claimant’s sex. The Tribunal considers that a hypothetical male comparator, in relation to whom the material circumstances are that they were a trainee surveyor who had made the same errors, would have been treated the same way as the Claimant. The Tribunal does not consider that this constituted less favourable treatment. This allegation of direct discrimination is therefore dismissed.
100. Allegation 2.2.10.1 (the May WhatsApp regarding another employee) was factually upheld. The Tribunal considers that there is an actual male comparator, namely Mr Ratcliffe, as a fellow director employee, who was treated in the same way. The Tribunal does not consider that this constituted less favourable treatment. This allegation of direct discrimination is dismissed.
101. Allegations 2.2.14,15,16,17,18,19,21, 22 and 23 were factually upheld. The Tribunal considers that these actions were motivated by the Claimant

leaving the business and the reason why was not because the Claimant was a woman. The Tribunal considers that the material circumstances in relation a hypothetical male comparator would be that they were an employee director who had the same shareholdings as the Claimant, and who had left the business. The Tribunal finds that this hypothetical male comparator would have been treated in the same way. The Tribunal does not consider that this constituted less favourable treatment. These allegations of direct discrimination are therefore dismissed.

102. Allegation 2.2.24 (not being informed in writing of the dismissal) was factually upheld, however the Tribunal considered that this was because of incompetence and is not therefore on the ground of sex. The Tribunal considers that a male comparator who had been dismissed would have been treated in the same way. The Tribunal considers that this is not less favourable treatment. This allegation of direct discrimination is dismissed.

103. Allegation 2.2.26 (the report to Action Fraud) is factually upheld but the Tribunal considered that it was because of the Claimant making the Respondent is aware of her intention to bring a claim, and that it is therefore not on the ground of sex. A male comparator who had brought a claim against the Respondents would have been treated in the same way. This allegation of direct discrimination is dismissed.

## **Victimisation**

104. Under section 27 EqA, a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

105. Protected acts are set out in section 27(2) EqA. They are:

105.1. bringing proceedings under the EqA (section 27(2)(a) EqA);

105.2. giving evidence or information in connection with proceedings under the EqA (section 27(2)(b) EqA);

105.3. doing any other thing for the purposes of or in connection with the EqA (section 27(2)(c) EqA); and/or

105.4. making an allegation (whether or not express) that A or another person has contravened the EqA (section 27(2)(d) EqA).

106. The burden of proof will shift if the worker proves that the employer has done a protected act, and that the worker has been subject to a detriment.

107. The EHRC Employment Code, summarises treatment that may amount to a 'detriment' as follows:

*“Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards... A detriment might also include*



*a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment” (paras 9.8 and 9.9).*

108. An unjustified sense of grievance is not enough (*Shamoon*). However, detriment is to be interpreted widely: see *Warburton v the Chief Constable of Northamptonshire Police [2022] EAT 42* - it is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the Tribunal itself. The Tribunal might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.

109. Similarly to direct discrimination, whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a “but for” approach. The protected act must be a real reason for the treatment (*Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425*). Put another way, the correct legal test to the causation or “reason why” question is whether the protected act had a significant influence on the outcome - see *Warburton*.

### **Discussion and conclusions**

110. It is not in dispute that bringing this Claim was a protected act. The Tribunal has factually upheld both alleged detriments: 4.2.1, the report to Action Fraud, and 4.2.,2 the email regarding liquidation.

111. The Tribunal considers that the reports to Action Fraud is a detriment, as it could clearly have serious negative implications for the Claimant. The Tribunal has found that the motivation for this was a belief that the Claimant may bring a discrimination claim (i.e. may do a protected act), following an ACAS notification of the same. This allegation of victimisation is therefore upheld.

112. The Tribunal considers that the email regarding liquidation cannot properly be seen as a detriment, and in any case did not make a finding that it was motivated by the protected act, as such this allegation of victimisation is dismissed.

### **Wrongful dismissal/Unlawful deductions/Breach of contract**

113. An action for wrongful dismissal is a common law breach of contract claim. The Tribunal must determine whether the dismissal is in breach of contract. This will involve a finding of whether there was, in fact, misconduct which is so serious that it entitled the employer to dismiss the employee. If there was no such misconduct, the dismissal is a wrongful dismissal. Whether the employer’s actions are reasonable or not is irrelevant (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*).

114. More generally, a claim for breach of contract can be brought in the Employment Tribunal by virtue of article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (“the Order”) provided that the claim was outstanding on the termination of employment.
115. The Claimant also claims in respect of deductions from wages which she alleges were not authorised and were therefore unlawful deductions from her wages contrary to section 13 of the Employment Rights Act 1996 which sets out the following.
- (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
    - (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
    - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*
116. Section 27(1) of the Employment Rights Act 1996 defines “wages” as “any sums payable to the worker in connection with his employment”, including “*any fee, bonus, commission, holiday pay or other emolument referable to the employment*”. By virtue of S.27(5), payments or benefits in kind are not to be treated as wages.

## Discussion and conclusions

117. The Claimant did not have a contractual notice period. The Tribunal made a finding that the period of notice which was given, from 11 November 2021 to 31 December 2021 was the period which was reasonable for an employee in her role. The Claimant was paid her basic salary for this period. However she was not paid her car allowance, which was part of her contractual remuneration. In addition her BUPA membership was cancelled with effect from 21 November 2021.
118. The car allowance constitutes “wages” under section Section 27(1) of the Employment Rights Act 1996. The car allowance was deducted without statutory, contractual or written authority. The Claimant’s unlawful deduction from wages claim is upheld in relation to the car allowance during her notice period between 11 November 2021 and 31 December 2021. This claim is duplicated in the wrongful dismissal and breach of contract complaints, and are therefore not dealt with under those heads of claim.
119. The BUPA membership is a benefit in kind and therefore cannot be recovered as an unlawful deduction from wages (section 27(5) Employment Rights Act).
120. The Tribunal made a finding that the Claimant’s notice period ran to 31 December 2021, therefore claim for the unlawful deductions from wages for January, February and March 2022 cannot succeed as it is the Tribunal’s finding that the Claimant was not entitled to be paid for this period.
121. Dividends do not constitute wages, as they are not referable to employment but to shareholder status. As such they are not within the remit of

this Tribunal in relation to a claim for unlawful deduction from wages complaint.

122. The Tribunal has made a finding that the Claimant did not in fact commit the alleged misconduct in that she did not falsify a mortgage reference letter (see paragraph 19 above). This renders the dismissal wrongful.
123. Damages for wrongful dismissal in relation to the failure to pay the BUPA membership are therefore recoverable during her notice period between 11 November 2021 and 31 December 2021 (i.e. during the notice period when the Claimant was contractually entitled to the BUPA membership).
124. The Claimant's entitlement to dividends did not relate to her status as an employee, but rather to her status as a shareholder of the First Respondent. Further, there was no contractual entitlement to receive the dividends, this was dependent on the company achieving a profit and was not a contractual right. These cannot be recovered pursuant to the wrongful dismissal claim or indeed the breach of contract claim.

### **Failure to provide written particulars**

125. Tribunals must consider section 38 of the Employment Act 2002 where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under section 1 ERA 1996.
126. A claim in relation to an unlawful deduction from wages falls within schedule 5 to the Employment Act 2002.
127. It is not disputed that the Claimant was not given any written particulars of employment, therefore section 38 of the Employment Act 2002 is made out.

### **Time Limits**

128. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.
129. The primary limitation period has been amended by the ERA, section 207A. The effect of section 207A is that there is an extension to the primary limitation period so that there is at least a month between the date of the issue of the EC certificate and the deadline for a claim.
130. The Tribunal considers that the relevant acts of discrimination were a series of acts, and therefore does not consider that they were made out of time.
131. In relation to the victimisation claim, this was added by way of amendment

application dated 9 December 2022, the Tribunal considers that relevant factors include the Claimant's lack of knowledge about the report to action fraud until receipt of the grounds of resistance, the tragic personal circumstances of her husband whose brother was very ill around this time (although this does not explain the entire period), and the potential for evidence to become less clear in people's minds. The Tribunal has also taken account of the balance of prejudice between the parties, the Respondent could not point to any real detriment, the relevant witnesses were called in any event and this could be compared to the Claimant losing the ability to pursue a Claim with good merits. Therefore the Tribunal considered it was just and equitable to extend time until 9 December 2022 when the amendment application was made.

**Employment Judge Volkmer**

**19 November 2023**

SENT TO THE PARTIES ON  
28 November 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE