EMPLOYMENT TRIBUNALS

Claimant: Ms J Patel

Respondent: Mr J Joshi R1
Citygate Automotive Ltd R2

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

On: **29 to 31 January and 1 February 2024**

Before: Employment Judge Quill; Ms P Barratt; Mr D Sutton

Appearances
For the Claimant: Mr N Gathani, Friend
For the respondent: Ms C Jennings, Counsel

JUDGMENT and reasons having been given orally on 1 February 2024, and written reasons having later been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

Introduction

1. The Claimant was a former employee of R2. R1 was her line manager. She brought claims of unfair dismissal and discriminatory dismissal (the protected characteristic being sex).

The Hearing and the Evidence

2. This 4 day hearing took place entirely in person.

3. On the first day of the hearing, we refused an amendment request for the reasons we gave at the time.

4. We had a bundle of 667 pages. We also listened to an audio recording during our pre-reading.

5. There were three witnesses in total:

   5.1 the Claimant;

   5.2 Mr Joshi ("R1") and

   5.3 Mr Poole (the decision maker on the Claimant's appeal).

6. Each witness had prepared a written statement, which they swore too, and then answered questions from the other side and from the panel.

7. Electronically, though not in paper, the panel had received documents JP1 and JP2. Copies of those had not been prepared for the witness table. In the event, there was one question from the Claimant's representative which relied on a document from those additional bundles, and – by agreement – the one page was shown to the witness by the Claimant's representative so he could answer.

The Issues

8. The following the list of issues had been produced at a preliminary hearing, and were in the hearing bundle. For the reasons we gave at the time, on Day 1, we rejected an amendment application, and this, therefore, stood as the final list of issues. There was no dispute that the previous preliminary hearing had allowed an amendment by the Claimant (hence the inclusion of the Equality Act claims listed below) on the basis that what the Claimant's application had termed "victimisation" were actually allegations of "harassment" within the definition in section 26 EQA (rather than conduct alleged to fall within the definition in section 27 EQA).

Time limits / limitation issues

8.1. Were all of the claimant's complaints presented within the time limits set out in

8.1.1. section 123 of the Equality Act 2010 ("EQA")

8.1.2. section 23 of the Employment Rights Act 1996 ("ERA")?

8.1.3. section 111 of the Employment Rights Act 1996 ("ERA")?

8.2. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended.

8.3. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 January 2022 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it, subject to consideration of the matters mentioned in the previous paragraph.

Unfair dismissal

8.4. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

The respondent asserts that it was a reason relating to the claimant's conduct.

8.5. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

8.6. If the claimant was unfairly dismissed:

8.6.1. Should reinstatement or re-engagement be ordered

8.6.2. What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant might still have been dismissed had a fair and reasonable procedure been followed?

8.6.3. Would it be just and equitable to reduce the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2)? If so to what extent?

8.6.4. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent? If so, is it just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

EQA, section 26: harassment related to sex

8.7. Did the respondents engage in conduct as follows:

8.7.1. Subject the Claimant's timekeeping to scrutiny that was not applied to others?

8.7.2. Subject the Claimant's performance to scrutiny that was not applied to others?

8.7.3. Dismiss her

8.8. If so was that conduct unwanted?

8.9. If so, did it relate to the protected characteristic of sex?

8.10. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EQA, section 13: direct discrimination because of sex

8.11. Did the respondent subject the claimant to the following treatment:

8.11.1. Subject the Claimant's timekeeping to scrutiny that was not applied to others?

8.11.2. Subject the Claimant's performance to scrutiny that was not applied to others?

8.11.3. Dismiss her

8.12. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators and/or hypothetical comparators.

8.12.1. David Bell

8.12.2. R1

8.13. If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

Unpaid annual leave – Working Time Regulations

8.14. On termination of employment, was the Claimant paid all of the compensation as per the entitlement under regulation 14 of the Working Time Regulations 1998?

Unauthorised deductions

8.15. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 and if so how much was deducted?

Breach of contract

8.16. To how much notice was the claimant entitled?

8.17. Did the claimant fundamentally breach the contract of employment such that she lost any entitlement to notice?

Remedy

8.18. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

The Facts

9. The claimant commenced ACAS conciliation on 6 April 2022 and the ACAS certificate was issued on 17 May 2022. She presented her claim form on 8 June.

10. The Second Respondent, Citygate Automotive Ltd ("the Respondent") is a new and used vehicle dealership group with branches across Greater London, Buckinghamshire, Middlesex, Hertfordshire and Berkshire.

11. The claimant had been employed by the respondent and in its accounts department since around 1997. Her employment came to an end when she was dismissed on 13 January 2022.

12. The respondent's position is that it was entitled to dismiss her without notice, and that is what it did.

13. Historically, the claimant's start time had been at 9am. In 2013, the claimant was given a warning in relation to timekeeping. We do not consider the warning to be of significance save to the extent that it demonstrates that prior to Mr Joshi's involvement (as line manager of the claimant) timekeeping had already been raised with her. So this was prior to any suggestion by the claimant that there had been any alleged financial irregularities by Mr Joshi, or carried out with his knowledge or approval.

14. Simon Willis was the claimant's previous line manager. The Claimant has no direct complaints about Mr Willis's conduct.

15. The First Respondent ("Mr Joshi" or "R1") became the Claimant's line manager in September 2018 when he became Centre Manager. He had worked for the Respondent for about 4 years by then.

16. Mr Joshi began to have concerns in relation to the claimant's timekeeping. On 30 January 2020 there was a meeting. The written outcome of that meeting is at [Bundle 188-189]. The claimant signed it on 31 January 2020, to acknowledge receipt. It included:

> I am writing to you to record the outcome of the reset meeting held on 30th January 2020 regarding your continued poor timekeeping and reporting to duty.
>
> To Recap,
>
> 1) We have all agreed that you are aware of your start and finish times.
>
> These are 9.30am staring time and 6.00pm finish time.
>
> 2) You are entitled to a 60 min unpaid lunch break. Should you choose not to utilise your lunch break is your prerogative. This cannot be used to subsidise your contracted hours of work or be used as an excuse to turn up late.
>
> 3) We have all agreed that we have had numerous (nearly daily) gentle conversation with you regarding your time keeping and the time you report to duty.
>
> 4) We all agree that this was also highlighted on your 121 in 2018.
>
> S) We have had several missed cash collections by G4S due to you not being on site at the required times.
>
> To provide a more supportive and positive way forward we have offered the following:
>
> 1) Do you want a change in your timings?
>
> 2) Do you want to work on a part time contract?

> You confirmed that you do not want any changes.
>
> You have before the 3rd of February 2020 to confirm if you want any time changes to your contract.
>
> Outcome.
>
> You have now been officially notified that should you report late on any day after the 3rd February 2020, all lateness will be recorded formally onto the ADP system.
>
> After 3 recorded late arrivals we will be escalating the situation to disciplinary procedure where the possible outcomes may be warnings or dismissal.
>
> This has also been highlighted for you in the employee workbook and copy issued to you.
>
> You have also been notified that you are solely responsible for the G4S cash collections and the safe. The Centre manager will cover only if you are on holiday or away officially.
>
> If you are unclear as to what is expected of you, please let me know immediately and I will be only too pleased to provide you with whatever further assistance or guidance you feel would be of value.
>
> Please sign a copy of this document and return to me to confirm receipt.
>
> I hope this information is clear, but should you have any further queries please do not hesitate to contact me.

17. He told her in writing that it was his opinion that the respondent had missed various cash collections (plural, not just once) because the claimant had not been there on time. There was no challenge to this comment in the letter at the time.

18. He told her that the absence would, from that point forward, be formally recorded on what was referred to it as the ADP system. What we heard in evidence and what we accept is that the reference to the ADP system is reference to a software package or application, to which the respondent's managers have access. They can record days when a employee is absent for any reason, and when they are late, and potentially record the start and finish times. This letter was informing the claimant that, in her case, all such lateness would be formally recorded on that system. It was not routine practice for managers to record the arrival times of employees on ADP. The Claimant was being told that it was going to be done in her case because her punctuality was a cause for concern, and would be monitored, and that there might be further action against her in due course, and, if so, the evidence from the ADP records might be used.

19. A further meeting took place with the claimant in November. This was conducted by Mr Willis and the details of what was discussed contained in an email. [Bundle 190]. The email was not copied to Mr Joshi or to the Claimant at the time.

20. It was sent to HR officer Abbie Godbold and copied to Natalie Cumino, also of HR. We accept the contents are accurate in terms of conveying Mr Willis’s genuine

opinions about what had been discussed in the meeting the day before (so 19 November 2020). Mr Willis records that the claimant had discussed her lateness with Mr Willis and had given specific reasons for why she was late. He informed HR that he had offered the claimant that she could have a fixed start time of 10:30am or of 11am if she wanted. The Claimant had declined both of those. This is correct, the Claimant had declined both of those options because the proposal was that her finish time would remain the same, meaning that her working hours would reduce, and the Respondent was proposing to reduce her pay pro rata.

21. Mr Willis and the Claimant had agreed that the Respondent would change her start time from 9.30am to 10am and that in addition they would allow her to work shorter lunch, a 30 minute lunch break, to keep the same 6pm finish time, and same pay.

22. Mr Willis authorised the change formally [Bundle 192] and both parties executed a written variation of the contract of employment. [Bundle 193 to 194].

23. The letter did not expressly state the reasons for the change, or that the Claimant had admitted lateness (and given reasons to Mr Willis); however, our finding is that Mr Willis's email to HR accurately reported the reasons that he and the Claimant had come to this agreement.

24. About six months later, Mr Joshi and the Claimant had a meeting. This meeting was on 21 May 2021 and on 24 May 2021, Mr Joshi sent an email to the Claimant with his version of what had been discussed. [Bundle 255 to 258]. The contents included, among other things:

> Subject: Outcome of Reset Meeting held on 21/05/2021
>
> Importance: High
>
> Morning Jayu,
>
> This is an outcome and agreed actions from the reset meeting held on Friday 21/05/2021 regarding all current ongoing issues.
>
> To begin with, you feel these processes and meeting are waste of your time but this is the general attitude that we need to address. You were 15 mins late to this particular meeting as you had ignored the invite.
>
> The problems and issues seem to be increasing on a daily basis and it is essential that we have meetings to open up our communication so that we can all understand each other and work effectively together.
>
> On to the points we discussed:-
>
> **1) Lateness and Timekeeping.**
>
> Your hours were amended to start time of 10.00am.
>
> We must ensure that you are on duty, present and settled by 10.00am.
>
> Should you be late, I will be send you an email highlighting this followed by an email confirming your actual arrival time.

Please be warned that after 3 more emails we will look to formally change your contract to potentially a part time contract or embark on disciplinary processes as per the company's guidelines and handbook, and the current Behavioural policy document that you have been issued with. I attach it again for your easy reference.

We strongly urge you to ensure you take the required actions and changes in your personal responsibilities and are on duty at the right time.

This matter has been discussed several times and over long periods of time now and if it continues will now be escalated formally.

2) Bonus.

A consistently explained, Bonus is a sum of monies paid out after achieving any KPIs or targets that the management has stipulated. It does not form part of your salary. It is not a guaranteed sum of money paid out.

You do have KPIs and measures in place that you need to ensure you achieved.

Currently, ALL staff bonuses are at 50%. You are no different.

You also need to understand we reduced your working hours too with no salary reduction but in reality, this was a salary increase that, most others didn't get last year.

Pay and bonus related queries are employer matters. Should you have any queries please first raise them to myself, if the response is not satisfactory, then please feel free to raise them to HOB Sean Willis.

…

6) Emails sent to you.

I have constantly asked you for responses on the late arrivals and not received 1 single reply or a reply to any email I have sent.

These emails have not even been opened or read demonstrating the lack of respect and care towards the whole organisation, and me as the Centre Manager

You currently have 5700+ unopened emails in your inbox.

Please be responding to my emails.

…

Your departure time.

7) Please ensure your out of the building at 6.00pm sharp.

It is a rather unfair to delay other staff, as you are not ready to depart.

…

We have now had several meetings, daily reminders and numerous conversations regarding timekeeping as well most of the things mentioned in this email. You agree that we have been more than accommodating, compassionate, empathetic and reasonable regarding all these issues and especially the time keeping. We now strongly urge you to fully understand the points highlighted and also understand the next steps we will be forced to take should this now continue.

> We look forward to your acknowledgement of this email and hope we do not have to have repeat conversations of the same nature.

25. The email had 9 headings, plus introductory and closing remarks. The email itself asked the Claimant to respond. He chased for the response on 25 May and 27 May. They had a further meeting on 8 June 2021, and Mr Joshi sent the outcome of that [Bundle 252]. It included the comment: "You are still arriving late. Today you arrived at 10.12am.". He said that unless he received her response to the 24 May email within 24 hours, he would "escalate the matter in a more formal manner".

26. The Claimant's response to the 24 May email (and the contents of the 21 May meeting) was dated 9 June 2021. [Bundle 260]. She sent the response to Mr Willis and copied it to Mr Joshi.

27. The Claimant made various comments (in blue on pages 261 through to 266) and we have taken those comments into account. To some extent these raise issues from the claimant's point of view about how her working relationship with Mr Joshi was not necessarily a smooth one. There were some specific challenges to what he had said in his email.

28. In relation, however, to what Mr Joshi had said about lateness, the Claimant's response did not say (to Mr Joshi or to Mr Willis) that what Mr Joshi had written the was either:

    28.1 untrue in the sense that she had been on time, not late; or

    28.2 untrue in the sense that the remarks had not been made at 21 May meeting.

29. Our finding, based on the things written in this email and the evidence as a whole, including the audio recording, is that the claimant was somebody who was capable of putting forward her arguments for why she thought that she was potentially in the right and/or for why she thought Mr Joshi was potentially in the wrong.

30. The Claimant was capable of rational and coherent thought, as demonstrated in the email. As well as setting out her points of view, she was capable of attaching documents which she believed were evidence that she was correct. Neither any mental health condition, nor any fear of Mr Joshi, prevented her arguing against points that he made to her. Furthermore, she was able and willing to bypass Mr Joshi and go straight to Mr Willis when she wished to express disagreement with things that Mr Joshi had said or done.

31. One of the items that was discussed in this email exchange was that the claimant's bonus. The claimant did have potential entitlement to a discretionary bonus. The bonus is referred to in her contract at clause 5 [Bundle 119]. It stated that she would (at the time, the contract was signed) receive a monthly bonus of £200.

32. A document signed by the Respondent and the Claimant in May 2010 stated, under the heading “Monthly Performance Bonus”:

> Subject to achieving the following, you will receive a performance bonus of £200, payable monthly in arrears.
>
> 1. All cash invoices loaded on a daily basis
>
> 2. Invoice loading accuracy to be 98% or above
>
> 3. No cash outstanding over 3 days
>
> All measured daily for the individual month.
>
> All bonus payments are paid in arrears and will be subject to a periodic review by the company.

33. The introduction to the contract on [Bundle 118] stated that the contract was to be read together with the employee handbook. The employee handbook is in the bundle and refers to the employer’s right to review and withdraw the bonuses at appropriate times.

34. During 2021, the respondent had made a decision in relation to all employees. It decided that, for reasons connected with the Covid situation, the maximum bonus entitlement for every employee would be reduced by 50%. The Respondent’s comments to the Claimant about this in the 24 May 2021 email were accurate. In her 9 June reply, the Claimant stated:

> My Bonus is part of my salary. My work has to be 100% daily basis, I have explained many times. In last meeting in February, mentioned to cut the Bonus if we are not in 'Zero' with TPS weekly report. I have explained in April video meeting and agreed to get the feedback from managers for outstanding invoices. See above attachments, I always do my best effort and give as much information I know, to simplify but no feedback, reminder next day, but no outcome. And when it shows in TPS list, then big meetings and threatened to cut the Bonus. See first 3 attachments please. (the reason I have asked in last e-mail, if 50% is company decision, then agreed

35. Our finding is that she acknowledged what she had been told, and accepted the situation (subject to the qualification that her acceptance was on the basis that what Mr Joshi had said was true, namely that it was a company decision – for all staff – not a decision by Mr Joshi which just affected her, or her and anyone else who reported to Mr Joshi).

36. In November 2021, the Claimant was issued with a written warning.

    36.1 On 22 November 2021 [Bundle 281], she was invited to a disciplinary hearing to take place the following day. The letter included:

> In line with Company policy, you are required to attend a disciplinary hearing to discuss the issue of misconduct, namely in relation to your persistent lateness.

> This meeting will be conducted by myself Jairaj Joshi, TPS Centre Manager and David Bell, TPS Sales Manager will also be present as a note taker.
>
> You will be given every opportunity to state your case before any decision is reached, however, I should advise you that this incident could result in disciplinary action being taken against you.
>
> You are entitled, if you wish to be accompanied by a work colleague or a Certified Trade Union Representative.

36.2 An email was sent to her by Mr Joshi at 11.09am that day stating that her arrival time that day (22 November 2021) was 10.49am. The next day, he sent an email at 10.37am to say that the Claimant had not yet arrived (by 10.35am). [Bundle 282-283].

36.3 Prior to the meeting, Mr Joshi had sought advice from HR, and he sought to follow that advice. [Bundle 660-664]. He requested the Claimant's permission to audio record the meeting, and she declined.

36.4 The hearing notes [Bundle 666-667] record that the Claimant was told the decision to move to a formal disciplinary hearing followed recent attempts (on 13 October 2021 and 19 November 2021) to address the matter informally, and referred back to the note put on her file following the 21 May meeting, the 24 May email to her and the 9 June acknowledgment by the Claimant. Our finding is that that is accurate; Mr Joshi had raised the Claimant's alleged lateness with her on those occasions.

36.5 The notes accurately set out the Claimant's responses to questions. She acknowledged regularly being late (while asserting that it was only 5 to 10 minutes). She acknowledged that she never notified anyone when she was running late. She did not offer any explanation, or ask for anything to be taken into account before a decision was made.

36.6 The warning letter [Bundle 284] supplied the Claimant with a copy of the notes, which she did not challenge. It informed her of her right to appeal, and there was no appeal. The letter included:

> … I can confirm that you have been issued with a Written Warning, in line with the Company's Disciplinary Procedure, for persistent lateness.
>
> …
>
> The Written Warning takes effect from 23rd November 2021 and will remain in force for twelve months. Should there be a reoccurrence of unsatisfactory timekeeping during the period of this warning, then you will be subject to further disciplinary action.
>
> A copy of this letter is being placed on your personnel file and, subject to no further reoccurrence of this issue, will be disregarded after twelve months, but will remain on your file.

> In future, please ensure that arrive to work for your contracted start time of 10:00am, if you are running late, it is essential that you call to let me know. If you are still unclear as to what is expected of you please let me know immediately and I will be only too pleased to provide you with whatever further assistance or guidance you feel would be of value.

37. Thus, amongst other things, the Claimant was told to ensure she arrived at her contracted start time of 10am and if she was late and then it was "essential" to make a call to Mr Joshi to let him know. The letter also offered the further opportunity to seek clarification.

38. The claimant was subsequently invited to a disciplinary hearing to take place in December. Between the first written warning and the invitation to the disciplinary hearing there were several occasions on which Mr Joshi had written to the claimant by email to say that she was late and stating a particular time of day, by which she had not arrived. These were: 26 November 2021; 29 November 2021; 30 November 2021; 1 December 2021; 3 December 2021; 6 December 2021.

39. The claimant did not reply to any of those emails. She did not reply to dispute the fact that she had been late, and she did not reply to acknowledge that she had been late to apologise for it, or to offer any explanation. Mr Joshi sent the emails with a setting which meant that he would receive a "read receipt" when the Claimant opened the email. He did not receive such notifications and his opinion was that the reason for that was that the Claimant was not reading those emails.

40. The invitation to this next disciplinary hearing is [Bundle 303]. It was dated 6 December 2021 with the meeting to be 7 December 2021. It contained similar information to the invitation to the earlier hearing. It told the claimant that she was required to attend a disciplinary hearing to discuss the issue of misconduct, namely "persistent lateness". The letter did not give any dates or alleged arrival times.

41. The claimant did not attend the meeting. She had been aware of it, but gave the reason for not attending that she was too busy. We have listened to the audio recording of the discussion on 7 December 2021 after the Claimant had failed to attend at the appointed time. The respondent decided to postpone the hearing. The letter inviting her to a rescheduled hearing is on [Bundle 310]. It included:

> In line with Company policy, you are required to attend a disciplinary hearing to discuss the issue of misconduct, namely in relation to your persistent lateness. This meeting will be conducted by myself Jairaj Joshi, TPS Centre Manager and David Bell, TPS Sales Manager will also be present as a note taker.
>
> You will be given every opportunity to state your case before any decision is reached, however, I should advise you that this incident could result in disciplinary action being taken against you. Please note that should you fail to attend, then the hearing will be held in your absence and a decision made on facts and evidence available.

> You are entitled, if you wish to be accompanied by a work colleague or a Certified Trade Union Representative.
>
> Please confirm your attendance to me as soon as possible. If you have any queries regarding this matter, please do not hesitate to contact me.

42. So the letter made clear what the purpose of the meeting was (to consider disciplinary action for alleged persistent lateness). It did not attach the evidence to be used at the hearing, or mention specific alleged dates and times of lateness.

43. At this time, Mr Joshi was seeking guidance about the correct process and Mr Simon Poole was also aware that there was a process being undertaken in relation to the claimant's alleged at lateness and a process that would potentially result in disciplinary action against the claimant. The bundle contains a trail of emails from shortly after the first written warning up to and including the Claimant's failure to attend the next stage hearing on 7 December, and the re-issued invitation. [Bundle 319 to 311]. Mr Joshi informed HR immediately after the first warning that the Claimant was still coming late, and asked if it was appropriate to move to the next stage. HR suggested waiting until there was evidence of at least 3 further occasions. He wrote to HR with a list of what he said were "4 incidents after the warning was issued" on 30 November. He also supplied details of the conversations that he and his colleagues had attempted to have with the Claimant on the topic, and alleged that the Claimant was taking no notice, and was still not phoning in when she was late.

44. After the Claimant refused to attend the 7 December 2021 meeting, on that date, Mr Joshi wrote to HR (Godbold and Cumino) and copied in Mr Poole, [Bundle 311]. This email meant that the whole trail of emails between Mr Joshi and HR (which had not contemporaneously been sent to Mr Poole) were forwarded to him.

45. The Claimant was aware of the meeting on 8 December 2021, but she refused to attend. Mr Joshi proceeded in her absence. [Bundle 333].

46. On 9 December, Mr Joshi wrote to the claimant with the outcome of the hearing and the outcome was expressed to be a final written warning for "persistent lateness". [Bundle 336]. The letter records Mr Joshi's genuine beliefs and opinions. It included:

> The Final Written Warning takes effect from 8th December 2021 and will remain in force for twelve months. Should there be a reoccurrence of unsatisfactory timekeeping during the period of this warning, then you will be subject to further disciplinary action.
>
> A copy of this letter is being placed on your personnel file and, subject to no further reoccurrence of this issue, will be disregarded after twelve months, but will remain on your file.

> In future, please ensure that you arrive at work ready for your contracted start time of 10:00am and call me in advance of your start time to report if you are running late. If you are still unclear as to what is expected of you please let me know immediately and I will be only too pleased to provide you with whatever further assistance or guidance you feel would be of value.

47. The letter accurately stated that she been offered the right to be accompanied by a representative and that she had declined to attend. No specific dates or times of lateness were specified. The letter included details of the claimant right of appeal at, but there was no appeal.

48. Following the written warning, Mr Joshi continued with the practice of sending emails to the Claimant which alleged that she had not yet arrived by the time he sent the email. In the bundle, these are:

10 December	10:06	[Bundle 338]
13 December	10:05	[Bundle 339]
14 December	10:10	[Bundle 340]
15 December	10:32	[Bundle 341]
06 January	10:10	[Bundle 343]
07 January	10:27	[Bundle 344]
10 January	10:35	[Bundle 345]
11 January	10:15	[Bundle 346]

49. During the Christmas and New Year period, Mr Joshi was on holiday. He asked a colleague, Mr Bell, to check the Claimant's arrival time, and to let him know. Based on information from Mr Bell, he sent an email on 24 December 2021 at 10:07 which said "10:05 am and you are not here". Like the others, these words were in the subject line of the email.

50. The Claimant was then invited to a further disciplinary hearing. [Bundle 350]. The covering email [Bundle 347] said:

> Attached please find a disciplinary invite for your persistent lateness for tomorrow Wednesday 12th January 2022 at 1.00pm in the TPS Colindale Boardroom.
>
> Kindly please read and understand it.

51. The letter included:

> In line with Company policy, you are required to attend a disciplinary hearing to discuss the issue of gross misconduct, namely in relation to persistent lateness. This

> meeting will be conducted by myself Jairaj Joshi, TPS Centre Manager and David Bell, TPS Sales Manager will also be present as a note taker.
>
> You will be given every opportunity to state your case before any decision is reached, however, I should advise you that this incident could result in disciplinary action being taken against you, up to and including dismissal.

52. So, amongst other things., the letter warned the Claimant that the hearing could result in disciplinary action, including dismissal. It advised her of her right to be accompanied. The time and location of the hearing was repeated in the letter, as well as being in the covering email.

53. The Claimant did not attend the hearing on 12 January. She knew about it. She refused to attend when Mr Bell went to tell her that the hearing was due to commence. She refused again when Mr Joshi did so. She told Mr Joshi to proceed in her absence.

54. The hearing was re-scheduled for the following day. A new invitation letter [Bundle 351] was emailed [Bundle 353], which was similar to the original, and included, in bold: "*Please note, should you fail to attend the disciplinary hearing, a decision will be made in your absence based on the information available*." We are satisfied that the Claimant knew about the re-arranged hearing, based on what she was told on 12 January and the email.

55. Neither of the invitation letters attached copies of any evidence that would be used at the hearing, or contained specific details of examples of alleged lateness. That is, there were no dates mentioned and (therefore) no alleged arrival times on those dates.

56. The Claimant did not arrive at the notified start time for the hearing on 13 January. Abbie Godbold of HR went to the Claimant's office to fetch her, and the Claimant complied with Ms Godbold's request to attend the hearing.

57. Near the start of the hearing the claimant was given a hard copy of the item which appears at [Bundle 348].

    57.1 This is a document which Mr Joshi created and we accept that he made a good faith attempt to be accurate.

    57.2 It shows a table with each date between 8 December and 13 January (omitting 25 to 28 December and 1 to 3 January and 8 to 9 January) with what Mr Joshi alleged were the arrival times of the claimant on each of those dates.

    57.3 While 11 and 12 December were noted as weekend dates (and there is no alleged arrival time on those dates), against 18 and 19 December, alleged arrival times of 10.29 and 11.04, respectively were recorded.

57.4 In fact, those two dates were a Saturday and Sunday, and it is common ground between the parties that the claimant did not work at weekends and was not due to work on either 18 or 19 December.

58. It is Mr Joshi's recollection that, when the 13 January hearing started, as well as handing the claimant, the document just mentioned, he also handed her the raw data upon which it was based. His recollection is that he had printed hard copies of various emails that were sent contemporaneously to the claimant recording her alleged lateness on each of those dates. He believed that they were emails sent by him on the days when he was in the office or else by Mr Bell on days when Mr Joshi was not in the office. As mentioned above, Mr Joshi sent one on 24 December, when Mr Joshi was not in the office, based on information he had received from Mr Bell. The bundle does not include any emails to the Claimant from Mr Bell. Other than those specified above, the bundle does not contain emails for the dates in the table at [Bundle 348] from Mr Joshi to the Claimant.

59. The hearing notes are [Bundle 354]. We have not heard the audio, but we are told that they are transcribed from an audio recording, and we accept the notes are reasonably accurate.

60. The Claimant was handed [Bundle 348] but we are not persuaded that Mr Joshi's recollection is accurate that she was also handed any other documents as evidence of lateness, such as the emails sent to her which matched the dates in the table. For completeness, and for the avoidance of doubt, she was not handed the documents in JP1 and JP2, which are the documents sent in (electronically) by the Claimant for the employment tribunal hearing, and which are historic emails and letters to her about lateness, including some which are screenshots, from CCTV, allegedly showing her empty office with a timestamp. (The Respondent has not sought to rely on those documents, but we note that it is common ground that they come from the Respondent’s disclosure to the Claimant as part of this litigation and/or from answers to subject access requests.) Nor was she handed any version of a printout from the Respondent’s ADP records, as discussed below.

61. There is no mention in the hearing notes, or elsewhere in the bundle, or in the witness statements, of the claimant having been handed a paper copy of the various emails that Mr Joshi alleges were the basis for creating [Bundle 348]. We think it unlikely that, had he done, there would have been no mention of it in the minutes (which is transcript of an audio recording) or in any of the documents written nearer the time. We do not doubt that, two years later, it is his genuine recollection that he gave at the emails themselves; however, the Claimant does not admit receipt and we are not persuaded that his recollection is accurate.

62. Mr Joshi was aware that the claimant had not been opening the emails sent on specific dates, referring to alleged lateness that same day, at the time that they were sent. (Although she would not necessarily have had to open the email to

have seen the information in the subject line which accused her of not being in the office at a specified time). The fact that he was aware of this is recorded in the contemporaneous emails which he sent to HR asking for advice about how to handle the situation.

63. During the 13 January meeting, Mr Joshi asked the claimant about alleged lateness, and we have a transcript of what she said in response to those questions At the end of the meeting, following a break. Mr Joshi informed the claimant that he had made a decision and that his decision was that she was to be dismissed with immediate effect. The dismissal letter itself is [Bundle 365].

> I am writing to you to record the outcome of the disciplinary hearing held on 13th January 2022 regarding the issues of Gross Misconduct relating to persistent lateness.
>
> After a full investigation into the facts of this case and in accordance with the Company's Disciplinary Procedure, I can confirm this incident constitutes gross misconduct. Following careful consideration of all the individual circumstances, I confirm the decision has been taken to summarily dismiss you and as a result, your Contract of Employment will be terminated from the 13th January 2022.
>
> In these circumstances no notice or pay in lieu of notice would be owed to you as a result of the termination of your Contract of Employment. However, as a gesture of good will, you will receive one months' notice payment in lieu of working.
>
> I record that your right to be accompanied by a work colleague was explained to you to which you declined.
>
> You have the right to appeal against the outcome of this disciplinary hearing in accordance with the Company's Appeals Procedure. Any appeal must be submitted in writing to Simon Poole, Commercial Director, stating reasons for the appeal and be made within seven working days of receiving this letter.
>
> Please find enclosed a copy of the recorded minutes taken during the disciplinary hearing.
>
> I hope this is clear, however, should you have any queries please do not hesitate to contact me.

64. Following the meeting, the Claimant was required to collect her belongings and leave. She spoke to HR in the days after dismissal. [Bundle 366]. It was the claimant's evidence to us, that prior to these discussions with HR, she had not understood that she had the right to appeal; that was her explanation to us for not appealing against the previous warnings.

65. The Claimant asked for more time to produce her appeal, but, in any event, within the original time limit, on 20 January 2022, she sent an email to Simon Poole, Commercial Director, and Mr Joshi's line manager, appealing the decision. [Bundle 367]

65.1 In the second paragraph, the claimant states that she been late several times and that that was due to anxiety and stress.

65.2 In the third paragraph, she asked for "another chance", and referred to her long service.

65.3 In the fourth paragraph, she alleged bullying by Mr Joshi. She referred to being the only female in the office, and, by implication, suggested that this was the reason for the alleged bullying. She said the bullying gave her sleepless nights and "*therefore as a result, sometimes I was arriving to work late*".

65.4 In the fifth and sixth, she referred to "stress and anxiety", and accepted that she had not mentioned these before. She stated that, on HR advice, she had contacted her GP.

65.5 She produced a bullet point list of what she alleged were examples of Mr Joshi's improper treatment of her. We do not accept that Mr Joshi had said he would make her redundant, or that she was scared to push back. In terms of the things he had asked her to do, as per the email of 24 May 2021 (and meeting of 21 May 2021), these were things that Mr Joshi had been transparent about, and it was he who had insisted on there being a written record, and insisted on the Claimant signing/commenting on his instructions.

65.6 The Claimant stated: "*I want to clarify that, even though at times I was coming late, I made sure that I compensated the time by working through my lunch breaks and sometimes not taking my entitlement of holidays to ensure all work is completed and fulfilling my duties*."

65.7 As well as long service, she referred to recognition of her work during that time, including by CEO in October 2019.

65.8 She suggested that there was too much focus on lateness and not enough focus on the fact that, notwithstanding the lateness, in other respects, her work was good.

66. An appeal hearing was arranged. The Claimant asked if she could bring someone other than a work colleague or union representative. This was declined.

67. The meeting took place on 31 January 2022. [Bundle 379-389]. Mr Poole was the decision-maker. He was accompanied by Ms Cumino. During the meeting, the claimant handed over a more detailed grounds of appeal [Bundle 390-397].

68. Throughout the hearing Mr Poole asked the claimant about why she was late and whether any reasons for that lateness, and referred to the documents that were being used as evidence. The claimant had every opportunity, had she wished to do so, to deny being late. Neither at the appeal hearing on 31 January 2022, nor

at the hearing on 13 January, before Mr Joshi did the claimant make any specific denials of having been late. In the 8 page letter handed to Mr Poole, the Claimant did not deny lateness. In that, her only mentions of lateness were suggestions that there had been nothing (else) wrong with her work and so (she said) Mr Joshi had focused on her lateness. In context, it would have been reasonable for a reader to take those comments as admissions that it was true that she was late.

69. The appeal made a number of allegations against Mr Joshi: that he was bullying the Claimant; that he was requiring the Claimant to train other employees despite that not being her job; that he was involved in financial wrongdoing, and turning a blind eye to financial wrongdoing by others. The Claimant claimed she had previously been able to communicate easily with Mr Willis. She stated that she had sent text messages to Mr Poole (in approximately December), seeking a meeting with him, and had had no reply. [The panel asked for copies of those messages. We did not receive them. Mr Poole accepted that he had seen them at the time and had not replied.]

70. Mr Poole adjourned the meeting in order to consider the points raised by the Claimant. The meeting reconvened on 2 February 2022. [Bundle 399-403].

71. The appeal was rejected and the dismissal decision was upheld. The outcome was confirmed by letter dated 4 February 2022. [Bundle 404]. The letter included:

> This meeting was held by me, Simon Poole, Commercial Director and Natalie Cumino, Group HR Manager was present to take notes. You had the right to be accompanied to the hearing however attended without representation.
>
> As a result of your points of appeal raised at the hearing, I agreed to review the information you provided as mitigating circumstances against your accused misconduct.
>
> During the appeal meeting you detailed the strained working relationship you felt you had with Jairaj Joshi, TPS Centre Manager and provided a few reasons for your continued lateness such as your yoga sessions in the morning, your walking pace to work and on one occasion, booking your Coronavirus vaccination.
>
> For context on the matter, you were first issued with a file note regarding your lateness in May 2021, followed by a Written Warning issued in November 2021 and a Final Written Warning in December 2021, and subsequent dismissal in January 2022.
>
> As discussed during the outcome meeting, having reviewed the case independently, I confirmed my decision that your disciplinary sanction of summary dismissal would be upheld. After discussing your reasons for appeal, I do not feel that any of the presented factors justified your misconduct, and as a result do not constitute mitigation.

72. We accept that the opinions which Mr Poole expressed in the appeal meeting and the letter were his genuine beliefs. He had considered the points raised by the

Claimant, but had decided that the evidence of lateness was such that she should be dismissed.

73. As alluded to in the letter, and in Mr Poole's evidence to the Tribunal, he had investigated the suggestions the claimant had made that Mr Joshi had bullied her and was potentially motivated to treat her badly as a result of finance issues which she had raised. Mr Poole investigated those issues. He decided that there had not been any wrongdoing by Mr Joshi's part either in connection to the and alleged wrongdoing itself or in the decisions to implement a disciplinary process or the eventual dismissal.

74. After the appeal outcome had been sent to the claimant, the claimant obtained a letter from her GP. I was dated 9 February 2022 and appears [Bundle 405]. That letter refers to panic attacks and due to work-related stress. The letter does not say that those panic attacks had caused the claimant to be late. The letter says - and we accept that it is accurate - that, in fact, the claimant had not had any absences due to ill health.

75. Furthermore, the respondent's position, which we accept, was that her overall work performance in general had been satisfactory. In saying that, we do not ignore the fact that, on 11 February 2021, Mr Joshi had written to the claimant and her colleague Isabel and make some criticisms of their performance. In particular, he had reminded them that one of the conditions of the bonus entitlement was to ensure that there was no out cash outstanding for more than three days; the letter made the assertion that that in fact had not been happening.

76. The Claimant's contractual holiday entitlement was clause 7 of the contract [Bundle 120]. The entitlement is 20 days plus bank holidays and the leave year is to run from 1 January to 31 December. For part years, when somebody ends their employment prior to 31 December, entitlement would be calculated would be on the basis of working out how many completed months (from 1 January onwards) there had been in that part year, and allowing 1.67 days holiday entitlement for each completed month.

77. Clause 7 is supplemented by the handbook and the relevant section of the handbook is pages 134-135 of this bundle. The last paragraph of that section states:

> The Company's holiday year runs from the 1st of January to 31st December. Holiday entitlement cannot be carried over to the next year and you will not receive payment in lieu of holiday not taken, unless in circumstances approved by senior management at their absolute discretion. Holidays are accrued on the completion of working a full month.

78. The complete bar on any carry over (unless approved) was loosened for carry over from 2021 to 2022 (for all employees including the Claimant). Due to Covid, an

automatic carry over (without specific and individual authorisation being required) up to a maximum of 10 days was permitted. Any excess unused leave (greater than 10 days) was lost as of 31 December 2021 unless the employee had had it approved by senior management.

The Law

Equality Act 2010 ("EQA")

79. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (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.

80. It is a two stage approach.

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

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

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

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

82. The burden of proof does not shift simply because, for example, the claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of discrimination or harassment. They are not sufficient in themselves to shift the burden of proof; something more is needed.

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

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

Time Limits for EQA complaints

85. In EQA, time limits are covered in s123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

Definition of Direct Discrimination – section 13 EQA

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

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

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

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

89. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

Harassment – section 26 EQA

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

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

91. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to

prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

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

93. The use of the word "or" in s26(b) (twice) is important.

94. "Purpose" and "effect" are two different things, and must be considered separately. Where it was the wrongdoer's "purpose" to do the things listed in s26(b), then the complaint can succeed even if the conduct did not successfully have that effect. Correspondingly, where the conduct does have the effect described in s26(b), then the complaint can succeed even if the Respondent (or the person whose conduct it was) did not have the intention of causing that effect.

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

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

96. When assessing the effects of any one incident of several alleged acts of harassment then it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself, but, in addition, we must stand back and look at the impact of the alleged incidents as a whole.

Unfair Dismissal

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

> 98.— General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—

> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

98. The respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for the reason relied upon. The reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

99. Furthermore, the employer must also satisfy us that this reason falls within one of the definitions in either section 98(2) or section 98(1)(b).

100. In this case, the Respondent alleges that the reason was “conduct” as defined by section 98(2)(b) ERA.

101. Provided the respondent does persuade us of these things, then the dismissal is potentially fair. That means it is then necessary to consider section 98(4) ERA. In doing so, we take into account the respondent’s size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismissal.

102. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the claimant did do the acts that the Respondent’s decision maker has found them to have done.

103. We also consider whether or not the respondent carried out a reasonable process prior to making its decisions.

104. In terms of sanction of dismissal itself we must consider whether this particular respondent’s decision to dismiss this particular claimant fell within the band of

reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached. The band of reasonable responses is wide, but it is not infinite.

105. If we do decide that there has been any unfairness at the original stage at which the dismissal decision was made, then we might potentially decide that that had been cured as a result of what had happened during the appeal process. That depends on all the circumstances of the case; it depends upon the nature of the unfairness of the first stage and it depends on the nature of what happens at the second stage, at the appeal stage and it depends on the equity and substantial merits of the case. We take into account the guidance in Taylor v OCS Group [2006] IRLR 61

106. It is not the role of the tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. It is not our role to substitute our decisions for the decisions made by the respondent.

107. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). The following paragraphs of the Code are particularly relevant, though we have considered the entire Code:

> 5 It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.
>
> 6 In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.
>
> 9 If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.
>
> 19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.
>
> 20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

> 21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.
>
> 27 The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.

108. A final written warning (or any written warning) is something that can potentially be taken into account by a reasonable employer when deciding whether to dismiss.

109. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave the following summary of the law on warnings in misconduct cases:

> We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:
> (1) The Tribunal should take into account the fact of that warning.
> (2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.
> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.
> (4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.
> (5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of

> circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.
> (6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

110. In Bandara v BBC 2016 WL 06639476, the EAT confirmed (having considered both Wincanton and also the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374) that a tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of final written warning for a prior incident was a manifestly inappropriate sanction. A tribunal should only take that step if it there is something that is drawn to the tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed, and this requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses.

111. Subject to the comments above, where a final written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

Compensation for Unfair Dismissal

112. Section 123(1) provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal.

113. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

114. Guidance on the correct approach was provided in Software 2000 Ltd v Andrews [2007] IRLR 568. It is for the employer to demonstrate (based on the evidence) that the employee would or might have ceased to be employed in any event had fair procedures been followed and/or would not have continued in employment indefinitely. When making the assessment, the Tribunal takes into account all of the evidence, including from the Claimant.

115. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

115.1 In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.

115.2 In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).

115.3 If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

115.4 There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "*what are the chances that the claimant have been dismissed if the process had been fair*?", it is not asking itself "*would a hypothetical reasonable employer have dismissed*"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair dismissal not taken place, and had the respondent acted fairly and reasonably instead.

Contributory Fault

116. S122(2) of the Employment Rights Act 1996 ("ERA") states

> Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

117. In relation to compensatory award, S123(6) ERA states

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

118. In Steen v ASP Packaging Ltd, the EAT, set out the correct approach to S122(2):

118.1 identify the conduct which is said to give rise to possible contributory fault

118.2 decide whether that conduct is culpable or blameworthy, and

118.3 decide whether it is just and equitable to reduce the amount of the basic award to any extent.

119. For S123(6), in Hollier v Plysu Ltd 1983 IRLR 260, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: employee wholly to blame (100 per cent reduction); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent). This suggestion is guidance, and does not replace the words of the statute.

120. The Tribunal is not obliged to apply the same percentage reduction to both basic award and compensatory award, but that will usually be the case, unless there is a good reason not to do so.

121. In Granchester Construction Ltd v Attrill UKEAT/0327/12:

121.1 In paragraph 26, the EAT notes: "*we accept that the Tribunal's approach in looking at a reasonable employer rather than at the actual employer was in error and was likely to understate the extent of the deduction that fell to be made*."

121.2 In paragraph 27, when considering the approach to adjustments for contributory fault and/or Polkey, the EAT suggested a tribunal should: "*consider what facts and matters the employer would probably have accepted for itself, reasonably, having carried out the investigation that would have been carried out had a proper procedure been followed*."

122. More generally, Attrill considers the approach to making adjustments when deductions to reflect both contributory fault and Polkey might be appropriate. If a tribunal provisionally decides on a percentage reduction to reflect contributory fault, then it is not necessarily an error for the tribunal to decide that applying that full percentage reduction to the compensatory award might not be just and equitable if a Polkey reduction (which takes account of the same conduct by the employee) is also being made. In other words, the tribunal might decide to make a smaller reduction for contributory fault than it might otherwise have made. However, in Attrill, the EAT noted that if the logic just described would not mean that the smaller reduction should be applied to both the basic award and the compensatory award if the Polkey reduction was applied only to the latter.

Uplift

123. Section 207A(2) of that Trade Union and Labour Relations (Consolidation) Act 1992 Act provides that:

> If, in any proceedings to which this section applies, it appears to the employment tribunal that
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) the failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

124. The complaints presented here are all complaints to which that section applies.

Time Limits for Unauthorised deduction claims.

125. Insofar as it is relevant, section 23 ERA states:

> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, …
>
> (3) Where a complaint is brought under this section in respect of—
>
> (a) a series of deductions or payments …
>
> … the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (3A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

126. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving it was not is on the claimant. When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant.

127. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

Holiday Entitlement and Pay in lieu of it

128. The Working Time Regulations 1998 ("WTR") provide employees (and other workers) with a minimum statutory entitlement to paid time off.

129. Regulation 14 WTR sets out the employee's entitlement for a payment in lieu on termination. The formula is:

$$(A \times B) - C$$

where–

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

130. The combined effect of Regulations 13(1) and 13A WTR is that an employee is entitled to 5.6 weeks per year as paid time off (which includes any such paid time off on public holidays) subject to a maximum of 28 days per year.

131. Paragraphs 9 to 13 of Regulation 13 WTR specify:

> (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–
>
> (a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and
>
> (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.
>
> (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).
>
> (11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.
>
> (12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.
>
> (13) For the purpose of this regulation *"coronavirus"* means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).

132. So, notably, as per Reg 13(9)(b), if an employee does not use their entitlement to leave, then the employer does not satisfy their obligation under WTR by making a payment to the employee instead.

133. That being said, if the employee does not use their entitlement in the leave year in question then, as per Regulation 13(9), they lose that entitlement. That is, they do not have the right to insist upon carrying it over and using it in the next year. (There are potentially exceptions to that literal interpretation where there is long term sickness or where the employer prevents the leave being taken, but those exceptions are not relevant in this case). As Regulation 13(9) states, an exception is where the employee was unable to take the leave because of the pandemic. This amendment to Regulation 13(9), as well as all of paragraphs 10 to 13, came into effect on 26 March 2020.

134. As per Regulation 17 WTR, while WTR sets out minimum entitlements for the matters covered, if an employee's contract provides a right which is more beneficial to the employee, then they may enforce that right instead. In other words, for annual leave (for example) the employee does not get double recovery. They cannot have the contractual leave, plus the WTR minimum on top. However, a claimant may invite the tribunal to calculate each of the WTR right and the contractual right. While any compensation or damages will not give both things, the claimant can have whichever one is more favourable to the claimant.

135. In terms of contractual entitlement, it is not the case that tribunals should assume that there is a right paid time off, or a right to carry over holiday entitlement from one year to the next, or a right to be paid in lieu of unused holiday entitlement. Whether any of these rights exist in a particular contract between a particular employee and particular employer is a matter to be determined in accordance with the usual methods of contractual interpretation. The contents of a staff handbook can, in some circumstances, potentially be incorporated into the contract of an individual employee.

Breach of Contract Notice Pay

136. In terms of breach of contract and the Claimant's notice pay argument, the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the Employment Tribunal jurisdiction to consider certain complaints of breach of contract.

137. In accordance with the ordinary principles for breach of contract claims, this jurisdiction allows the Tribunal to interpret the relevant contractual provisions and assess what the employee's contractual entitlement was to notice pay for example as well as holiday entitlement.

138. When a Tribunal is considering a wrongful dismissal claim (in other words a claim that the dismissal itself was in breach of contract) then the analysis is entirely different and separate to the analysis of whether the same dismissal was fair or unfair.

139. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant might have grounds to succeed in a claim for wrongful dismissal.

140. The amount of notice to which an employee is entitled is determined by the contract but subject to the statutory minimum. Again, in other words, if the contract allows the employee more notice than the statutory minimum then the employee is entitled to bring a claim for that period of notice but the contract cannot insist that the employee has less notice than the statute would allow, generally one week for every year up to a maximum of 12 weeks' notice after 12 years' employment.

141. For the employer to prove that there has been conduct by the employee which entitles it to dismiss without notice then the conduct must be such that it must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment (see Neary v Dean of Westminster [1999] IRLR 288). The jargon phrases "gross misconduct" and "gross negligence" are sometimes used. There is no clear dividing line between them and, in any event, the decision is whether the contract has been breached and whether the employee has acted in such a way that they are deemed to be ignoring their contractual obligations, and/or showing that they do not acknowledge that they are bound by them. Gross misconduct is often used to refer to things which an employee has done deliberately. Gross negligence, however, also includes serious failure to carry out their contractual duties even if that is because of an inability to comply with the contractual obligations.

142. In defending itself against a claim that it is required to pay damages for failure to give notice to an employee which it dismissed, the employer is entitled to rely upon facts not known at the time. In other words, the employer is not only entitled to rely on the reasons that caused it to dismiss the employee; it is entitled to rely on any other repudiatory breach that it later discovers. (That is another difference compared to unfair dismissal.)

Analysis and conclusions

143. We will deal with the claims about bonus entitlement first.

Bonus – as unauthorised deduction claim

144. On the Claimant's own case, the last time that she was paid £125 for bonus, rather than £250, was August 2021. Furthermore, her payslips as per the bundle show payments of £250 for each of September 2021 through to January 2022.

145. [Bundle 534] shows that pay date in August 2021 was 27 August 2021. The Claimant therefore had until 26 November 2021 to present a claim (or, strictly

speaking, to commence early conciliation, with a claim to follow by the date adjusted for early conciliation).

146. Since early conciliation was not commenced until 6 April 2022, which is after the time limit had expired, there is no early conciliation extension.

147. The claim was presented on 8 June 2022 and so was more than 7 months out of time.

148. No suggestion has been made that the Claimant was ignorant of her rights prior to that. There had been correspondence from her challenging the bonus issue, and so she was aware at the time that she was being paid £125 not £250. She was aware of the Respondent's stated reasons for that.

149. The suggestion made in submissions is that the Claimant was unable to face dealing with the matter any sooner than she did. We do not accept that submission. Our decision is that there was no medical or psychological reason that the Claimant could not have presented the claim sooner.

150. If it were necessary for us to make a specific finding about the reason that no claim was presented prior to the 26 November deadline, then our decision would be that, as per the Claimant's email on 9 June 2021 at 14:12 (and the passage on [Bundle 262] in particular), she accepted the fact of the reduction, and had no intention of bringing a claim.

151. However, and in any event, regardless of the Claimant's reason(s) for not presenting the claim by 26 November 2021, it was reasonably practicable for her to do so.

152. The claim is out of time.

Bonus – as breach of contract claim

153. Although not expressly stated in the list of issues as a breach of contract claim, during the parties' closing submissions, the Tribunal indicated that if the unauthorised deduction from wages claim was out of time, we would still consider whether, as per our breach of contract jurisdiction, there was any entitlement to damages in relation to bonus.

154. Our decision is that there was not. The Respondent did not breach the contract, and the Claimant has no entitlement to damages.

155. The Monthly Performance Bonus, as per clause 5 of the Claimant contract [Bundle 119] and the document on [Bundle 658] was that, each month, the Claimant was entitled to receive a particular payment provided the conditions therein were met (and provided the Respondent had not previously withdrawn or varied the scheme). In 2010, the figure was £200 per month, and later it was £250 per month.

Once the month was over, and the Claimant had achieved the targets, it would have been too late, for that month, for the Respondent to try to claim that it had a discretionary right to withhold the payment.

156. However, the document on [Bundle 658] refers to periodic review, and our decision is that the bonus entitlement was subject to the terms of the staff handbook. (See Introduction to the Claimant contract on [Bundle 118]). As stated in the handbook [Bundle 138].

> BONUS AND COMMISSION SCHEMES
>
> From time to time, the Company operates bonus and/or commission schemes relating either to individual, departmental or branch performance against specified targets. Your Statement of Terms and Conditions will list if you are eligible to participate.
>
> The Company reserves the right in its absolute discretion to terminate, withdraw, amend or vary any such schemes without notice and at any time, and further reserves the right to exclude any employee from participation in any of the schemes without giving any reason.
>
> All bonus and commission schemes are subject to regular review: any subsequent changes to existing schemes or the introduction of new schemes will be explained by your manager.

157. The Respondent was entitled to vary or withdraw the scheme. It could not remove entitlement to payments that had already accrued. However, it could reduce future entitlement. That is what it did in when, because of Covid, it applied a 50% reduction to each employee's maximum entitlement.

158. Furthermore, and in any event, quite apart from the fact that the Respondent had a right to unilaterally vary the bonus entitlement (and had validly exercised that right), the Claimant agreed to the variation by her email of 9 June 2021.

159. The breach of contract claim (for alleged underpayment of bonus) therefore fails.

160. We have noted Mr Joshi's email of 11 February 2021 [Bundle 196]. However, the onus is on the Claimant to prove that there was any month in which she was entitled to the full £250, and the Respondent failed to pay that. His assertion in the email was that she had failed to meet one of the conditions of the bonus, namely "no cash outstanding for more than 3 days". It is true that there was this requirement, and the Claimant has not been proven that the assertion was false. Further, she has not proven that her bonus payments were actually affected by any opinion/decision contained in that email.

161. That applies to all of the months itemised on [Bundle 498]. Furthermore, the allegations in relation to May 2016 and earlier are out of time as they refer to alleged breaches of contract which are more than 6 years before the claim was presented.

Holiday - Contract

162. The Claimant's contractual entitlement was clause 7 of the contract [Bundle 120]. It was for 20 days per year, plus bank holidays. The leave year ran 1 January to 31 December, with entitlement for part year to be 1.67 days per completed month.

163. The contract cross-references the handbook, with the relevant section being [Bundle 134 to 135].

164. The combined effect of these would be, therefore, that as of 1 January 2022, the Claimant had lost any unused entitlement for 2021, other than the 10 days she was allowed to carry over because of Covid. She did have more than 10 unused days, and therefore was entitled to carry over the 10 day maximum.

165. She was dismissed with immediate effect on 13 January 2022, and therefore had not accrued any unused contractual entitlement at all for that year, because she did not work a completed month.

166. [Bundle 532] shows that she received £988.56 for holiday pay. This was in excess of the entitlement to 10 days pay. (Basic Salary of £22,350, plus maximum bonus of £3000, would imply 10 days pay was around £975; it would be lower than that if bonus were not taken into account when working out the contractual entitlement to holiday pay).

167. Thus the holiday pay claim fails if based on contractual entitlement.

Holiday – Working Time Regulations 1998 ("WTR")

168. For WTR purposes, the leave year would be, as per the agreement, 1 January to 31 December.

169. WTR does not allow carry over except where Regulation 13(10) applies

> (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph 11

170. So this is wide enough to cover various possible Covid-related reasons that might be argued as having prevented/hindered the worker from using their entitlement.

171. However, we are not persuaded that there was any such reason that the Claimant did not use her full entitlement to 2021 holiday.

171.1 Firstly, the Claimant's evidence was that she was not furloughed, and so being on furlough was not the reason for failing to take the full 2021 allowance.

171.2 Secondly, the Claimant's evidence was that, throughout her employment, she failed to use her entitlement. Her evidence was not that either the pandemic or the employer's refusals of any request prevented her taking her leave, but that she chose not to take it.

172. So all of the Claimant's 2021 WTR entitlement was lost, given that she failed to use it all by 31 December 2021, and could not carry any of it over.

173. Thus, in accordance with WTR, the Claimant would only have a proportion based on 13/365 of her 2022 entitlement. The Respondent did not fail to pay an amount which was (at least) that, and the holiday pay claim based on WTR fails.

Equality Act claims

174. We will next describe the decisions in relation to the Equality Act claims. These are the only claims that are against both R1 and R2. All the other claims are against the employer, R2, only.

175. We have taken all of the evidence and arguments into account, including those matters which we discuss in more detail below in relation the Notice Pay claim and Unfair Dismissal claim.

176. The Claimant relies on the same alleged acts and omissions for both harassment and direct discrimination. If we had upheld any of the complaints, that would have been a factor which would have had some influence on our decisions in relation to unfair dismissal. Furthermore, as discussed below, we did find that the dismissal was unfair, and we have taken account of that when assessing the EQA claims.

177. The list of issues only mentioned Mr Bell and Mr Joshi as potential actual comparators. Neither of these individuals are valid actual comparators, taking into account the provisions of section 23 EQA. Neither of them was in a similar role to the Claimant, or had similar duties or lateness. (And we do not think it necessary to make any findings about how long Mr Joshi spent on cigarette breaks, or how much work he did – by phone, etc – during those breaks, because allegedly long smoke breaks are not the same as alleged late arrival, and because the Claimant and Mr Joshi had different line managers.)

178. However, we have taken into account the evidence that we have heard about other employees, including those mentioned in Mr Joshi's statement, when considering whether there is any actual comparator, and, if not, whether there is any evidence that a hypothetical comparator would have been treated differently to the Claimant.

8.7.2. Subject the Claimant's performance to scrutiny that was not applied to others?

179. We are not persuaded that it is accurate to state that Mr Joshi or the employer subjected the Claimant's performance to scrutiny that was not applied to others.

180. We accept Mr Joshi's evidence (with which the Claimant agrees) that the make up of the business was that most of the employees were male. As noted in Mr Joshi's statement:

> In my role as TPS Centre Manager, my team was made up of the following: 2 Warehouse Managers (Male), 2 Warehouse Operatives (Male), 2 Business Development Managers (Male), 2 Administrators (Female), 13 Drivers (1 Female) & Bikers, 1 Sales Manager (Male), 8 Parts Sales Executives(Male)

181. We had no evidence that would have allowed us to decide that any of these men, or any other men reporting to Mr Joshi, were actual comparators for the Claimant. From what we heard from Mr Joshi, which we accepted, their circumstances were considerably different to the Claimant, as they had completely different duties, as well as different working times.

182. There is an email on [Bundle 196] which criticises the Claimant's performance, and that of her female colleague. We take that into account.

183. There are no facts from which we could conclude that a hypothetical male colleague would not have received the same scrutiny, feedback and criticism as the Claimant if that hypothetical male colleague's circumstances had been the same as the Claimant's including in job duties, job performance and time keeping.

184. On the evidence, Mr Joshi introduced some new systems and procedure which affected how the Claimant was instructed to perform her work, and the Claimant did not – in all cases – comply with the instructions, leading to him reiterating those instructions. There are no facts from which we could conclude that those changes would not have been introduced had the Claimant been a man, or that Mr Joshi would have been more tolerant of the employee's failure to comply with the new way of working had the employee been a man.

185. Therefore, in relation to this alleged act, the claims of harassment and discrimination both fail, as the Claimant has not persuaded us that there was any conduct that was either related to sex or because of sex, even taking account of the burden of proof provisions.

8.7.1. Subject the Claimant's timekeeping to scrutiny that was not applied to others?

8.7.3. Dismiss her

186. For the allegation that the Claimant's timekeeping was subjected to greater scrutiny than was applied to others (because of sex or for a reason related to sex), and the allegation that she was dismissed (because of sex or for a reason related

to sex), we are satisfied on the evidence, that the Claimant's sex did not play any part at all, even unconsciously, in the decisions to speak to the Claimant informally about timekeeping, give the Claimant warnings for timekeeping, monitor her arrival times (especially during the warning period), formally instigate disciplinary proceedings, dismiss her, and reject her appeal.

187. The evidence that Mr Joshi has also taken action against others is fairly neutral. We found paragraph 10 of his written statement to be potentially misleading, as it implied that one or more of the names in brackets were men whom Mr Joshi had dismissed. While we accept that they were all men, and that he had taken some action against them in each case, in actual fact, none had been dismissed.

188. There is evidence in the bundle (which the Claimant does not concede is reliable) about occasions on which the Claimant arrived later than her 10am start time. There was no evidence about the specific arrival times of other people in relation to their respective contractual start time. The evidence does show that the Claimant was frequently late; it has not been established that the others had similar frequency of lateness.

189. There is no actual comparator for the Claimant (including the people mentioned in Mr Joshi's paragraph 10, as well as Mr Joshi and Mr Bell). These individuals did not have sufficiently similar circumstances to the Claimant's. To the extent that some were warned, rather than dismissed, the Claimant was also warned. To the extent that some resigned, or left because of a TUPE transfer after the warning, there is no evidence to persuade us that their timekeeping was similar to the Claimant's in the weeks immediately following their warning, or at any time between the warning and the end of employment.

190. The Claimant's own bundles, JP1 and JP2, contain evidence of her being informed that her line manager raised concerns about lateness with her. Prior to this the Tribunal hearing, the Claimant had not argued that these emails were unjustified because she was not late (on the specific occasions identified by the specific emails, or at all), but rather she had argued that Mr Joshi should have been willing to accept her lateness because she made up the time and because her performance, apart from the lateness, was good, and for that reason the frequent reminders/accusations about lateness were unjustified.

191. The Claimant's lateness was extremely frequent, and some of it involved arriving tens of minutes, rather than a few minutes, after 10am. We accept Mr Joshi's account that every employee had a contractual start time, and was expected to keep to it, and would face disciplinary action if they failed to do so. The evidence shows that in the Claimant's case, not counting the warning in 2013, she had various informal warnings and discussions in 2020 and 2021, prior to the formal disciplinary stage. There was a first warning and a final warning prior to dismissal.

192. The evidence shows that Mr Joshi sought and attempted to follow HR advice. While that does not, in itself, eliminate the possibility that he was motivated by the Claimant's sex, or by a reason related to her sex, we reject the Claimant's argument that we should infer that he was overly eager to seek to dismiss her. The tone and content of the emails to HR in late 2021 does tend to show that Mr Joshi thought that it was time to progress the matter through the formal stages, and potentially move to a dismissal decision. However, that is not surprising or suspicious given both the specific written informal warnings following the "reset" meetings, and given, as he mentioned to HR, he was regularly sending emails to the Claimant and speaking to her about lateness, but the Claimant was, in his opinion, brushing him off and was showing no signs that further informal action by the Respondent would bring about the desired improvement. There is no suggestion in the emails that he would still have moved to a dismissal hearing even if the Claimant's punctuality improved following the earlier written warnings.

193. Not only are there no facts from which we could conclude that the Claimant's sex influenced the decision making (about the amount of scrutiny, warnings or dismissal), we are fully satisfied that a male employee whose timekeeping was the same as the Claimant's would have been treated no more leniently.

Unfair Dismissal

194. We ask ourselves these questions.

194.1 Was the Respondent's dismissal reason the Claimant's conduct (specifically persistent poor timekeeping) as the Respondent claims?

194.1.1 It is for the Respondent to show it was, not for the Claimant to refute, but we analyse the Claimant's arguments that it was because of sex, or because she had made reports of financial irregularities?

194.1.2 We have to decide if Mr Joshi was the decision-maker. If he was, we have to decide if he genuinely believed that the Claimant was guilty of persistent poor timekeeping AND whether, if so, that was his reason for terminating the Claimant's employment?

194.2 If the dismissal reason was genuinely the Claimant's conduct, then did the Respondent have reasonable evidence that she had acted in the manner alleged.

194.3 We also have to decide whether a fair procedure was followed prior to dismissal, and whether the procedure as a whole, including the appeal, was fair.

194.4 Finally, we have to decide whether the decision was inside or outside the band of reasonable responses, making sure that we assess the Respondent's decision, and do not substitute our own.

195. On the first question, we are satisfied that the Respondent's reason for dismissing the Claimant was the Claimant's conduct (specifically persistent poor timekeeping). Mr Joshi took the decision to dismiss. He genuinely believed that she was persistently late, and he genuinely believed that the lateness justified dismissal (taking account of the fact that there was a current final written warning, which had been issued after an earlier formal warning, which had been issued after several informal warnings). His decision to dismiss was because of that lateness.

195.1 As part of her job as accountant, it was the Claimant's responsibility to highlight any financial issues or irregularities. We are satisfied that she did so diligently, whenever such matters came to her attention. We are not satisfied that she was treated any differently after raising any particular matter than she was before it.

195.2 The Claimant's witness statement refers to some alleged incidents in January to March 2019. The implication is that Mr Joshi was angry with her because she highlighted wrongdoing by him in that period, and that he subsequently disciplined or dismissed her because of it. However, the three reset meetings were January 2020, November 2020 and May 2021. So the first of those was 9 months after the alleged highlighting of his wrongdoing. The first written warning was not until November 2021. The chronology does not lend weight to the Claimant's argument, and, while we do not ignore the possibility of an unscrupulous person being so devious as to wait a long time for revenge - precisely so that they could argue that it was implausible that someone would wait so long to retaliate - there are no facts which cause us to infer that any of Mr Joshi's actions were motivated by his opinion of what the Claimant had said or written, to him or about him, either in the period January to March 2019, or at all.

195.3 We have also noted [Bundle 412 to 417] and the Claimant's reference to those pages in her witness statement. There are some alleged discrepancies which are later than March 2019. However, in fact, many of those actually post date the first warning in November 2021. The sums are fairly small, and there is no evidence that these were anything more than the type of routine matters which a diligent administrator would notice, and seek resolution for. In the main, in those documents, the Claimant is suggesting incompetence on Mr Joshi's part, and/or a failure to understand her role rather than making allegations of any dishonesty, or cover-up, or that Mr Joshi was retaliating against her for some improper motive.

195.4 As against the Claimant's argument that Mr Joshi had some hidden reason for seeking to dismiss her, there is substantial contemporaneous evidence that both Mr Joshi and Mr Willis regarded the Claimant's lateness as being something which had to be addressed, and which they attempted to address, and for which they sought HR's assistance and advice.

196. For the second question, we are satisfied that Mr Joshi did have reasonable grounds for his belief that the Claimant was guilty of persistent poor timekeeping.

196.1 We will discuss documents at [Bundle 348] and [Bundle 439] in more detail below, but on the dates that he was in the office, Mr Joshi had the evidence of his own eyes that the Claimant was not present at 10am. On the days he was not in the office, he relied on information from Mr Bell. He also had the Claimant's own comments, both before and during the 13 January 2022 meeting. In the meeting, the Claimant did not deny being late, and actually accepted that she had been. She put forward explanations for some specific occasions, and more generally accepted having been late without having notified the Respondent in advance.

196.2 Mr Joshi did have reasonable grounds to decide that, at 10am, the Claimant was not already working elsewhere in the building, before going to her own desk for the first time. He had reasonable grounds for concluding that she was significantly late very often. That included that the Claimant did not seek to persuade him that she had already been in the building every day, or on specific occasions, and his own assessment that her work elsewhere would take no more than 10 minutes or so, coupled with his instruction to her that she should be present, in her own office and ready to work, by 10am.

196.3 The Claimant did not state during her employment (or at the appeal) that she had been in the building working away from her desk at 10am. It was not necessary for Mr Joshi to specifically address his mind to an argument that he did not believe to be true, and which had not been raised by the Claimant. The issue of whether there were reasonable grounds for him to reject, on 13 January 2022, a specific argument that was not presented does not arise. However, he did have reasonable grounds to believe that she was not at work by 10am, as per the requirements of her contract, and as per his previous instructions to her as her manager.

197. For the third question, our decision is that the procedure fell outside the band of reasonable responses which a reasonable employer could adopt.

197.1 Not every defect in a procedure would lead to that conclusion. The standard is reasonableness, not perfection.

197.2 Furthermore, not only is it totally irrelevant how the Tribunal might have handled the procedure, the fact that some other employers might have done

things differently is not the test either. Another system for recording the Claimant's arrival time could have been created, but it does not follow from that that it was outside the band of reasonable responses for Mr Joshi to rely on direct observation by himself and Mr Bell.

197.3 The investigation did not entail gathering evidence (CCTV or witness statements) from the ground floor to find out if the Claimant was in the building working away from her desk. However, this was not an argument raised by the Claimant in any of the informal meetings about her lateness, or when she was invited to the first disciplinary hearing or the second disciplinary hearing. It was not raised by her on 13 January either, and so it was not necessary to adjourn and investigate that point further.

197.4 We do not think it was a breach of the ACAS code for Mr Joshi to be the decision-maker in the circumstances. Nor was it a breach of the ACAS code that there was no separate meeting deemed "investigation meeting" with either Mr Joshi or anyone else. As the Claimant's line manager, it was not unreasonable that he was the person who collated the evidence of alleged lateness, and that he was the decision maker on the dismissal.

197.5 It was also not unreasonable that he was the person who issued the first warning and later then final warning, and was also the decision maker on the dismissal. Apart from anything else, there had been no formal challenge to those warnings. The Claimant had the right to appeal and did not do so. It is not plausible that the Claimant was unaware of the right to appeal, but, even if that is hypothetically true, the Respondent did nothing to create that state of ignorance.

197.6 The Claimant had every opportunity to request a different hearing officer, or to request an investigation meeting. She did neither. It was not unreasonable for the Respondent to decide that neither such thing was required.

198. However, the following defects cause us to decide the process was outside the range of reasonable responses and therefore unfair.

198.1 The Claimant was told both on 30 January 2020 [Bundle 188] and 24 November 2021 [Bundle 287] that her lateness was being recorded on the ADP system. While we accept that it is factually accurate that Mr Joshi made a good faith attempt to do so:

198.1.1 his entries [Bundle 439] were not consistent with the data presented to the Claimant on 13 January [Bundle 348];

198.1.2 his ADP entries were not provided to the Claimant so that she could consider if they provided help to her to defend the allegations;

198.1.3 his ADP entries were not taken into account by Mr Joshi prior to making the decision to dismiss, and nor were they considered by Mr Poole for the appeal.

198.2 We are satisfied that neither [Bundle 348] nor [Bundle 439] was deliberately manipulated to try to make the Claimant's timekeeping look worse than (in Mr Joshi's genuine opinion) it actually was. However, according to Mr Joshi's account (which we accept as being truthful) each of them was created based on the same evidence (his own personal knowledge of the Claimant's arrival time, the emails which he sent her, and the emails which Mr Bell sent to him). Neither was created entirely contemporaneously ([Bundle 348] being created entirely after the events in question, and for the purposes of the disciplinary hearing, and [Bundle 439] being at least partially completed later than the day in question, when Mr Joshi returned to work after his holiday). However, a reasonable investigation would have been one which revealed that two different documents which, in theory, ought to have contained the same data did not in fact do so. Further, a reasonable procedure would have been one in which the Claimant was supplied with the information from ADP, so that she could have sought to challenge the accuracy of [Bundle 348]. The Claimant had specifically been told historically that – because her lateness was perceived as a problem – accurate records of arrival times would be put on ADP. It was unreasonable, in those circumstances, to fail to provide the data from ADP to the Claimant, and unreasonable for the employer to fail to check it and cross-reference it to [Bundle 348].

198.3 We are not persuaded by the Respondent's evidence that the Claimant was handed, on 13 January, printouts of all the emails which had allegedly been sent to her showing her absence on specific dates. Even if we are wrong on that:

198.3.1 none of them were sent with the hearing invitation letter, and that was unreasonable if it was the Respondent's intention to suggest that they were evidence of specific arrival times, and ask her to account for the reasons for lateness (or to dispute the time, as the case may be)

198.3.2 when they were (on the Respondent's case) handed to the Claimant in the meeting, the Claimant was not offered time to read through them all, and consider them, and prepare what she might want to say in response.

198.4 It is common ground that the list on [Bundle 348] was handed to the Claimant in the meeting. However, it was not sent to her in advance of the meeting, and the Claimant was not offered time to consider each entry one by one, and consider if there were grounds to challenge them with specific evidence. The Claimant did know, before the hearing, that it was about lateness. She

did not necessarily know which specific dates or alleged arrival times the Respondent had in mind.

198.5 The Respondent's procedure did not uncover that 18 and 19 December 2021 were weekend days, and days on which the Claimant was not working and was not required to work, and so the entries for those dates were false accusations of lateness. (False in the sense of being inaccurate; they were not fabricated and it is not the case that the Respondent knew that she was not late on those dates). The Respondent's procedure was such that the Claimant did not have an adequate opportunity to spot that for herself prior to Mr Joshi's dismissal decision.

198.6 Although it is true that, on the Respondent's case, the Claimant had received emails contemporaneously alleging lateness on specific dates, it does not follow that she knew which of those specific dates would be dealt with on 13 January 2022. Furthermore, on Mr Joshi's own evidence, he believed that the Claimant was ignoring these emails and was not opening them.

199. In some circumstances, defects at an initial stage can be cured on appeal: Taylor v OCS Group [2006] IRLR 61.

199.1 In this case, Mr Poole had some knowledge of the events prior to the dismissal, and of Mr Joshi's decision. That, in itself, does not breach the ACAS code or render the appeal unfair.

199.2 We accept his evidence on oath that, on a conscious level, he was willing to listen to the Claimant's arguments, and, potentially, overturn the dismissal.

199.3 However, the Claimant had asked to speak to him in December, and he decided that was not necessary because she was already in discussions with Natalie Cumino from HR. Thus, he was not simply aware that one of his reports (Mr Joshi) was dealing with a disciplinary matter; he had made up his mind by that stage that there was no reason for him to meet the Claimant.

199.4 However, the defect of failing to give the Claimant the evidence in advance of the meeting, coupled with the fact that the Claimant had been required to leave the premises on the day of the dismissal, meant that the Claimant had not had the opportunity before the appeal hearing to check her own work records (emails sent, for example) to attempt to refute any given alleged arrival time.

199.5 We do accept that there was time after the dismissal decision, and before the appeal, such that the Claimant could at least have spotted 18 and 19 December were weekends, and she might have also been able to access information from other sources to confirm her own whereabouts on particular

days. But the defect in the procedure which led to the decision on 13 January was not cured by the subsequent appeal opportunity.

200. Thus, the dismissal was unfair because the procedure was outside the band of reasonable responses.

201. Based on the extent of the lateness as Mr Joshi and Mr Poole genuinely perceived it, and on the fact of the previous warnings, it was not outside the band of reasonable responses that the decision was dismissal. The Claimant's length of service was not ignored, and she was given every opportunity to out forward explanations or mitigation. There are reasonable employers who would have decided that no sanction short of dismissal was appropriate. We will address the lack of notice, and the pay in lieu of notice, below.

202. At the remedy stage, we will make a decision in relation to Polkey.

202.1 This will include an assessment of whether the Claimant would still have been dismissed on 13 January 2022 had the Respondent acted fairly by (either providing the evidence in advance or), for example, by offering a break in the hearing for the Claimant to consider the evidence and formulate her response and/or to consider asking for the raw data on which it was based.

202.2 It will include an assessment of whether the 13 January hearing might have been adjourned for a few days to enable those things to happen

202.3 It will include an assessment of whether the Claimant, having been provided such an opportunity, might have been able to persuade Mr Joshi that the evidence was flawed and that, rather than dismissing her at that stage, he should make a decision that the Claimant was still under a Final Warning,

202.4 We will decide whether the approach will be to decide that the Claimant's dismissal would have been delayed, but was inevitable, or else whether to apply a percentage reduction to the compensatory award to reflect the uncertainty.

203. At the remedy stage we will also make a decision on contributory fault. It is our provisional view that there will need to be a percentage reduction to both basic award and compensatory award because of blameworthy conduct by the Claimant. We are likely to follow the guidance of applying either 25%, 50%, 75% or 100%, rather than a different amount.

Breach of Contract

204. We are satisfied on the evidence that the Claimant was frequently late. We do not think that [Bundle 348] or [Bundle 439] is sufficiently reliable that we can decide on specific arrival times on specific dates. However, regardless of whether she was

sometimes at her desk on time, or sometimes she was downstairs working at 10am, it is clear to us that there were many occasions over many years that the Claimant did not arrive until a long time after 10am. This lateness continued even after the final written warning.

205. Even if there was tolerance of this lateness at some periods during the Claimant's long period of employment, the Respondent never varied the contract so that she could have a flexible arrival time. On the contrary, she was told many times that it was not flexible.

206. The Respondent had made clear that the arrival time should be 10am. This was a change from a fixed arrival time of 9.30am and was agreed to attempt to accommodate her. It was agreed that she could take a shorter lunch break, thereby keeping her weekly hours and pay the same.

207. The Respondent offered her a later time, and she refused. The offer made was that she could start later than 10am, but still finish at 6pm. The Claimant knew that this would mean fewer weekly hours and a pay reduction. She rejected this offer. She knew that the Respondent required her to be there for 10am as a condition of her contract, and as a condition of her continuing to receive the same weekly pay (that is, without the reduction in pay that would have been the result if she had accepted the offer of a start time later than 10am).

208. The Claimant knew that the Respondent did not regard making up the lost time as an acceptable alternative to arriving for 10am. It had told her she had to take at least 30 minutes as lunch break, and that she was required to leave promptly at 6pm.

209. In 2021, the Claimant was given first warning and then a final warning, reiterating the 10am requirement.

210. It was a serious breach of contract on the Claimant's part to be often late. Whether it was a deliberate choice to be late or was accidental, it was still a breach of contract.

211. However, on the evidence we are not persuaded that the Claimant intended her actions to flout the contract. She believed that she was complying with the more important obligations by getting the work done including working through lunch and so on. She was committed to working for the Respondent and wanted to carry on.

212. We have taken into account the full list of examples of gross misconduct in the handbook (and of the fact that they are examples, not an exhaustive list), including that "serious breach of company policy / procedure" is one of the examples mentioned.

213. Although a repudiatory breach can be conduct on the employee's part which is accidental or negligent, rather than deliberate misconduct, our decision is that the Claimant's breach was not so serious that it was repudiatory. Since there was no repudiatory breach, the Respondent breached the contract by purporting to accept a repudiatory breach by its summary dismissal.

214. The Claimant was entitled, in accordance with clause 11 of her contract, to either be given 12 weeks' notice, or else a payment in lieu of that period. She received some payment in lieu, but less than her full entitlement.

215. There was therefore a breach of contract, and the amount of damages will be assessed at the remedy stage.

Outcome and next steps

216. Following announcement of our liability decision with reasons, we heard submissions about re-employment. We have sent a separate reserved decision about that.

217. We also arranged a hearing for 19 March 2024 to deal with other remedy issues and the Claimant's application for a preparation time order.

Employment Judge Quill

Date: 24 February 2024

REASONS SENT TO THE PARTIES ON
26 February 2024

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FOR EMPLOYMENT TRIBUNALS