EMPLOYMENT TRIBUNALS

Claimant: Ms Y Zhang

Respondent: Greenland (United Kingdom) Investment Limited (1)
Mr Ling Luan (2)

Heard at: **London Central Employment Tribunal (via CVP)**
On: **7th-9th November 2023**

Before: **Employment Judge Singh**
Ms L Venner
Ms S Brazier

Representation
Claimant: Did not participate
Respondent: Ms K Parker (of Counsel)

JUDGMENT

Unfair Dismissal

1. The Claimant's claim for Unfair Dismissal is not well founded and is dismissed.

Direct sex and race discrimination

2. The Claimant's claims for direct sex and race discrimination are not well founded and are dismissed.

Harassment (sex and race)

3. The Claimant's claims for harassment are not well-founded and are dismissed.

Victimisation

4. The Claimant's claims for victimisation are not well founded and are dismissed.

Unlawful deduction from wages

5. The Claimant's claim for unlawful deduction from wages is not well-founded and are dismissed.

Holiday pay

6. The Claimant's claim for holiday pay is not well-founded and is dismissed.

REASONS

Introduction

7. The Claimant was employed by the First Respondent, the UK subsidiary of a global real estate company, from September 2015. Her employment ended on the 11th March 2021. The Second Respondent is the Deputy HR Director of the First Respondent.

8. The Claimant was employed as a Deputy Design Director. The Claimant claims that this was a Senior Management role.

9. The Claimant relocated to the UK from China for the role. Her visa allowing her to work in the UK was sponsored by the First Respondent.

10. At the start of her employment, the Claimant was told she would be enrolled in the First Respondent's pension scheme after passing her probation. The Claimant says that she was not enrolled in it for a period of 2 years, and had to complain to the First Respondent.

11. This was eventually corrected and made a backdated pension payment In March 2017. The Claimant says that because the backdated payment was a lump sum, it caused her to pay a higher amount of tax in that month.

12. The First Respondent appraises its staff each year. Employees are either categorised as "senior managers" or "other staff" for the purposes of the appraisal. The Claimant claims that between 2015-2018 she was appraised as a senior manager but not in 2019 and 2020.

13. On the 6th May 2020, the Claimant claims that she approached Mr Taotao Song, CEO of the First Respondent to notify him that her visa would be expiring soon and that she wanted to know whether the First Respondent would support her in an application for indefinite leave to remain (ILR) in the UK. The Second Respondent confirmed that the First Respondent would support the Claimant's ILR application.

14. The Claimant alleges that on the 29th July 2020, the Respondents gave her notice of termination, without following any procedure.

15. An issue with the ILR application arose in August 2020. The Claimant claims that the Respondents forced her to resign her employment before they would support her application.

16. The Respondents contend that there had been discussions with the Claimant prior to August 2020, in which they had raised the possibility of having to make her role redundant due to lack of work as a result of the Covid-19 pandemic. They go on to say that, nonetheless, they directed the Claimant to a solicitor at Lewis Silkin to assist her with the application.

17. The Respondents say that on the 5th August, there was a discussion between the Claimant and the Second Respondent, where the Claimant said she was worried that the First Respondent would terminated her employment

as soon as she was granted ILR. The Second Respondent stated that if the economic outlook continued to be bleak, they may have to consider furloughing the Claimant or making her redundant. The Claimant said that she would prefer to resign than either of those options.

18. The Second Respondent states that it was in response to that suggestion by the Claimant that he thought about the best way to protect the First Respondent in relation to any future claims by the Claimant. The Respondents state that the Claimant offered to sign a resignation letter in advance in case she did decide to go down that route, as an assurance to the Respondents.

19. The Claimant alleges that the Respondents blocked access to the First Respondent's IT system from September 2020.

20. The Respondents state that by October 2020, the position regarding the Claimant's work had not improved and so it notified her on the 14th October 2020, that her employment had ended on 30th September 2020, when her Tier 2 visa had expired.

21. The Respondents state that following this, the Claimant became more receptive to suggestions for other work she could carry out. As a result, the Respondents re-engaged her on the 5th December 2020. The start of her employment was given as 5th December 2020 and she was given a new employee number. However she had actually worked in October and November 2020 for the Respondent and been paid for those months' work.

22. The Claimant's ILR was granted on the 25th January 2021.

23. On the 27th January 2021, there was a discussion about the Claimant, following her last appraisal. It was decided that as she continued to be inflexible about alternative work and her own work had diminished, and she was resistant to the idea of being placed on furlough, she would have to be made redundant.

24. The Claimant submitted an informal grievance on the 5th February 2021.

25. She was placed at risk of redundancy on the 9th February 2021.

26. The Claimant submitted a formal grievance on the 11th February 2021.

27. The Claimant's employment was brought to an end on the 11th March 2021.

28. In the Claimant's final salary, the First Respondent made a deduction regarding her holiday pay.

29. The Claimant submitted her claim on the 28th July 2021. That claim form made complaints of unfair dismissal, direct race and sex discrimination,

harassment, victimisation, unlawful deduction from wages and unpaid holiday pay.

30. At a preliminary hearing on the 20th May 2022, EJ Walker ordered the Claimant to provide further information to particularise her claim.

31. The Claimant was based in China for the period that the claim was going through the tribunal system. As China is not a country which has given blanket permission for witness evidence to be given from it, the Claimant would have needed to obtain permission from the Chinese government before being able to give evidence at any hearing.

32. EJ Wade further ordered on the 12th September 2022 that the Claimant must attend the final merits hearing in person if permission was not obtained. It was made clear in that order that the hearing would not be postponed because the Claimant was not present at it or in a country which had given permission for witness evidence to be given.

33. The gap in time between the claim being issued and this hearing was clearly much longer than should be preferred. This was due to a significant number of interlocutory applications during the course of the case.

34. The case was eventually listed for a 6 day final hearing, due to commence on the 2nd February 2023. However, at a preliminary hearing on the 23rd January 2023, this was postponed by EJ Brown to the 7th-10th and 13th-14th November 2023, in person.

35. The reason for the postponement was partly because the Respondents had not received the Claimant's statement and because the Claimant had sent in evidence to state she was unwell and would not be able to engage in the hearing.

36. EJ Brown made it clear that she had postponed the hearing the earliest date available. Although the hearing could have been postponed to a later date to give the Claimant more time to recover from her illness, EJ Brown felt that 9 months was a sufficiently generous period of time. Further, EJ Brown took into account the fact the claim had been issued in July 2021 and many of the matters complained of stretch back to 2019 (and some to 2015). Listing the claim beyond November 2023 would mean there was a real risk that a fair hearing would not be possible.

37. On the 18th October EJ Brown made a further order following a preliminary hearing. The Claimant had applied to postpone the final merits hearing on the basis that she was too ill to attend or participate in the hearing, even if it was held via CVP. She would also still be in China so would not be able to give evidence.

38. EJ Brown did not agree to the request to postpone. EJ Brown decided that the hearing needed to go ahead without further delay. A strike out was

considered but it was decided instead that the hearing would go ahead in the Claimant's absence.

39. As the Claimant was not going to be able to participate or give evidence at the hearing, EJ Brown ordered that the Claimant be allowed to provide supplementary bundles and a supplementary witness statement to redress and imbalance.

40. The hearing was converted to a 3 day hearing by CVP. The length of the hearing was reduced to reflect the fact that there would be no cross examination of witnesses and the fact that the Claimant would not be attending.

The hearing

41. Although the Claimant's previous medical evidence and her own submissions had made it clear that she would not be attending the final hearing, she did in fact log on to the CVP hearing at the start. This was a surprise to the Respondents and the tribunal.

42. This caused an issue to arise as to what, if any, involvement the Claimant could have in the hearing.

43. The Claimant was asked the capacity in which she was attending. She said she had logged on simply to observe but if she was able to participate by being able to question witnesses or make submissions, she wanted to be able to do that.

44. She made it clear that she was still in China so understood she would not be able to give witness evidence and be cross examined.

45. The Respondents made it clear that they objected to the Claimant being able to participate in the hearing in the way she wanted. They had not prepared for that and the directions had been set out with the clear understanding that the Claimant wouldn't be attending at all.

46. The panel therefore took some time to determine whether it was fair to allow the Claimant to participate in the hearing. After some discussion it was decided that it would not be in the interests of justice to allow the Claimant to participate in the hearing.

47. The Order of EJ Brown was relevant in our opinion. As per the case of Serco v Wells UKEAT/0330/15/RN, a previous case management order can only be varied by another Judge where it is "necessary in the interests of justice". That is, that there has been a material change of circumstances since the original order was made, that the original order was based on a misstatement, or otherwise in "rare and out of the ordinary" circumstances. The Claimant did not propose that any of these reasons applied and therefore EJ Brown's order was binding on these proceedings.

48. It was clear that the basis of EJ Brown's order was that this hearing needed to go ahead without further delay. She had considered striking out the Claimant's claim due to her failure to comply with orders and the delays that she had been responsible for, but had decided it was less draconian to relist the case for November and for it to go ahead in her absence.

49. It was clear to the panel that the hearing being completed without further delay was of paramount importance to EJ Brown when making her orders. The panel agreed with EJ Brown's reasoning. The case had been languishing for far too long and the longer it went on, the more risk there was that there would not be able to be a fair hearing of the issues. The further in time we were from the incidents that were the basis of the claim, the less reliable witness evidence would be. Justice delayed is justice denied.

50. Delaying the case further would also cause the parties to incur further costs and time being spent and more ET time being used up.

51. The length of the hearing had been shortened to 3 days as EJ Brown rightly envisaged that that was all that would be needed for a hearing where there would be no cross examination and the Claimant would not be attending.

52. The panel agreed that if the Claimant was allowed to cross examine the Respondent's witnesses the hearing would very likely not conclude in the 3 days that had been allocated. The case would need to be part heard which would cause further delay to the outcome being given to the parties.

53. Alternatively, the hearing may have to be postponed completely and relisted for a new trial period that is sufficiently long to accommodate the Claimant participating. That again would cause further delay.

54. The panel took into account the disadvantage that would be suffered by the Claimant if she was not allowed to question the Respondents' witnesses. It was clear that there would be a disadvantage to the Claimant.

55. However EJ Brown had already anticipated this disadvantage and made accommodations for it by allowing the Claimant to submit further documents and a supplementary statement.

56. Further, we considered that there was disadvantage on both sides. Although the Claimant wasn't being afforded the opportunity to question the Respondents' witnesses, the Respondents were also being denied the opportunity to question the Claimant as well.

57. The panel also took into account that there would be prejudice to the Respondents as their witnesses had not prepared to be cross examined.

58. We therefore considered that the parties would not be on equal footing if the Claimant was allowed to participate. The panel therefore decided that it

would not be in line with the overriding objective to allow the Claimant to participate and that the hearing should go ahead as proposed by EJ Brown.

59. The panel spent the remainder of the first day reading through the papers which were extensive. The bundle of the Respondents totalled over 2,000 pages. The Claimants bundles totalled over 3,000 pages.

60. There were also over 180 pages of witness evidence. The Respondent had 3 witnesses. The Claimant had produced a first statement and then a supplementary statement after exchange. Both these statements had been updated shortly before the hearing.

61. The second day had been set aside for questioning of the Respondents' witnesses by the tribunal, however the tribunal considered that the witness statements had been comprehensive and had little or no questions for the witnesses.

62. The Respondents' representative provided written submissions before the tribunal panel broke to make their decision.

The claims and issues

63. There was a detailed list of issues included in the bundle which the tribunal found extremely helpful. The Claimant's claims were as follows

Unfair dismissal

64. The reason or dismissal was redundancy which is a potentially fair reason for dismissal.

65. The tribunal therefore needed to determine:

a. Was the dismissal fair in accordance with section 98(4) of the Employment Rights Act 1996; and
b. Did the Respondent act within the band of reasonable responses when deciding to dismiss the Claimant?

Direct race and sex discrimination

66. The Claimant relies upon her being Chinese for the purposes of the race discrimination claim.

67. The alleged acts that the tribunal had to determine occurred or not were as follows;

a. The First Respondent failing to pay the Claimant's pension contributions between September 2015 and February 2017 and refusing to compensate the Claimant for any losses incurred because of that.

b. In her appraisals in 2019 and 2020, the First Respondent appraised her within the group “other staff” instead of in the “senior managers” group.

c. The First Respondent reclaimed holiday pay for the years 2020 and 2021

d. The First Respondent gave the Claimant notice of termination of her employment on the 29th July 2020 without following any procedure and the Second Respondent falsely claiming he had already discussed it with her.

e. In November 2020, the Second Respondent “spreading rumours” to Edwin Chan that the Claimant had been furloughed and/or that the Claimant was leaving.

f. In November 2020, the Second Respondent instructed the IT department to block the Claimant’s access to the First Respondent’s intranet, drives, files and to RAM project files up to her termination date in March 2021.

g. In August 2020 and November 2020, the Second Respondent refused to provide an employer’s support letter for her application for indefinite leave to remain until she submitted her resignation.

h. The First Respondent forced the Claimant to sign a resignation letter indicating that her employment would end on the 31st December 2020.

i. The First and Second Respondent placed the Claimant at risk of redundancy on the 10th February 2021.

j. The First Respondent failed to properly deal with the Claimant’s grievance (dated 11th February 2021) properly. The allegations included that the First Respondent

    i. Failed to take note of the grievance meeting on the 15th February 2021.
    ii. Failed to obtain evidence from the interviewees in support of the statements they had given.
    iii. Failed to carry out a reasonable search for documents during the investigation
    iv. Failed to appropriately consider (or consider at all) the evidence provided by the Claimant in support of her grievance and the appeal
    v. Failed to carry out a fair and impartial investigation
    vi. Predetermined the outcomes of the grievance and the appeal.

k. The First Respondent failed to consider the Claimant for a bonus in March 2021, despite it being a contractual requirement and then awarding a much lower bonus in April 2021.

l. The First Respondent failed to follow a fair redundancy procedure. It was alleged that the First Respondent

i. Failed to inform the Claimant of the forthcoming redundancy , provide a redundancy plan or identify the pool of selection before issuing the at risk letter.
ii. Failed to conduct a real and meaningful selection across the development team.
iii. Failed to appropriately or at all consider all options to reduce or avoid redundancies.
iv. Failed to consider other employees for the selection pool
v. Prematurely predetermined the decision to make the Claimant redundant.
vi. Failed to address the appeal in the investigation report.

m. The Second Respondent initially refused to provide the Claimant with assistance and the employer's support letter and supporting documentation in relation to her indefinite leave to remain (ILR)application on numerous occasions between 5th August 2020 and 29th November 2020.

n. The Second Respondent delayed the provision of the employer's support letter and other supporting documents for the ILR application from on or around 5th August 2020 until 29th November 2020, resulting in a 16 week delay.

68. The matters g, m and n were alleged to be direct sex discrimination.

69. The remaining matters were alleged to be direct sex and/or race discrimination.

70. For each of the acts, the tribunal would need to consider whether the acts amounted to less favourable treatment. Did the Respondents treat a comparator who did not share the protected characteristic with the Claimant better than the Claimant, or, in the case of a hypothetical comparator, would they have done so?

71. The comparators for the complaints were as follows

a. For allegation b (the appraisal allegation), the Claimant relied upon Mr Edward Morton Jack as an actual comparator, and in the alternative, a hypothetical comparator.

b. For allegations g, m and n (relating to her ILR application), the Claimant relied upon Mr Kun Li as an actual compactor and, in the alternative, a hypothetical comparator.

c. For the remaining complaints, the Claimant relied upon a hypothetical comparator.

72. For the purposes of the sex discrimination claims, the Claimant's hypothetical comparator was an employee of the First Respondent who is not in materially different circumstances to the Claimant, other than their sex is not female.

73. For the purpose of the race discrimination claims, the hypothetical comparator is identified as an employee of the First Respondent who is not in materially different circumstances to the Claimant, other than their race is not Chinese.

74. In the alternative, the list of issues stated that the hypothetical comparator for the Claimant's race and sex discrimination claims was a non-Chinese male who is not otherwise in materially different circumstances.

75. If the tribunal found that the Claimant had been subjected to less favourable treatment, it next needed to find whether or not the reason for the treatment was the Claimant's race or, because of the protected characteristics of race or sex more generally.

Harassment

76. Did the following acts occur?

a. The Second Respondent instructed the IT department to block the Claimant's access to intranet, drives and files, in particular, to RAM project files from September 2020 up to the termination date (11th March 2021)

b. The Second Respondent spread rumours that the Claimant had been furloughed and/or she was leaving to Edwin Chan around November 2020.

c. The Second Respondent referred the Claimant to the earlier purported termination on the following days:

i. 4th October 2020;

ii. 3rd November 2020;

iii. 4th November 2020;

iv. 5th November 2020;

v. 6th November 2020; and

vi. 9th November 2020

d. The Second Respondent forced the Claimant to resign by refusing to provide an employer's support letter until she did so, which was required for the ILR application on numerous occasions from August 2020, and in particular, on the following dates:

i. 2nd November 2020

ii. 3rd November 2020

iii. 29th November 2020

The Claimant signed the resignation letter on 30th November 2020.

e. The Second Respondent commented on the Claimant's trousers on 29th November 2020 suggesting that she looked like a *"frumpy grandmother/auntie"*

f. The First and Second Respondent placed the Claimant at risk of redundancy on 10th February 2021

g. The Second Respondent initially refused to provide the Claimant' with assistance and the provision of employer's support letter supporting documents in relation to her ILR application, on numerous occasions from on or around 5th August 2020 until 29th November 2020, putting her at risk of being an illegal employee for months.

h. The Second Respondent delayed the provision of the employer's support letter and other supporting documents for the ILR application from on or around 5th August until 29th November 2020, resulting in in 16 weeks' delay.

i. The Second Respondents attempts to justify his actions and rely upon untrue statements in his email of 9th February 2021 to someone.

77. If so, did they amount to unwanted conduct?

78. If so, did they have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

79. If so, in relation to allegations d, g, h and i, were they related to the protected characteristic of sex?

80. In relation to the remaining allegations, were they related to the protected characteristic of race or sex?

Victimisation

81. Were the following protected acts for the purposes of a victimisation claim?

    a. The Claimant's email of the 5th February 2021 to the Second Respondent
    b. The Claimant's grievance of the 11th February 2021.

82. Was the Claimant subjected to the following detriments?

    a. The Second Respondent attempted to justify himself and failed to refer the Claimant's concerns addressed in the email dated 5th February 2021 on to someone who was impartial.
    b. The Second Respondent relied on untruthful statements in outlining his justifications.
    c. The Second Respondent informed the Claimant that the First Respondent had no realistic option but to revisit the Claimant's redundancy.

    d. The First Respondent placed the Claimant at risk of redundancy on 10th February 2021.

    e. The First Respondent failed to follow a fair redundancy process with the Claimant including appeal, particularly in light of her grievance.

    f. The First Respondent failed to undertake a fair investigation with the Claimant in relation to her grievance.

    g. The First Respondent failed to consider the Claimant for a bonus despite contractual requirement on 5th March 2021 and then awarded a much lower bonus than expected on 22nd April 2021.

    h. The First Respondent failed to compensate the Claimant as a result of losses incurred due to the failure to make pensions payments.

83. If so, was the reason for the detriments the protected acts the Claimant had done?

Unpaid annual leave

84. Was the Claimant owed any pay for outstanding, unused accrued annual leave when her employment came to an end?

85. If so, was she paid for that?

86. If not, was there a lawful reason for the Respondent to not pay it?

Unlawful deduction from wages

87. Did the Respondent make a deduction of 8 days pay at the end of employment?

88. If so, was that amount properly payable to her?

89. If so, was the Respondent's deduction authorized by statute or a prior written authorization?

The Law

Direct discrimination

90. Section 13 of the Equality Act 2010 states

(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.

91. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** (2003) ICR 337, Lord Nicholls in the House of Lords (NI) said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others? At paragraphs 7 of his judgment we find the following passage:

"Thus the less favourable treatment issue is treated as a threshold which the Claimant must cross before the tribunal is called upon to decide why the Claimant was afforded the treatment of which she is complaining.

92. And further at paragraph 11:

"Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was
treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter,
the application fails. If the former, there will be usually no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

93. In **Nagarajan v London Regional Transport** (1999) ICR 877, a case concerned with the definition of direct discrimination under the previous legislation of the Race Relations Act 1976 (which referred to treatment 'on racial grounds'), the House of Lords considered the

proper approach to dealing with discrimination cases. In that case Lord Nicholls said:

"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'. The crucial question, in every case, was 'why the complainant received less favourable treatment..?"

94. In **Chief Constable of West Yorkshire Police v Khan** (2001) ICR 1065 the House of Lords made it clear that in a case of alleged subjective discriminatory treatment the test to be adopted was: a tribunal must ask itself why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?

95. In the case of **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278, CA, Mummery LJ (at paragraph 49) said:

'Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment.'

Harassment

96. Section 26 of the Equality Act 2010 states that

(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.

97. In **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, EAT, Mr Justice Underhill P gave guidance on the elements of harassment as defined under the Race Relations Act 1976 (which was in slightly different terms to section 26 EA 2010). Underhill LJ revised that guidance as it applies to section 26 in the case of **Pemberton v Inwood** [2018] ICR 1291, CA, as follows (at paragraph88):

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of

subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b)……. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

98. **In GMB v Henderson** [2017] IRLR 340, the Court of Appeal said that in deciding whether the unwanted conduct 'relates to' the protected characteristic the Tribunal would need to give consideration to the mental processes of the putative harasser.

Victimisation

99. Victimisation is set out in section 27 of the Equality Act 2010

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

100. In a victimisation claim there is no need for a comparator. The Act requires the tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

"The primary objective of the victimisation provisions...is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

101. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

102. To get protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the Tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable.

103. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi EAT0269/09**. Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572, **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, and **St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540**. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136**. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

"There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."

104. In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan**. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-

"Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful

discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

105. In **O' Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615** the Court of Appeal said that, if there was more than one motive, it is sufficient that there is a motive that is a discriminatory reason, as long as this has sufficient weight. Conscious motivation is not a prerequisite for a finding of discrimination. It is therefore immaterial whether a discriminator did not consciously realise they were prejudiced against the complainant because the latter had done a protected act. An employer can be liable for discrimination or victimisation even if its motives for the detrimental treatment are benign.

Burden of Proof

106. Section 136 of the Equality Act 2010 states:

"(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

107. Guidance has been given to Tribunals in a number of cases. In Igen v Wong [2005] IRLR 258 and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

108. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the

respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

109. In the case of **Strathclyde Regional Council v Zafar [1998] IRLR36** the House of Lords held that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

110. In **Law Society and others v Bahl [2003] IRLR 640** the EAT agreed that mere unreasonableness is not enough. Elias J commented that

"all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour…Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way … The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable."

111. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

Unfair dismissal

112. Section 94 of the Employment Rights Act 1996 states that

(1) An employee has the right not to be unfairly dismissed by his employer.

113. Section 98 states

(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—

(c) is that the employee was redundant…

(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.

114. Section 139 (1)(b) of the Employment Rights Act sets out the legal test for a redundancy situation.

"139 Redundancy.
(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to— …
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, … have ceased or diminished or are expected to cease or diminish."

115. The case of **Williams v Compair Maxam Ltd [1982] ICR 156** is relevant, in which the following principles which a reasonable employer should adopt in a redundancy situation were expounded:

(a) The employer will seek to give as much warning as possible of impending redundancies to enable affected employees to consider possible alternative solutions;
(b) The selection criteria should, so far as possible, not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service;
(c) The selection should be made fairly in accordance with the criteria;
(d) The employer should consider whether alternative employment could be offered.

116. In relation to the question of a pool for selection of candidates for redundancy we were considered the case of **Capita Hartshead Ltd v Byard [2012] ICR 1256** which includes the following guidance:

(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the (J) Page 5 of 12 Case Number: 3301612/2023 question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per BrowneWilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]; (b) [9] … the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM) ; (c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan [1994] EAT/663/94); (d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that (e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

117. In this case the question is whether the identification of the claimant as part of a pool of one was fair. There are circumstances when it is permissible for employers to identify a redundancy pool of one person as in the case of **Wrexham Golf Co. Ltd v Ingham, (EAT/0190/12).**

Working time regulations

118. Regulation 14 of the Working Time Regulations 1998 states that

14.—*(1) This regulation applies where—*

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

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

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

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.

Unlawful deduction from wages

119. Section 13 of the Employment Rights Act 1996 states

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Time limits

120. Section 123 of the Equality Act 2010 states

(1) 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.

And

(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.

Findings

Race and sex discrimination

121. Many of the discrimination allegations overlapped under different heads of claim. I have set out the tribunal's findings in relation to the Direct Discrimination claims first and made reference back to our findings of fact here, where relevant under the other claims.

Direct discrimination

- *Failed to pay her pension contributions between September 2015 and February 2017 (para 4 PoC) and refusal to compensate the Claimant for the subsequent losses incurred as a result.*

122. As stated above, the essence of this complaint was that the First Respondent failed to enrol the Claimant into their pension scheme and then, when the error was acknowledged and a back payment made, that was made in one lump sum which the Claimant states affected her tax liability.

123. It was accepted by the tribunal that this act occurred. There was evidence in the bundle where the First Respondent acknowledged that it had failed to include the Claimant in the pension scheme and then made a lump sum payment to correct the mistake. This would have caused the Claimant to move to a higher tax rate bracket as the HMRC will have assumed that her pay each month was going to be same, higher amount.

124. In reality, this is then usually corrected by the HMRC at the end of the financial year when they can see the amount an individual has actually earned, but, nonetheless, the tribunal acknowledged that the Claimant would have suffered a detriment at the time if her tax was increased.

125. However, the tribunal found that there were no grounds to conclude that a comparator who was not Chinese or male would have been treated better than the Claimant in these circumstances. The correspondence in the bundle supported that the failure to enrol was an error by the Respondent and there was nothing to suggest that the Claimant's race or sex were any factor in this occurring. Similarly, the correcting back payment was the First Respondent's procedure to correct this and again, no evidence was presented by the Claimant to show that a comparator would have been treated better.

126. Given that we found that this was not less favourable treatment, this allegation failed.

- *Without explanation, appraised the Claimant with "other staff" rather than with senior managers in 2019 and 2020*

127. Again, the tribunal accepted that, factually, this did occur. The First Respondent did not deny that the Claimant was appraised with "other staff" in 2019 and 2020.

128. However, again, we did not find that this was less favourable treatment.

129. The Respondents' explanation for the change as to how the Claimant was appraised was because the senior manager category was reserved for staff who either have a direct responsibility for a department or project team , or directly reported to the CEO/Executive Office. All other staff would be appraised as "other staff".

130. This included the Claimant in 2019 as she reported to a department head. The Second Respondent assured the Claimant on the 23rd December 2019 (page 153) that this had no impact on the Claimant's visa status and personal benefits package.

131. Firstly, the tribunal questioned whether or not this was actually a detriment, given there didn't appear to be any negative impact on the Claimant. However, we accepted that the Claimant may have felt as if she had lost some status if she was now not going to be appraised as "Senior Management".

132. The Claimant alleges that the change in appraisal would have impacted her ability to carry on working in the UK, but the tribunal did not accept this. Although the Claimant's work permit was based upon her role as a Senior Manager in the First Respondent, it did not appear that this was being changed just because she was being grouped with other staff during the appraisal process in 2019. There was nothing to show that the Claimant was being demoted from the role of senior manager.

133. Even though we found that this was detriment, there was no evidence that an actual or hypothetical comparator would have been treated better than the Claimant.

134. The Claimant relied upon Mr Edward Morton Jack as the actual comparator. The Respondents argued that Mr Morton Jack was not an appropriate comparator as he reported directly to the CEO and was a department head. The Claimant did not show that she was a department head or report directly to the CEO. We accepted therefore that Mr Morton Jack was not an appropriate comparator.

135. The Claimant relied upon a hypothetical comparator in the alternative. The hypothetical comparator would be someone doing the same role as the Claimant, with the same position in the company, but who was either male or not-Chinese. Given that the Respondent's explanation for how staff were grouped for appraisals, we found that a hypothetical comparator who was also not a department head and not reporting to the CEO, would also have been appraised with "other staff". Therefore, the Claimant could not show she had suffered less favourable treatment in 2019.

136. In 2020, the Claimant's line manger had left the company and that there therefore needed to be alternative arrangements for her appraisal. The Respondents were unsure as to who would appraise the Claimant in the absence of a formal line manager. For that reason, the Claimant did not appear on the staff list when it was circulated.

137. There was a great deal of time spent in the witness evidence on this, but the tribunal could not see how it affected the issue of how the Claimant was grouped for the purpose of the appraisal. The rule still appeared to be the same; that only department heads and people who reported directly to the CEO would be appraised as senior managers. The tribunal again concluded

that a hypothetical comparator would be treated the same way in 2020 as well.

138. This claim therefore failed.

- *Reclaimed holiday payment from the Claimant for holiday years 2020 and 2021 despite the Claimant only taking two days of her annual leave in 2021*

139. This was a very tricky issue to unpick as it was not clear what had happened with the Claimant's holiday pay and what she was effectively claiming for.

140. Eventually, through reading the bundle and the statements, the tribunal was able to understand the claim. Essentially, the Claimant had been dismissed by the First Respondent with effect from 30th September 2020 and then reengaged afterwards on the 5th December 2020. She was then dismissed again 11th March 2021.

141. Upon her September 2020 dismissal, the Claimant had 22 days, unused, accrued holidays, and was paid for them in November 2020.

142. However, upon her termination in March 2021, the First Respondent decided that the payment for 22 days holiday in November 2020 should not have been made. It decided that as the Claimant was reinstated shortly afterwards, there was opportunity for her to have taken the 22 days before the end of the First Respondent's holiday year. The Claimant did not take any holidays as far as we can see between 5th December and 31st December 2020. A

143. The First Respondent allowed its staff to carry over 8 days holiday from the year 2020 and the Claimant had accrued 5 days holiday from working between January 2021 and March 2021. This entitled the Claimant to be paid for 13 days upon her dismissal in March 2021. However, given the Claimant had been paid 22 days in November 2020, which the First Respondent considered had been paid in error, they stated that she actually owed them 9 days leave.

144. The tribunal accepted that this was a detriment to the Claimant as she suffered a financial loss.

145. However, whilst the tribunal did not consider that the First Respondent had acted fairly when deciding they wanted to reclaim the 22 days the Claimant had been paid in November 2020, there was nothing to suggest that a hypothetical comparator who was male or not Chinese would have been treated any better in the circumstances. This was a policy decision by the First Respondent's HR.

146. As there was nothing to support that this was less favourable treatment, this claim also failed.

- *Gave the Claimant notice of termination of her employment on 29 July 2020 without any procedure being followed and the Second Respondent falsely claiming he had already had a discussion with her about this.*

147. It is important to understand what led up to it in order that we could determine whether it was less favourable treatment.

148. The First Respondent's position is that from 2019, the Claimant's workload began to reduce. This was further affected by the impact of Covid in 2020. The Claimant's role involved the development of apartments on the First Respondent's Ram Quarter site but development ceased in 2020. The only work remaining on that site was managing the existing apartments.

149. The Claimant was asked to assist in the management tasks but the First Respondent says that she resisted doing this.

150. The Claimant notified the Second Respondent in May 2020 that she wanted to apply for ILR. The Second Respondent says that due to the reduction in the Claimant's work and the economic uncertainty, they needed to consider whether that was something they could support.

151. On the 13th July 2020, there was a telephone conversation between the Second Respondent and the Claimant about the concerns about the lack of work for the Claimant. The Second Respondent says that the Claimant was reluctant to take on other work outside her actual role. The Second Respondent says that he told the Claimant that if she was not willing to take on other duties that she would potentially be made redundant.

152. The Claimant does not confirm or deny that this conversation took place in her witness statement. Her claim is that the Second Respondent lied about discussing the dismissal with her, but she does not deal with it in either of the statements she has submitted.

153. She does talk about discussions with Mr Song in July 2020, and confirms her told her to talk to the Second Respondent.

154. In the bundle, at page 197, there is an email from the Second Respondent to the Claimant, dated 29th July 2020, in which the Second Respondent makes reference to a "recent conversation" about potentially dismissing the Claimant.

155. This would support the Second Respondent's argument that there was a prior conversation and on that basis, we did not accept the Claimant's claim that the Respondents had lied about discussing the dismissal with her. There was no email in response to the 29th July 2020 one where the Claimant says "I have no recollection of you discussing the dismissal with me" or words to that effect. We therefore believed that this email reflected what had actually

happened. The part of the allegation relating to the Second Respondent making a false claim therefore fails as we find that this did not happen.

156. In relation to the notice of dismissal itself, the Claimant says in her evidence that the email dismissed her. In actual fact, the wording of the email states the although the Respondents do not envisage needing to continue employing the Claimant at present, they will keep the situation under review. It is not overtly clear therefore whether this was actual notice of dismissal or not.

157. The tribunal eventually decided that it was a notice of termination. The fact that there was a specific date in the email (30th September, when the Claimant's visa would expired) led us to decide that there was sufficient certainty for a reasonable person to read this as notice that their employment would end, unless something happened in the interim to change things.

158. The Claimant did continue working into October 2020, but in October, the Respondents decided to retrospectively terminate the Claimant's employment, with effect from 30th September 2020, as set out in the email.

159. That supported our finding that the email of the 29th July 2020 was notice of dismissal. We also accepted that there was no procedure followed before this was sent. All that had been done was some discussions with the Claimant.

160. However, although we found that this detriment occurred we did not find that it was less favourable treatment. There was no basis for us to find that a non-Chinese or male hypothetical comparator would have been treated better in similar circumstances.

161. The Respondents' decision was based on the lack of work for the Claimant and their perception that she was unwilling to do other work or be furloughed. A non-Chinese or male employee in those circumstances would have been treated the same way by the Respondents in our opinion.

162. This claim for direct discrimination therefore failed as well.

The Second Respondent spread rumours that the Claimant had been furloughed and/or she was leaving to Edwin Chan around November 2020.

163. There was evidence in the bundle, in the form of a transcript of a covertly recorded conversation with Mr Chan and the Claimant on the 26th November 2020, where he confirms to the Claimant that he had been told by the Second Respondent that the Claimant was on furlough.

164. The Second Respondent denies making such a comment to Mr Chan. He stated in his witness statement that would know himself which employees were and were not on furlough himself as he assisted the Second Respondent with day to day HR queries and also managed IT matters himself.

165. The conversation took place in the context of the Claimant being denied access to the Respondent's servers.

166. In conflict with the recording transcript was a note of an interview between Mr Chan and a Mr Dan Luo on the 16th February 2021. In that interview, Mr Chan denied that he had been told by the Second Respondent that the Claimant had been furloughed.

167. There was a discrepancy between the two documents. The tribunal decided it was likely that Mr Chan had been told by the Second Respondent that the Claimant had been furloughed. The covert recording was made closer to the date of when the event was supposed to happen and it is more likely that by February Mr Chan had a poorer recollection of what the Second Respondent had said to him.

168. However, although we accepted that there had been a comment made by the Second Respondent to Mr Chan, we did not agree that this was the same as "spreading rumours" as per the Claimant's complaint. The Second Respondent explained that he had spoken to Mr Chan about restrictive the Claimant's access to the First Respondent's servers and would have needed to explain a reason why. This appears to be a purely operational step rather than a malicious act as suggested by the Claimant. We therefore found that the Second Respondent had not been "spreading rumours" and that this claim also failed.

- *The Second Respondent Instructed the IT department to block the Claimant's access to intranet, drives and files, in particular to RAM project files from September 2020 up the termination date (11th March 2021).*

169. The Second Respondent accepts that this occurred. However, he provided an explanation for this which was that the Claimant's work that would have required access to those project files had ended. This is in line with the Respondents' position that the Claimant's work on the RAM project had ended, which was why they were looking to terminate her employment if no other work could be found for her.

170. The tribunal accepted this explanation. Whilst we are unable to comment on whether it would have been necessary for the Claimant to still access the files, the Respondent gave an explanation that convinced us that a hypothetical non-Chinese or male comparator would have been subjected to the same treatment. This claim therefore failed.

- *The Second Respondent forced the Claimant to resign by refusing to provide an employer's support letter until she did so, which was required for the ILR application, on numerous occasion from August 2020 and in particular on the following dates*

- *2nd November 2020*
- *3rd November 2020*
- *29th November 2020*

The Claimant signed the resignation letter on the 30th November 2020

171. This was a claim for direct sex discrimination only.

172. The tribunal found that the following events occurred after the termination notice email was sent in July 2020.

173. The Claimant confirms she continued to work after that email, and even after the 30th September 2020, when her visa expired. However, there is an email in the bundle (page 248), dated the 14th October 2020, from the Second Respondent, which states that the Claimant's employment ended on the 30th September 2020.

174. The Second Respondent confirms that after the discussion in July 2020, the situation regarding the Claimant's work looked better and the Respondents agreed to continue employing the Claimant and supporting her ILR application.

175. However, they say the position changed again in October 2020. The Second Respondent's evidence that by mid-October it became clear that

176. the Claimant was not willing to carry out tasks which were outside her job description. He states that, coupled with the fact the Claimant was unwilling to accept furlough or a redundancy consultation, they made the decision to confirm that her employment had retrospectively ended on the 30th September. That was communicated to the Claimant on the 14th October 2020.

177. The Second Respondent says that that conversation caused a change in attitude in the Claimant and she now presented as being willing to take on additional duties and be flexible. There were further discussions with the Claimant on the 10th November 2020, it was agreed that the Claimant would be reemployed.

178. One of the discussions took place in a meeting on the 2nd November 2020. There are conflicting accounts as to who suggested the pre-signed resignation letter. The Second Respondent says that the letter was drafted following the Claimant suggesting that if the economic situation started to get worse again, she would rather resign that have to be furloughed or made redundant.

179. The Claimant's version of events is that the meeting on the 2nd November was to discuss the Second Respondent providing supporting materials for the ILR application. The Claimant says that the Second Respondent said in that

meeting that he would not provide the ILR documents unless the Claimant signed the pre-prepared resignation letter.

180. Both versions of events give different reasons as to the circumstances of the letter. There is a recording and a transcript of that meeting but it doesn't clearly support either version of events.

181. However the Second Respondent stated in his statement that the reason the Respondents were keen on getting the Claimant to sign the resignation letter they prepared was because they were concerned that, if the Claimant did eventually resign, she would submit a claim against the company. There is a transcript of the meeting on the 26th November 2020 where the Claimant is told that the resignation letter contains a waiver to claims in it.

182. The tribunal therefore accepts that the Claimant was asked to sign this letter. It also accepts, from the wording of the transcripts, that the Respondents' continued support of the ILR was contingent on the Claimant signing that letter.

183. However, we do not accept that this was less favourable treatment on the grounds of sex. There is no evidence to suggest a male comparator would have been treated better in similar circumstances.

184. In relation to this allegation, the Claimant relies upon an actual comparator, Mr Kun Li, or a hypothetical male comparator in the alternative. The Respondents confirmed that Mr Kun Li's full name is Mr Likun Zhao.

185. The Respondents argue that Mr Zhao is not an appropriate comparator as they did not support his ILR application- he obtained it himself via a different route. The tribunal accepted that a crucial part of the Claimant's allegation as that her ILR application required supporting documents from the Respondents. As the Respondents were not involved in Mr Zhao's application, he would not be an appropriate comparator.

186. The tribunal went on to consider whether a hypothetical male comparator would have received better treatment than the Claimant in similar circumstance. Our finding was that a hypothetical male comparator, who the Respondent also worried would pursue a claim against them after they resigned would also have been required to sign a similar letter waiving claims.

187. Whilst the tribunal does not condone the Respondents' practice, it was clear that their motive was to protect themselves from any future claim and this would have been the same, regardless who the employee was, or their gender.

188. This claim therefore failed.

- *Forced the Claimant to sign a resignation letter indicating that her employment would terminate on 31st December 2020*

189. This claim is similar to the above claim, except that it was a claim for direct race and sex discrimination, as opposed to just sex discrimination. The Claimant relied upon a hypothetical comparator.

190. As above, we accept that the Claimant was required to sign a resignation letter. The copy in the bundle at page 490 confirms the termination date is the 31st December 2020.

191. However, as with the above claim, we did not find that this was less favourable treatment. Our reasoning was the same. The motive of the Respondents was to protect themselves from future claims and we found that a hypothetical male or non-Chinese comparator in the same situation before the Respondents would have been required to do the same.

192. This claim therefore failed as well.

- *The First Respondent and/or the Second Respondent placed the Claimant at risk of redundancy on 10th February 2021.*

193. This did occur and would have been a detriment to the Claimant. However, we needed to consider whether it amounted to an act of less favourable treatment.

194. In his witness statement, the Second Respondent states that the reason for putting the Claimant at risk was because the level of work hadn't improved and the Claimant had again become reluctant to take on other duties.

195. In paragraph 15 of his witness statement, the Second Respondent sets out that the project that the Claimant was primarily working on, the Ram Quarter, had been ceased to be a development by 2020 and that from the start of the Covid-19 pandemic, the remaining work was simply liaise with the Managing Agents.

196. The Respondents have stated that the Claimant was being asked to carry out other alternative duties, which supports their argument that her main role had diminished.

197. The Respondents go on to allege that although the Claimant had previously been happy to take on alternative work, her attitude changed in January 2021, and she again became reluctant to take on other duties. This coincided with her being granted ILR. It is in our opinion likely that the Claimant's attitude towards taking on alternative work changed when she had secured ILR and no longer needed to fear the Respondents not supporting her application.

198. The Claimant's reluctance to carry out other duties together with the disappearance of the work that formed her main duties prompted the Respondents to make the Claimant redundant in March 2021.

199. We did not find that a hypothetical non-Chinese comparator or a male comparator would have been treated better or any differently. Had a comparator also had a reduction in work and not been willing to take on alternate duties, they would have been treated the same way.

200. This claim therefore failed.

- *The First Respondent failed to consider and address the Claimant's grievance dated 11th February 2021 and grievance appeal appropriately by failing to;*

    i. *Take notes of the grievance meeting on the 15th February 2021*
    ii. *Seek evidence from the interviews in support of their statements.*
    iii. *Reasonably search for documentary evidence as part of the investigation process*
    iv. *Appropriately, or at all, consider the evidence provided by the Claimant in support of her grievance and the appeal*
    v. *Carry out a fair and impartial investigation*
    vi. *Predetermined the outcome of the grievance and appeal process.*

201. This was a wide ranging allegation. However, after reviewing the grievance and the process that was followed, it was the tribunal's finding that the Claimant did not suffer the detriments alleged.

202. In relation to the notes of the grievance meeting, there were copies of these notes, that were originally hand written, with translations, in the bundle. The Claimant stated that she did not receive them at the time but that does not mean that they were not taken contemporaneously. There was no evidence put forward by the Claimant which would show that these notes were made up afterwards. As such, we found that notes were made of the grievance meeting.

203. The Claimant complained that the notes weren't long enough and then sent an expanded version. The Claimant argues that as the Respondents didn't challenge her version, that must mean that the original notes were insufficient. However, the Claimant's allegation is not about the fullness of the notes, but that none were taken at all which is plainly not true.

204. In relation to seeking evidence from the interviews, the Claimant did not provide any explanation as to what evidence the grievance investigation should have sought but failed to do so. Without knowing what the Claimant was challenging, we could not find that this had occurred.

205. In relation to the allegation that the Respondent didn't carry out a reasonable search for documents, we can see from the bundle that a large

number of documents were considered for the investigation. Again, the Claimant has failed to provide any specificity to her complaint. She has not said what was unreasonable about the Respondent's search or what they would have uncovered if they had done. We therefore did not find that the Respondent had failed to do this.

206. The same applies to the next allegation, that the Respondent didn't appropriately consider the evidence. This is a very subjective comment by the Claimant and obviously based on the fact that the finding in the investigation wasn't in her favour. Overall, it appeared to us that the grievance process was thorough and there was no evidence of failure to consider it appropriately.

207. This also ties into the last two allegations- that the investigation was not fair and impartial and that the outcome of the grievance and appeal were pre-determined. The Claimant's allegation is based on the fact that she was not successful. There was no evidence that the Respondent had pre-determined any decision or been unfair or biased.

208. The allegations in relation to the grievance therefore failed.

- *Failed to consider the Claimant for a bonus, despite a contractual requirement on 5th March 2021 and then awarded a lower bonus than expected on the 22nd April 2021.*

209. The Claimant was paid a bonus of £6,000 for her work in 2019. This was paid to her in 2020.

210. The Claimant was paid a bonus of £750 for her work in 2020, paid in 2021. It is clear then that the Claimant was paid a bonus in 2021 and that it was lower than the amount paid in 2020.

211. The wording of the claim was that the Respondent had failed to consider the Claimant for a bonus on the 5th March 2021. There was no evidence to confirm the date on which the Respondents had considered the Claimant's bonus so no finding could be made as to whether this was done before the 5th March 2021, however, nothing in the Claimant's contract stated that there was an obligation for this to be done by the 5th March each year. Further, the Claimant pointed us to no other evidence that showed that Respondent needed to consider the bonus by the 5th March. This aspect of the claim failed.

212. The panel then considered the second aspect, which was whether the payment of a lower bonus in 2021 was an act of direct race or sex discrimination.

213. The Claimant relied upon a hypothetical comparator and so the Tribunal considered whether a hypothetical non-Chinese person or a man in similar circumstances would have been treated better or not.

214. We looked at the circumstances in which the bonus was awarded. According to the Respondents' witness evidence, the Claimant's bonuses each year were performance based. They stated that the £6,000 bonus in 2020 was paid to reflect the fact that the Claimant had carried out specific work with the Ram defects team and had also been part of a project that won an award in 2019.

215. Conversely, as per the narrative presented, the Claimant's workload had reduced in 2020 due to Covid restrictions. The Respondent states that the Claimant also did not attend the annual appraisal meeting or provide her annual report in 2020. The Claimant did not challenge this evidence.

216. Given the reasons provided by the Respondent, which the panel accepted, it was decided that a hypothetical male or non-Chinese comparator who also had a reduction in work in 2020 and had not attended the appraisal meeting or provide an annual report would also have received a smaller bonus in 2021 than they were paid in 2020.

217. As the panel did not find there was any less favourable treatment, this claim failed.

- *Failed to follow a fair redundancy process with the Claimant including appeal, particularly in light of her grievance in that the Respondents:*

    i. failed to inform the Claimant of the forthcoming redundancy, the redundancy plan and the pool before issuing the at risk of the redundancy letter;
    ii. failed to conduct a real and meaningful selection across the development team;
    iii. failed to appropriately, or at all, consider all options to reduce or avoid redundancies;
    iv. failed to consider other employees for the selection pool;
    v. prematurely predetermined the decision to make the Claimant redundant;
    vi. failed to address the Claimant's redundancy appeal in the investigation report.

218. We have previously discussed some of the evidence presented by the Respondents regarding the Claimant's redundancy above.

219. It was not accepted that the First Respondent failed to warn the Claimant. The Claimant was sent correspondence on the 9th and 10th February 2021 that the First Respondent was considering making her redundant. This was sent before consultation meetings had taken place and before the final termination notice was given in March 2021. There had also been previous discussions about making the Claimant redundant starting back in the middle

of 2020. The decision therefore was unlikely to have been a surprise to the Claimant in our opinion. We considered therefore that this alleged detriment did not occur.

220. Whilst we find that the Respondents did not provide a redundancy plan, as alleged by the Claimant, we did not consider that this was less favourable treatment. The Claimant did not show that such a plan was something the Respondents were required to do, so we found that the Respondents would have acted the same way for any comparator in similar circumstances.

221. The Respondents' position was the Claimant was the only person at risk and in her pool of selection. The Respondents stated that the Claimant's colleagues who had been carrying out similar duties to her had previously left in 2020, which the Claimant accepted. The Claimant argued that she carried out other duties and so others should have also been considered for redundancy. However, although the Claimant may have been picking up ad-hoc duties, these were in addition to or in the place of her substantive duties. This was the Respondents' reasoning for not considering anyone else. Again, although the Claimant may not be happy with their approach, it was our finding that the Respondents would have treated a non-Chinese or male hypothetical comparator who was in similar circumstances, that is, carrying out ad-hoc alternate duties, the same way.

222. We therefore found that the Respondents actions of not considering anyone else in the pool of selection, not carrying out a selection process and not notifying the Claimant of other people in the pool were not acts of less favourable treatment and therefore not direct discrimination on the grounds of sex or race.

223. In relation to the allegation that the Respondents failed to consider all options to reduce or avoid redundancies, we note that the Claimant did not identify what alternatives there were that the Respondents failed to consider. In her email in response to the redundancy, at page 719 of Bundle B, there is a section headed "My suggestions" but the Claimant only asks the Respondents to reconsider their decision to make her redundant, rather than propose other options they could take such as other roles or a reduction in hours.

224. The Respondents position is that they did consider alternative positions but none were identified. In the absence of the Claimant clarifying what other roles the Respondents could have placed her in, we did not find that there had been any less favourable treatment here.

225. In relation to the allegation that the Respondents predetermined the decision to make the Claimant redundant, there was evidence that the Respondents had engaged in consultation meetings with the Claimant. We therefore did not find that this had occurred.

226. Finally, the Claimant alleged that the Respondents had failed to include the Claimant's redundancy appeal in the investigation report (that was the outcome to the Claimant's grievance.)

227. It was noted that the Claimant's grievance outcome was dated 10th March 2021. The redundancy appeal letter was dated 17th March 2021. Given that this was after the investigation report, we cannot see how the Respondents could have addressed the redundancy appeal in the investigation report. We therefore found this was not a detriment and that the claim for direct discrimination in relation to this failed.

228. All the direct discrimination claims in relation to a fair redundancy process therefore failed.

- *The Second Respondent initially refused to provide the Claimant with assistance and the provision of the employer's support letter and supporting documents in relation to her ILR application, on numerous occasions from on or around 5th August until 29th November 2020, putting her at risk of being an illegal employee for months.*

And

- *The Second Respondent delayed the provision of the employer's support letter and other supporting documents for the ILR application from on or around 5 August until 29th November 2020 resulting in 16 weeks' delay.*

229. These were claims for direct sex discrimination only. The Claimant relied upon an actual comparator, Kun Li, and in the alternative, hypothetical comparators.

230. It has already been determined that the person identified by the Claimant as "Kun Li" is not an appropriate comparator because they were not provided with the same support the Claimant was in relation to their application.

231. However, we still had to consider whether this was less favourable treatment in relation to a hypothetical comparator.

232. We have set out our findings regarding what happened in relation to the Second Respondent's support of the Claimant's ILR application. Those findings are relevant to this allegation. We accepted that there was initial reluctance from the Second Respondent to provide the Claimant with assistance but that this was due to the concern about the Claimant's reducing workload and worry that she would leave as soon as ILR was granted.

233. As with our previous findings, we found here that a hypothetical male comparator, in our opinion, would have been treated the same way. These claims for direct sex discrimination fail.

Harassment

234. The unwanted conduct complained about for the purpose of the harassment claim are set out in paragraph 75, above. Allegations d, g, h and i are harassment on the grounds of sex claims only, the rest are claimed to be related to sex and race.

235. For each of the complaints, the tribunal must find that the incident occurred and that it was unwanted conduct related to the relevant protected characteristic (either race or sex).

236. Findings of fact have been made for all of the allegations, apart from the following

i. The allegation (c) regarding the Second Respondent referring the Claimant to the earlier purported termination on various days in October and November 2020
ii. The allegation (e) that the Second Respondent commented on the Claimant's trouser on the 9th November 2020 suggesting that she looked like a "frumpy grandmother/auntie".
iii. The allegation (i) that the Second Respondent attempted to justify his actions and rely upon untrue statements in his email of the 9th February 2021.

237. In relation to the allegations for which findings of fact have already been made (a, b, d, f, g and h), I note that all of the acts had been found to have occurred.

238. However, we did not find that any of these amounted unwanted conduct, related to race or sex, which had the purpose or effect of violating the Claimant's dignity or creating and intimidating, hostile, degrading, humiliating or offensive environment.

239. For each of them, there was no evidence put forward by the Claimant upon which we could make a finding that the conduct was related to a protected characteristic.

240. In relation to the remaining actions, starting with allegation (c), this referred to emails the Second Respondent had sent discussing the proposed termination of the Claimant's employment that was due to take effect on the 30th September. The emails go on to discuss the Claimant's final pay.

241. It was accepted that these emails had been sent and they made reference to the termination, however we did not consider that these would amount to unwanted conduct related to sex or race. These emails were sent to confirm the action that had been taken and the steps following that. There was nothing inherent in them that connected them to race or sex, nor did the Claimant provide any explanation as to how they were related to race or sex.

242. In relation to allegation (g), this referred to a comment made by the Second Respondent to the Claimant in a meeting in November 2020.

243. The Second Respondent's evidence on this is that he was responding to the Claimant saying that she felt depressed and that he said that she might feel better if she wore brighter clothing.

244. The Claimant says that the Second Respondent made reference to her trousers and that they made her look like a frumpy grandma. The conversation was not in English and we accept the words may not translate over exactly.

245. It was the tribunal's finding that it was more likely than not that this comment was made. The fact that the Second Respondent recalls making a comment about the Claimant's clothing and the comment appears to be about how drab they were suggests that it was a comment of the nature the Claimant alleges.

246. We found that such a comment was unwanted conduct related to sex. The very nature of the comment (calling someone frumpy) was inherently linked to gender and we also found that such conduct had the purpose or effect of violating the Claimant's dignity. The Claimant expresses how humiliated the comment made her feel and we can understand why she says that.

247. However, we noted that this incident occurred in November 2020. There was a limitation point therefore that needed to be considered in relation to this allegation, which I will deal with after the findings on each of the claims has been dealt with.

248. In relation to allegation (i), we had sight of the email the Claimant was referring to in the bundle at pages 670-672.

249. The email was in response to the Claimant's email of the 5th February 2021. In that email, the Claimant makes several complaints about how she has been treated over the past few months.

250. The Second Respondent replies and responds by setting out what he felt were the key events that had occurred over that period. There was nothing in his response which we felt allowed us to make a finding that this was unwanted conduct related to sex. His response was simply to set out facts (as he saw them) and there was nothing remotely relating to gender in his words. The Claimant has not explained how this was unwanted conduct related to sex and therefore this claim fails also.

<u>Victimisation</u>

251. The tribunal firstly needed to find whether or not the Claimant had carried out protected acts.

252. The Claimant relied upon 2 protected acts

    a. The Claimant's email of the 5th February 2021
    b. The Claimant's grievance of the 11th February 2021.

253. The Respondents did not accept that these amounted to protected acts.

254. In relation to the email of the 5th February 2021 (page 653 of Bundle B), we found that this did not amount to a protected act. Although the email makes reference to "bullying and discrimination", the Claimant makes no indication that the acts complained of are in any way connected to race or sex discrimination. The email itself therefore was not a protected act.

255. Further, we found that based on the wording of the email, the Respondents would not have believed that the Claimant intended to do a protected act. The Claimant states that she has "full right to protect my privacy and to raise issues and complaints regarding bullying and discrimination I have suffered in the workplace" which could be read as a threat to take further action, but again there is nothing in the email that would lead the Respondent to believe, in our opinion, that this was going to be a complaint about discrimination such as would be found under the Equality Act 2010.

256. In relation to the 11th February 2021 email (page 649 of Bundle B), again the Claimant uses the words "bullying and discrimination" several times, as well as claiming that the actions she has been subjected to amount to victimisation in the last paragraph.

257. However, again there is no specific reference to discrimination on the grounds of sex or race.

258. The panel considered if such a complaint could be inferred from the issues raised by the Claimant. The complaints made relate to the employment and ILR issues that have been going on for several months. It was our finding that a reasonable employer would not have been able to infer from this that the Claimant was complaining about race or sex discrimination, nor that the Claimant was intending to bring a future complaint about that.

259. As we did not find that the Claimant had carried out a protected act, the complaints for victimisation failed.

<u>Unfair dismissal</u>

260. The Claimant was expressly dismissed by the First Respondent. The reason given was redundancy which is a potentially fair reason for dismissal.

261. The Claimant does not accept that redundancy was the real reason for dismissal and instead alleges, according to her witness statement, that the reason for her dismissal was because she had raised complaints about bullying and discrimination.

262. The tribunal firstly considered what the reason for dismissal was.

263. The Claimant's complaints about discrimination were raised in emails dated the 5th February 2021 and 11th February 2021.

264. The notice of redundancy was sent on the 10th February 2021, but it is clear that discussions and considerations about making the Claimant redundant had been taking place much earlier than this. As stated above, the Respondents had been raising this with the Claimant since July 2020 and had even actually purportedly terminated her employment in late 2020 on the grounds of redundancy (however this explored in more detail in the holiday pay section below).

265. The First Respondent had "re-engaged" her after that purported dismissal, so it is not beyond the realms of possibility that after she began working for them again, there was no further redundancy situation and that they decided to dismiss her again because she had raised complaints about bullying and harassment.

266. However, the panel felt that this was not likely. The Second Respondent states that he had had discussions with Mr Song about the Claimant's redundancy in January 2021 and had been attempting to contact the Claimant, also in January, which he says was about the redundancy.

267. There is an email between the Second Respondent and one of the Senior Development Directors, dated 8th February 2021 in which they discuss the work that the Claimant has been carrying out. (page 575). This we feel was strong evidence that the Respondents were actually looking into the Claimant's redundancy at least prior to the email of the 10th February 2021 that the Claimant sent.

268. It was the tribunal's finding of fact that the conversation between the Second Respondent and Mr Song did happen. The email to Mr Gehrmann on the 8th February 2021 would be completely out of the blue if discussions about redundancy were not already taking place.

269. On that basis, we found that the First Respondent had been considering the Claimant's redundancy prior to the emails of the 5th February 2021 and therefore that redundancy was the reason for the Claimant's dismissal and not the complaints she made about bullying and discrimination.

270. We then considered whether there was a fair redundancy. We have dealt with some of this above.

271. We found that the First Respondent had provided adequate warning to the Claimant. As stated they had written to her in February 2021, prior to consultation taking place and the actual dismissal in March 2021. They had also already been raising the issue of redundancy in 2020.

272. The tribunal considered whether the First Respondent had properly considered the pool of selection, had, if required, gone through a fair selection process, engaged in meaningful consultation with the Claimant and considered alternatives to dismissal.

273. We accepted the First Respondent's justification for the Claimant being placed in a pool of one. As stated above, the Claimant was the only person doing her role as her 2 colleagues had left employment in 2020.

274. The Claimant argued that other individuals who were doing some similar duties to her should have been included in the pool. We rejected this idea based on the First Respondent's reasoning that the people the Claimant had identified were only doing small parts of the Claimant's duties and some of those duties she was only doing ad-hoc. It did not seem appropriate therefore to include these people in the pool given they were not doing the work that had diminished. The Claimant also identified other individuals who the First Respondent confirmed were not in comparable positions to the Claimant. The tribunal accepted the evidence on this.

275. Given the Claimant was in a pool of one, there was no requirement for the First Respondent to go through a selection process.

276. In relation to the consultation, we can see that the Claimant attended consultation meetings on the 16th and 23rd February 2021 and 2nd March 2021. The evidence presented shows that the Claimant was given the opportunity to raise a number of points with the Respondents. It appears from the correspondence that was sent after these meetings that the Respondents responded to the points raised by the Claimant. Whilst the Claimant may not have been happy with the outcome of the discussions, it was the tribunal's finding that there had been meaningful consultation.

277. Finally we considered whether the First Respondent had considered alternatives to dismissal.

278. As set out above, the Claimant did not identify any alternative positions or proposals. The Respondents state that they gave consideration to alternatives and none were available. Given the downturn in work in the company, we accept that this was likely.

279. We therefore found that the dismissal was fair in all the circumstances.

<u>Unpaid annual leave/Unauthorised deduction from wages</u>

280. These two claims have been grouped together because they are about the same issue.

281. As stated above, the Claimant had a deduction made from her last wage for holiday pay they had paid her in November 2020 (22 days).

282. To repeat, the First Respondent had paid the Claimant upon termination of her employment in September 2020 for unused accrued holidays up to that date. However, they had reengaged her on 5th December 2020 and therefore considered that she was not entitled to be paid for those holidays as she could have taken the 22 days between 5th December 2020.

283. We considered firstly whether or not the Claimant had been entitled to be paid the 22 days in November 2020 as this was effectively the amount that had been deducted from her final payslip in March 2021 (less the 8 days she had been entitled to carry over from the 2020 holiday year).

284. We noted that when the Claimant was re-engaged in December she was given a new employee number. With such a gap (September to December) it would seem the reemployment in December was the start of a new employment with the First Respondent. If that was the case then it would seem that the payment for the 22 days would be correct. An employee who is dismissed is entitled to be paid for any unused accrued holidays upon termination.

285. Further, the start of the new employment in December 2020 would begin accrual of new holidays. This would only be between 5th December 2020 to the end of the holiday year of the First Respondent on 31st December 2020, but it would be completely distinct from the previously accrued 22 days.

286. However, it does not appear that any of the parties have treated the purported dismissal in September as actual termination of the Claimant's employment and that the December "re-engagement" appears to be a technical practicality only.

287. If the Claimant was actually dismissed in September and not re-employed until December, she would have a break in service and by the time she was dismissed in March 2021, she would not have acquired sufficient length of service to pursue a claim for unfair dismissal. Neither party was suggesting that this at all.

288. Further, we noted that no p45 had been issued, despite a "final payslip" being issued. The Claimant also appears to have continued carrying out work for the First Respondent beyond September and paid for her work.

289. The Claimant herself alleges in her statement that the payslip in November was not a final payslip and alleges that the First Respondent manipulated the payslips in October and November 2020 to make it look as if her employment had terminated in September.

290. The tribunal therefore found that there had not actually been a dismissal in September 2020. As such, the Claimant had not been entitled to be paid for unpaid accrued holidays in November 2020 and the First Respondent had the right to reclaim the monies paid in error.

291. We note that paragraph 8 of the Claimant's employment contract allowed the First Respondent to make deductions from the Claimant's salary of any money owed to them. As the Claimant had been paid in error, this was money owed to the First Respondent.

292. In light of this, we did not accept that there was an unlawful deduction from wages in March 2021, nor did we find that the Claimant had been incorrectly paid her holiday pay. She had been paid for 8 days which she had carried over from her outstanding balance at the end of 2020 and 5 days which she had accrued in 2021, albeit this had been consumed by the deduction made for the 22 days, leaving her with a deficit figure.

Time limits

293. Only one of the Claimant's claims had succeeded, that of the harassment claim in relation to the "Frumpy Grandma" comment. This comment was made by the Second Respondent. The Claimant had not claimed that the First Respondent was vicariously liable for the complaint so the claim was against the Second Respondent only.

294. This comment had been made on the 29th November 2020. The time limit for this claim would therefore have expired on the 28th February 2021. The Claimant would have needed to lodge her claim with ACAS before then and

295. The Claimant had lodged her claim with ACAS originally on the 19th May 2021. This was against the First Respondent only. The Claimant had lodged a claim with a ACAS against the Second Respondent on the 16th July 2021.

296. Both those dates are outside the ordinary time limit, as was the date of the ET1, 28th July 2021.

297. No other claims had been successful and therefore the tribunal found that this claim could not form part of a continuing sequence of events.

298. We next considered whether it was just and equitable to extend the time limit. Although the discretion afforded to the tribunal is a wide one, we noted that time limits are to be observed strictly in employment tribunals. There is no presumption that time will be extended unless it cannot be justified. The reverse is true: the exercise of discretion is the exception rather than the rule. The onus is on the Claimant to convince the tribunal as to why time should be extended.

299. The Claimant had put forward no arguments as to why it was just and equitable to extend the time limit.

300. We however considered the factors that we thought to be relevant. The delay was over 6 months. Whilst there may have been claims that have had a longer delay that have been granted an extension, we took into account the fact that this claim was about a singular comment at a singular incident. Even

a delay of a few months would make the evidence less cogent. This is further compounded by the fact that there were lots of other events happening after that which push the details of what happened during that conversation to the backs of the parties' minds.

301. The Claimant gave no explanation for the delay. She did not seek to argue that she was ignorant of her rights or the practicalities of pursing a claim. She came across in her correspondence as a very intelligent and articulate individual who we have no doubt could have pursued her claim in time had she put her mind to it. She was not incapacitated by illness or something similar. She was not unable to pursue the claim because she was waiting for further information from the Respondents or any other action to be taken. She raised a grievance in February 2021 but did not seek to include this as part of that complaint and was therefore not waiting for the outcome of an investigation into the incident.

302. We also took into account the prejudice to the Second Respondent if the claim was allowed to continue. As an individual on his own he would obviously face prejudice in having to meet a claim that would otherwise be out of time. We also felt there would be prejudice to the Second Respondent in having to recall facts about a singular incident which occurred more than 6 months before the claim was issued. We noted in the Second Respondent's witness statement, very little was said about this incident in detail.

303. Taking into account all of these factors, we decided that it was not just and equitable to extend the time limit for this claim. The claim was therefore presented out of time and the tribunal did not have jurisdiction to hear it.

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Employment Judge **Singh**

__24th April 2024_____
Date

REASONS SENT TO THE PARTIES ON

14 May 2024
.....

.....
FOR THE TRIBUNAL OFFICE