



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106798/2023

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Held in Glasgow on 29-30 April and 1 & 3 May 2024
Deliberations on 6, 7 and 23 May 2024

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Employment Judge D Hoey
Members P McColl & R Taggart

Mrs Clare Dooley

Claimant
Represented by:
Mr C Philips -
Solicitor

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Strathkelvin Instruments Ltd

Respondent
Represented by:
Mrs A Singh -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

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1. The claimant was not dismissed as she resigned and accordingly her complaint of unfair constructive dismissal is dismissed.

2. The claimant's complaint that she was unlawfully harassed by reason of disability pursuant to section 26 of the Equality Act 2010 is ill founded and is dismissed.

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3. The claimant's complaint that she had been unlawfully harassed by reason of sex when in January 2023 Mr Reid said that the claimant should not attend a meeting with a prospective buyer because she was a woman is well founded and while brought outwith the statutory time period the complaint was brought within such period as was just and equitable. The remaining complaint of unlawful harassment by reason of sex is ill founded.

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4. The claimant is awarded the sum of **one thousand five hundred pounds** (£1,500) in respect of injury to feelings pursuant to the unlawful harassment

by reason of sex together with interest in the sum of **one hundred and sixty four pounds and thirty nine pence** (£164.39).

5. Of consent in terms of rule 64, It has been agreed between the parties that the claimant was due 10 days' holiday pay at the date of termination and payment of **one thousand nine hundred and twenty three pounds and ten pence** (£1,923.10) will be made by the respondent to the claimant by way of bank transfer by 5pm on 17 May 2024 which failing interest would run on the balance at the judicial rate until payment.
6. Of consent in terms of rule 64, It has been agreed between the parties that the claimant was due the sum of **five thousand eight hundred and thirty three pounds** (£5,833) in respect of salary for May 2023, which sum would be paid by 5pm on Friday 17 May 2024 which failing interest would run on the balance at the judicial rate until payment.
7. The claimant's remaining complaint of unpaid wages is ill founded and dismissed.

REASONS

1. The claimant raised a claim for unfair dismissal, disability and race discrimination and payments due to her. The respondent disputed the claims.
2. At a case management preliminary hearing, matters had been focussed and it was agreed a full hearing would be convened. The full hearing took place in person with submissions being delivered remotely and in writing.
3. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality.

25 Case management

4. The parties had worked together to focus the issues in this case. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

The case was able to conclude within the allocated time with the parties using one of the days to focus the issues and facts agreed and in dispute.

Issues to be determined

5. The issues to be determined were discussed in detail and focussed by the parties. The issues to be determined were agreed to be as follows.

Constructive unfair dismissal

1. Did the respondent's conduct breach the implied term of trust and confidence, by acting in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the respondent and the claimant (which is itself considered to be a fundamental breach), and in particular by:
 - a. By Mr Reid acting unprofessionally in April 2021 seeking to pressure the claimant to pay Sismic fees;
 - b. By Mr and Mrs Reid placing undue pressure on the claimant to carry out tasks or attend board meetings urgently;
 - 15 c. In October 2022 by Mr Reid refusing significant information the day before a board meeting;
 - d. At a board meeting on 1 December 2022 by Mr and Mrs Reid making belittling comments about the claimant and not being able to listen to the claimant;
 - 20 e. At a meeting in January 2023 and prior to the meeting, being told that the claimant was not to attend a meeting with a prospective purchaser;
 - f. At the meeting in January 2023 being told by Mr Reid that the claimant should attend as she was a woman;
 - 25 g. At the meeting in January 2023 by Mr Reid questioning the claimant's qualifications (and seeking to undermine her);
 - h. At the meeting in January 2023 by Mrs Reid telling the claimant she had been appointed to the board for entrepreneurial tax reasons;

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- i. At a meeting in July 2023 between Mr Reid and the claimant's husband when Mr Reid demanded the claimant's fees be reduced (which her husband communicated to her after the meeting);
 - j. Following a board meeting in August 2023 by Mr Reid telling the claimant's husband her behaviour had been unprofessional (which undermined the claimant); and
 - k. The last straw being Mr Reid giving to the claimant's husband an "ultimatum" whereby investment would be withheld unless the claimant resigned (which was communicated to the claimant by her husband after the meeting).
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2. Was the breach of contract a reason for the claimant's resignation?

3. Did the claimant affirm the contract before resigning?

Harassment on the grounds of disability

4. Did the following conduct take place:

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- i. An email exchange on and around 31 October 2022 regarding Mr Reid's request for information from the claimant in advance of a board meeting.
 - ii. In December 2022 at a board meeting, Mrs Reid said that she could not listen to the claimant 'going on about how hard and tough it was for her'.
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5. Was the conduct unwanted?

6. Did it relate to disability?

7. Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?

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8. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Harassment related to sex

- 5 9. Did the following conduct take place
- i. In January 2023 at a meeting, Mr Reid said that the claimant should not attend a meeting with a prospective buyer (Yokogawa) because she was a woman.
 - ii. In January 2023 at a meeting, Mr Reid questioned the claimant's
10 qualifications for the position she held.
10. Was the conduct unwanted?
11. Did it relate to sex?
12. Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive
15 environment for the Claimant?
13. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Holiday Pay

- 20 14. It has been agreed between the parties that the claimant was due 10 days' holiday pay at the date of termination. A payment of £1,923.10 will be made by the respondent direct to the claimant by way of bank transfer. Payment shall be made in cleared funds by 5pm on Friday 17 May 2024. If payment of the said sum is not made in full timeously then interest shall run on the balance
25 at the judicial rate until the date of payment.

Salary

15. It has been agreed between the parties that the claimant is due the sum of £5,833 in respect of her salary for May 2023, which sum will be paid by the respondent direct to the claimant by way of bank transfer. Payment shall be made in cleared funds by 5pm on Friday 17 May 2024. If payment of the said sum is not made in full timeously then interest shall run on the balance at the judicial rate until the date of payment.
16. Was there an agreement between the parties that the Claimant would continue to work between 1 and 7 September 2023?
17. Did the claimant work between 1 and 7 September 2023 and if so what salary is due for that period?

Remedy for unfair dismissal

18. Specific issues had been identified in relation to remedy if the unfair dismissal complaint was successful.

Remedy for harassment

19. What injury to feelings has the harassment caused the claimant and how much compensation should be awarded for that?

Evidence

6. The parties had produced a joint bundle of 355 pages. Regrettably this was printed single sided and it is hoped parties can ensure double sided printing is used to save paper.
7. The Tribunal heard from the claimant and her husband (who was a shareholder and managing director at the time, the claimant's line manager) and from Mr and Mrs Reid (who were both investors and nonexecutive directors). The witnesses each gave oral evidence and were cross examined and asked further relevant questions.

Facts

8. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time (when viewed in context). The Tribunal is grateful to the parties for focussing the issues and agreeing key facts and making it clear what the disputed position was in relation to such facts.

Background

9. The respondent is a company specialising in the development, manufacture and installation and servicing of wastewater and medical research equipment.
10. The claimant's husband was a substantial shareholder in the respondent and also managing director. He had key technical skills required to deliver the company business.
11. The claimant joined the company as a volunteer to assist her husband from April 2005. She provided services as and when required to support her husband (which she did voluntarily and not as an employee). The claimant became an employee of the respondent no later than 1 January 2019 when she began to receive remuneration. The claimant was employed most recently as Marketing Director and worked full time until her employment ended on 1 September 2023.
12. The claimant was elevated to the office of Company Director in April 2022. The other Company Directors between April 2022 and September 2023 included Mr and Mrs Reid and the claimant and her husband who was Managing Director until 4 September 2023. The claimant's husband was the claimant's direct line manager.
13. The claimant had been permitted and able to work from home. She had access to the necessary systems and documents at home to allow her to carry

out her role. The claimant was not required to attend the respondent's premises at any prescribed time. The claimant was also subject to a contract of employment in relatively standard terms.

14. Mr and Mrs Reid were non-executive directors. Mr Reid also had a shareholding in the business and had worked with Scottish Enterprise to invest in the respondent and seek to place it on a strong financial footing. Mr Reid had considerable expertise and experience in working with companies in this regard.

15. In 2022, the respondent's Board was exploring a sale of the business. The potential sale of the business was referred to by the Board as 'Project Clearwater'. The respondent engaged Convergence to advise on this process. Within the Board, Mr Reid was appointed to drive the sales process. There were two principal potential buyers: Yokogawa and Kromek. A sale of the respondent's business was not achieved before the claimant's resignation on 1 September 2023. While the claimant and her husband had believed a sale was likely to be achieved within 3 months around the time of their departure, in reality a sale was highly unlikely to be achieved within that timescale and was likely to have occurred many months later, if at all.

16. In June 2023 and during the preceding months, the respondent was experiencing very substantial financial difficulties. The Directors often did not agree as to how best to manage the situation and this created repeated conflict.

Disability – claimant's children

17. The claimant and her husband have three adult children, each of whom is disabled in terms of section 6 of the Equality Act 2010. The claimant is the primary carer for her three children. Each of the children require ongoing care and help with meeting basic needs. The claimant's daughter in particular requires round the clock care. The claimant is responsible for providing direct care to her children and for arranging carers and day placements.

18. The claimant would generally leave the respondent's premises by 4pm each day in order to care for her children. She carried out the necessary tasks with her children in the early evening and routinely continued to work thereafter from her home. This was not known by Mr and Mrs Reid, who rarely attended the respondent's premises and whose principal focus on the business was to maximise its value for the benefit of employees and shareholders. Mr and Mrs Reid had invested in the business and in the staff and wished to secure the business to protect not only their income but to protect the staff.
19. Neither Mr nor Mrs Reid knew about the specifics of the claimant's children's disabilities nor her caring responsibilities nor the claimant's working patterns. The claimant had been able to carry out her work, attend conferences (including abroad) without any issues or concerns arising and Mr and Mrs Reid considered the claimant's family life and personal situation to be a private matter.
- 15 *April 2021 – allegations of 'unprofessional conduct'*
20. On 27 April 2021, Mr Reid sent an email to the claimant's husband copying in the claimant and the other director. In that email, Mr Reid said "The behaviour of Strathkelvin is not professional and I will need to do something about this as the overall position of the company and how it deals with all its stakeholders is my responsibility. Please advise me when we can discuss this and agree any actions."
21. The context of the email was non-payment of invoices by the respondent to Sitemic Scotland Limited, a company of which Mr Reid was a Director which the respondent had decided to engage on a subcontract basis (and provide significant amounts of work). The comment was directed at the claimant as Mr Reid was concerned that the claimant had not complied with what he understood the position to be with regard to payment and that the claimant had delayed settling sums Mr Reid considered to be due.
22. Mr Reid had understood that invoiced rendered by Sitemic would be paid when issued. That was a matter Mr Reid believed had been agreed with the claimant's husband. The claimant, however, assumed the invoice were

payable on the same basis as all of the respondent's creditors. Neither party had committed the matter to writing and therefore relied upon their beliefs. Mr Reid acted genuinely on the basis of his understanding. Cash flow was important to him both in relation to the respondent and his other investments.

5 23. It was clear that cash and cash flow were challenging and controversial issues within the respondent's business and placing the business on a firm footing was creating considerable stress for the parties involved. The claimant believed that Mr Reid was acting unfairly towards her during these challenging times and took matters personally when in reality Mr Reid was seeking to understand the financial position and seek to put measures in place to improve the position. The claimant saw that as personal and negative towards her, rather than it being something Mr Reid was doing to protect to the business.

15 24. The claimant sent an email on 3 May 2021 to her husband Mr Reid and the other director headed "Relationship" in which the claimant referred to discussions that had taken place at the board meeting and the allegation of unprofessional conduct. The claimant set out how the respondent managed its creditors (which differed from Sitemic) and the challenge cashflow presented, including how she had been instructed (by her husband) to prioritise payments. She indicated that her track record in managing payments was "exemplary" and that she believed comments made had been "disproportionate". She said the comments had hurt her as she had strongly supported the company and "gone the extra mile". She hoped everyone would work together going forward.

25 *October/November 2022 – exchange of emails regarding provision of information to the board and upcoming board meeting*

30 25. On 31 October 2022 at 3:39pm, Mr Reid requested by email that the claimant provide financial information in advance of a Board Meeting scheduled for the next day. The information requested included a bank account download as an excel file, a list of aged creditors, a list of aged debtors, and loan account payment logs.

26. Mr Reid's view was that the information required was typical of information needed in order to have a meaningful board meeting and ought to have been information that was readily available. If the claimant was unable to provide the information or wanted more time to provide it, he would have agreed to any such request. None was made.

27. Mr Reid was unaware that the claimant left work late afternoon and this was not something the claimant had told him about. Mr Reid's conduct was in no sense related to disability but solely in connection with seeking information prior to a meeting to understand the position at the time.

10 *Communication between the parties at the end of October*

28. The claimant had becoming increasingly concerned about the cashflow position of the company and she believed that Mr and Mrs Reid were acting unfairly. The claimant had been unable to see that Mr and Mrs Reid had been seeking to protect the company's position (and their actions were in no way personally directed to the claimant in an unfair way).

29. Correspondence had been exchanged between the claimant and Mr Reid. The claimant had wanted to say more but following discussion with her husband decided not to set out her views in detail in writing. One of the key issues was cash flow and the stress this created for all parties. The claimant believed Mr and Mrs Reid were more focused on receiving payment rather than upon the respondent (and she was resentful that she had done so much work in the past without payment).

30. In reality, each of the parties was seeking to protect the respondent but regrettably the claimant had taken matters personally and was unable to see matters from any other perspective. The claimant believed that the value of the time she had volunteered for the company and worked for it was valued at around "£300,000 back pay at the very least" with interest. The introduction of that issue (looking at historical issues of the respondent) had created further issues given Mr Reid was seeking to work with the claimant and her husband to maximise value of the business. Mr Reid noted that the claimant

was “well paid and [you] have the expectation of a successful outcome” in the terms of a company sale.

31. The claimant was angry at Mr Reid not recognising the full value the claimant believed she had brought to the company. She felt Mr Reid had been more focused on securing the sums he was due rather than recognising the value the claimant had brought to the business. Mr Reid was keen to progress matters looking forward but the claimant was angry that Mr Reid had not been sympathetic to her position and her efforts in the past. This had become a real issue for the claimant and she was angry towards Mr and Mrs Reid. The claimant had considered it unfair that she and her husband had made personal investments and sacrifices into the business (which she contrasted with what Mr and Mrs Reid had done) and the claimant bore resentment to Mr and Mrs Reid because of this.

Forecasting

32. At this and other meetings, Mr Reid raised the issue of non-payment of investor fees. Mr Reid was concerned about the cashflow issues relating to the respondent and payment of sums he considered due.
33. In the normal course of business and in light of Mr Reid’s considerable experience in managing businesses and dealing with challenging financial situations, he was seeking to work with the claimant’s husband to forecast cash flow and manage and understand the position in relation to different scenarios. That included identifying all options, including where cash flow was severely impacted. There was no suggestion this was different from normal business practice and was exploring all options and ensuring all scenarios were considered and options explored.
34. The Tribunal did not accept that Mr Reid was seeking to force the claimant to make payment of the sums due to his company in preference to statutory creditors, but the forecasting process involved exploring all options in all situations. The claimant may have perceived that Mr Reid was seeking to be treated preferentially but that was not something the Tribunal found to have occurred as a fact.

Board meeting on 1 December 2022

35. At a board meeting on 1 December 2022, the claimant had repeatedly made reference to how hard the claimant's husband had been working and the hours he had been committing to the business. The claimant had said that Mr and Mrs Reid did not appreciate how hard he worked. Mrs Reid replied that she could not listen to that (any longer) as each of the directors worked hard and this was a point that the claimant had repeatedly made. Mrs Reid was not singling the claimant (or the claimant's husband) out but rather making the point that each of the directors was under pressure and had other commitments and that times were tough. The comment the claimant had made was emblematic of her approach at meetings, which was to refer to how she believed she had been undervalued in the past and that she and her husband had made significant personal investments and sacrifices into the business (instead of working with Mr and Mrs Reid to identify a sustainable solution going forward).

Events of 4 January 2023

36. On 4 January 2023, Mr Reid and the adviser for the sale, Mr Maynard, exchanged emails referring to previous discussions about excluding the claimant from the Yokogawa meetings. The email exchange was initiated by Mr Reid at 8.17am (on the email printout). On the same date, there was an online meeting with the claimant, her husband, the other director and Mr Maynard to discuss the upcoming meetings. Mr Reid did not want the claimant to be present at the meeting with a potential purchaser of the business as he was concerned that the conduct of the claimant could have a bearing upon the outcome. Mr Reid was of the view that on occasion the claimant's behaviour could be erratic and her approach had the potential to create a concern for a potential buyer.

Email exchange in January 2023 regarding the claimant's involvement in the Yokogawa visit

37. On 6 January 2023, Mr Reid emailed the claimant's husband reiterating that he did not wish the claimant to take part in an upcoming visit by a prospective

buyer of the respondent's business. Mr Reid had decided that it would not be in the company's best interest for the claimant to be in attendance given his experience of how the claimant conducted herself during meetings (as evidenced during the meeting in December).

5 *Board meeting in January 2023*

38. On or around 10 January 2023 a board meeting took place, at which the upcoming visit by Yokogawa was discussed. Mr Reid reiterated that he did not wish the claimant to take part in the meeting. He said the claimant should not attend the Yokogawa meeting because she was a woman and that would
10 not go down well with the guests given their (perceived) cultural issues. Mr Reid had said this to mask the real reason which was that he considered the claimant's presence to risk creating negative or adverse consequences to the potential purchaser given Mr Reid's view on how the claimant could act at the meeting given how she had acted before.

15 39. The claimant was unhappy and angry that Mr Reid wished her to be excluded from the meeting. The claimant's focus and response had been in relation to being excluded as she considered she had a valuable role to play and excluding her from the meeting was unfair. Her focus at the time had not been on the comment Mr Reid made but she was unhappy that a suggestion had
20 been made that in Japanese culture women would not be welcome at such meetings.

40. The final decision was to allow the claimant to join the meeting after around an hour and the meeting went well.

25 41. At the board meeting Mr Reid asked the claimant what her qualifications were for her role which was relevant in terms of understanding the qualifications each of the employees in the business had which may arise during the sale process. Mr Reid was concerned about the claimant's behaviour and approach and how this could be perceived by third parties. The claimant and her husband confirmed she had been appointed on merit given the work she
30 had put into the business and her skills.

42. Reference had been made at the meeting to entrepreneurial tax relief which the claimant understood as having been a suggestion that this was the reason she had been appointed to the Board, but that had been misunderstood by her (and the reference had been in relation to a benefit individuals can secure by being appointed to a board).
43. There were significant disputes during board meetings and the claimant believed that Mr and Mrs Reid were acting in a way that was personal and adverse to the claimant. She genuinely believed that she had put a huge amount of effort and time into the business and this had not been properly recognised and she had not been properly rewarded for it. That created serious animosity given the sums to which Mr and Mrs Reid were entitled, despite the challenging financial situation facing the respondent and the claimant. During the meeting the claimant would perceive comments as being personal and negative when the comments were general in nature, such as the qualifications the claimant had.
44. While there had been a discussion about entrepreneurial tax relief, no suggestion had been made that the claimant had only been appointed to the board because of this. The discussion that took place was professional, albeit heated and within very challenging circumstances, a common occurrence in some board meetings during such challenging circumstances.

Email exchange in April 2023 re 'Corporate Governance'

45. On 5 April 2023, Mrs Reid requested an urgent meeting to discuss 'Corporate governance'. The claimant suggested meeting on the following Tuesday, 11 April 2023. No meeting subsequently took place as the issues were resolved between Mr Reid and the claimant's husband by telephone. The meeting had been called due to critical financial issues arising (and had not been called for any other reason). As the matter was able to be dealt with in the course of business, no formal meeting was required.

Alteration of cashflow forecasts of June and July 2023

46. On 30 June 2023 the claimant's husband had provided Mr Reid with an annual cashflow forecast, outlining that the company was experiencing difficulties. The cash flows that had been provided were challenging and Mr Reid would find it difficult when forecasts that the claimant's husband had prepared were not met. It was also difficult given the aim to place the business in its best possible position going forward for the purposes of a sale. There was no conduct that was in any way negative or inappropriate towards the claimant.

Meeting between the claimant's husband and Mr Reid on 12 July 2023

47. At this meeting discussion took place as to how to manage the company's finances. All options were being explored. There was no particular focus on the claimant but instead all options were considered in a way to protect the financial position of the business. The claimant clearly felt under pressure given the financial challenges facing the business, but Mr Reid acted appropriately in exploring all options and in working with the claimant's husband as to forecasts.

Board meeting of 15 August 2023

48. On 15 August 2023 a Board Meeting took place at which Mr and Mrs Reid, the claimant and her husband and the other director were present. The respondent's financial position was discussed. The claimant's husband presented two funding options to the Board. The claimant and her husband fundamentally and vocally disagreed as to the cashflow position of the company. The claimant told the Board that there was not enough cash in the business to pay sums due in rent, salaries and to HMRC.

49. It was clear that the claimant's husband was surprised in what the claimant had set out. The claimant had been clear that the financial position of the business was in a perilous financial position. The claimant's husband, as ever, tried to maintain a positive position and state that there was confidence the business would "get there". The claimant and her husband had been conducting the meeting from their home and it was clear that there was a fundamental disagreement as to the position. The claimant repeatedly made her position clear that the business was in a very serious position. The lack of

agreement and way in which this came across unsettled Mr and Mrs Reid particularly in light of the forecasts that had been provided. The claimant had been very vocal as to her position.

Meeting on 16 August 2023 between Mr Reid and the claimant's husband

5 50. At the meeting Mr Reid expressed concerns regarding the claimant's behaviour during the earlier Board meeting. Mr Reid was concerned that the claimant had acted unprofessionally in the way she had set out her concerns and fundamentally disagreed with her husband and how she had made her points. She had done so in a very vocal way.

10 51. The business was in a serious financial position and alternatives had to be identified to place the business on a sound footing for its survival. Mr Reid was concerned that the suggestions offered by the claimant and her husband would result in further liabilities being assumed with the underlying issues not being dealt with such that the problem was being prolonged or a resolution
15 delayed rather than a solution being identified.

52. Having considered matters, Mr Reid had noted that the claimant's conduct and behaviour had not been positive. He also considered that the claimant's salary was high. Having reflected he considered that one solution would be for him to inject personal capital into the business provided urgent steps were
20 taken to create some financial stability. Consequently as an option Mr Reid told the claimant's husband that he would be prepared to invest £40,000 of his money into the company if the claimant were to depart from the business. He suggested that as an option to the claimant's husband who immediately rejected it and left the meeting. The matter was not therefore explored.

25 53. Mr Reid understood that the claimant's husband would consider any alternative measures with a view to dealing with the serious financial position, as the claimant had set out.

54. Following the meeting, the claimant's husband went home and told the claimant that Mr Reid had offered £40,000 subject to her leaving the company
30 and that he had immediately rejected that proposal.

55. The claimant's husband then sent an email to Mr Reid noting that Mr Reid had offered to invest £40,000 in the company contingent upon the claimant resigning as an employee and director which the claimant's husband had rejected. However, he said that "I rejected that offer but on thinking about it I
5 decided that out of respect for the claimant I would make her aware of the offer and allow her to come to her own decision... She is considering her response."

56. The claimant was off work ill at the time and on holiday the following week.

Claimant chooses to resign

10 57. The claimant reflected upon what she had been told and took time to explore her options. She knew the financial position of the company. She was not aware of any other solution that could create financial stability. She decided that she would seek to negotiate a resolution involving her departure from the respondent in return for a cash sum.

15 *Aftermath of 16 August 2023 meeting and claimant's resignation*

58. On or around 21 August 2023, the claimant's Representative wrote to Mr Reid seeking to negotiate a settlement agreement in return for her exit from the business (as employee and director).

59. On 1 September 2023, the claimant signed a letter to the company (which
20 had been drafted for her) to her husband stating: "I would like to advise you of my decision to resign as a director and employee as soon as possible. I will continue to undertake my duties to the best of my ability until you advise me I can leave the company. I confirm I will not take any action against the company and I will not make any claim on the company for pay in lieu of
25 notice, compensation for loss of office or any other compensation or employment related claim."

60. By email of 1 September 2023 headed "resignation" to the claimant's husband, the claimant wrote: "Further to our recent discussions I confirm that I will resign as director and employee once the £40,000 is transferred from Mr
30 and Mrs Reid into the company bank account. As my last action I will pay the

critical creditors as instructed by you. I am taking this action in the interests of the creditors in our supply chain and more importantly our staff to ensure their wages. I confirm I have instructed my solicitors to cease all action and I am not making a claim on the company for pay in lieu of notice or compensation for loss of office or any other compensation”.

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61. On 1 September 2023, the claimant’s husband copied the claimant’s resignation email to Mr Reid who sought to have the resignation drafted to include a formal compromise of all claims. At the same time Mr Reid sent an email to the claimant’s representative requesting a formal statement withdrawing its letter dated 21 August 2023 as Mr Reid was concerned as to how such a formal letter would look in terms of a company sale. The claimant did not alter her resignation letter.

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Minimal work done following 1 September 2023

62. The claimant’s employment effectively ended on 1 September 2023. Although she carried out some bank transactions after that time, there was no other work done by the claimant.

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63. The claimant had also deleted a large number of emails (around 700) from the company system, changed some of the company internet pages (around 28 pages) and sent to her personal email account a large number of communications (in connection with her time with the respondent).

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Linked In Post

64. On 27 September 2023 the claimant posted a 5 page LinkedIn communication entitled “Truly Devastated...”. The claimant had around 7000 contacts. She said: “Unfortunately our investors, when I say investors, that’s what they believed they were, put some money into the business 7 years ago, but unfortunately they lacked any support, passion or drive with it. I felt my lack of wages over 14 years should have shown my support for the business – I saw this as my investment, but it appears my 18 years of work was rewarded with the response from our investors – that they were “unsympathetic” and believed equated to no value either monetary or otherwise. Last month they

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decided they would use their powers under the Investment Agreement to cut Strathkelvin off from refinancing.. Remarkably Strathkelvin was able to obtain several offers acceptable to us (with no guarantees required from the investors) but our investors also vetoed these offers resulting in effect
5 Strathkelvin was financially cut adrift. With this financial “gun” to our heads our “minority investors” then offered to provide some financial input (less than the loan value secured) but the price to be paid was my immediate resignation. Constructive dismissal I hear you all say – yes indeed. However,, for the good of the business, its employees and suppliers I fell on my sword,
10 drafted my resignation only to have it redrafted for me with no offer of a legal settlement – no compromise agreement, no payment of my outstanding wages, The situation was completely untenable for myself and my husband leaving us with nowhere to go but out.”

Remedy

- 15 65. The respondent has agreed to pay the claimant in respect of 10 days’ holiday pay outstanding as at the date of termination and pay her May salary.
66. The claimant’s gross annual salary was £70,000. Her gross weekly pay was £930.70.

Observations on the evidence

- 20 67. The Tribunal found each of the witnesses generally to be credible. They did their best to recollect the position.
68. The **claimant** genuinely believed that Mr Reid in particular had acted in a way to remove her from her position and that he had intended this for some time. Unfortunately this arose as a result of the claimant’s perception that the
25 claimant had, in light of the amount of work and effort her husband (and herself) had put into the business. Despite that investment, financial challenges remained. The claimant did not perceive Mr Reid (and Mrs Reid) in a positive light, bearing some resentment to the fact Mr and Mrs Reid had invested money into the business and not spent as much time and effort as

the claimant had (and yet received financial rewards with, in the claimant's view, less risks being taken).

69. The claimant considered that she was entitled to greater recognition that what she had received from Mr and Mrs Reid and she bore some resentment to Mr and Mrs Reid and was suspicious of their actions. Sadly that affected the claimant's perception and observations and she considered any act of Mr and Mrs Reid to somehow be adverse to the claimant and motivated by a desire to be negative towards the claimant (when the actions of Mr and Mrs Reid were not directed towards the claimant at all but instead singularly focused on finding a way to place the business on a sustainable footing)
70. An example of this was in relation to Mr Reid asking the claimant for information in connection with a board meeting. The claimant believed this act of Mr Reid was harassment related to disability. This was said to be so because the claimant left work early to support her disabled children. However, Mr Reid was not aware the claimant left at that time to support her disabled children and therefore his action could not be harassment related to disability. Nonetheless the claimant fervently believed this act was related to disability She genuinely believed Mr Reid was always acting in a way that was negative towards her, when in fact both Mr Reid and the claimant had the same desire, to maximise the value of the company. It was regrettable that a way was not found to work together and recognise the different strengths.
71. Another example was the claimant saying in cross examination that Mr and Mrs Reid had asked that the office be updated and refreshed (given prospective purchasers were visiting) which the claimant took as belittling and a personal slight on her when it was a desire to place the business in the best position for sale.
72. The claimant was clearly passionate about the business, what it did and what it could do. The claimant was very protective of the business and in particular her husband and the work he had done. The Tribunal had no doubt that the claimant's passion (and tenacity) would, however, often be displayed in a way that could be perceived as erratic in that her approach could differ and her

focus would be to refer to how successful the business had been (or could be) and the effort and time (and money) the claimant's husband (and the claimant) had put into the business. The claimant would jealously guard what had happened and consider challenge to the business as a personal affront which she challenged. This created conflict particularly at board meetings and her relationship in particular with Mr and Mrs Reid was severely affected by the claimant's perception of Mr and Mrs Reid's motives.

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73. As a result of the claimant's perception, the Tribunal found on occasion that the claimant's belief as to the position, while strongly and genuinely held, was often not based on reality. The claimant viewed Mr and Mrs Reid's actions as negative when in fact their actions were intended to focus on the business (and not the claimant personally). In the event of conflict, given the evidence given by Mr and Mrs Reid, the Tribunal preferred Mr and Mrs Reid's evidence which was given in a more measured and objective way, accepting there had been errors and fairly conceding points, which the claimant had not been prepared to do. The claimant considered Mr and Mrs Reid to be entirely responsible for the situation in which she found herself and viewed each issue as an example of this.

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74. The **claimant's husband** had been very supportive of Mr and Mrs Reid. He understood the importance of their investment and working with them as he built the business and hopefully realised his substantial shareholding. He was clearly very good with the technical matters pertaining to the business and relied heavily upon the claimant to support him, not least given his time spent away from home at work. He was placed in a difficult position when clearly he recognised issues Mr Reid had and sought to support Mr Reid, whilst at the same time working with the claimant to support her and the challenges she perceived existed. The claimant's husband tried to find a middle ground and understood the need to maintain cash flow and work with the investors. During his employment the claimant's husband supported what Mr and Mrs Reid were doing and sought to address concerns the claimant had in a nonconfrontational and informal way. The claimant's husband recognised the

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support he had been given by his wife and clearly felt unable to deal with the professional issues which Mr and Mrs Reid had identified, in a formal way.

75. At the time at work it was clear that the claimant's husband was working with Mr Reid to place the business as best as possible on a firm footing, whilst
5 working with the claimant. Given the claimant's husband had (and has) a significant shareholding in the business it was very much in his (and the claimant's) interest to do the best they could to maximise the value of the business. Unfortunately following the claimant's departure from the business it was clear that the claimant's husband perceived some matters a little
10 differently and supported the claimant (as opposed to recognising the value Mr and Mrs Reid brought to the business which was the position he had adopted during his employment).

76. This was an unusual case given the claimant's husband was in effect the respondent and a witness for the respondent, despite being led as the
15 claimant's main witness. This placed him in an invidious position since clearly he wished to support his wife while also showing his position as his line manager (and director). This presented a number of challenges for the claimant's husband. He was placed in a difficult situation given the issues affecting the business, how the claimant had acted during the challenging
20 times and how Mr and Mrs Reid were seeking to assist. It was clear that during his employment the claimant's husband had worked hard to support Mr and Mrs Reid and in effect manage the claimant. Following his departure from the business, his focus was more with regard to supporting the claimant and parts of his evidence were given in that light.

25 77. The Tribunal found **Mr Reid** to be clear and candid in his approach. Mr Reid was objective and measured in setting out what he understood the position to be. He was also fair. Thus when he set out that he believed his company's invoices were due to be paid upon issue but was told that the claimant's husband believed normal payment terms applied, he fairly accepted that he
30 had found the claimant's husband ordinarily to be fair and consistent in his approach to business matters. That contrasted with the claimant and the claimant's husband's evidence.

78. Mr Reid was generally clear and cogent in his evidence. The Tribunal did not find his approach with regard to the exclusion of the claimant from the presentation clear given the emails with which he was presented. However, that did not alter the fact that Mr Reid candidly explained he considered the claimant's behaviour to be such that her presence at the meeting would be detrimental to a sale of the business. That was the reason why he did not wish the claimant present. While he did not tell the claimant that, he relied upon an inappropriate cultural reference to Japanese business norms. The Tribunal did not consider that Mr Reid was seeking to misrepresent the position and instead there was a lack of clarity around the emails and approach. Ultimately he accepted that the reason why he did not wish the claimant to be present was due to his conclusion that the claimant's behaviour in meetings could be considered erratic and create a risk of a negative perception in the mind of prospective purchasers. That was not an unreasonable conclusion to reach, even if it created risks given the valuable input the claimant had given in building the business and in her knowledge.
79. Mr Reid did apologise to the claimant for his behaviour in that regard, which he accepted was inappropriate. This showed an insight into Mr Reid that was absent from the claimant's evidence in that Mr Reid had recognised that his behaviour had a negative impact on other people. There was no doubt what Mr Reid had said was wrong (and discriminatory).
80. The Tribunal carefully considered each area where there were conflicts in evidence and found that Mr Reid's evidence was by and large more likely than not to be what occurred. The claimant viewed matters through a prism that skewed the reality. The claimant's husband would often have to find a middle ground and at Tribunal adopted a position more supportive of the claimant when at the time the claimant's husband had been supportive of Mr and Mrs Reid in trying to find a solution.
81. The Tribunal found **Mrs Reid** also to be clear and candid in her approach. She set out what she genuinely believed the position to be. The Tribunal found her evidence to be more likely than not to be the case compared to the claimant in relation to the claimant's belief that Mrs Reid had made personal

comments directed at the claimant; In fact the comment was directed to comments about repeated comments the claimant had made about her husband and the work he had done. There was no doubt about the work the claimant's husband had done, but the focus had to be on the future and steps
5 needed to protect the business. The claimant's repeated reference to what she perceived as unfairness (with regard to her husband and the time she had spent working, unpaid, in the business) had created conflict and Mrs Reid was seeking to focus matters and recognise that each of the directors had worked hard.

10 82. There were a number of factual disputes that required to be determined by the Tribunal which it did from considering each issue, the oral evidence led and contemporaneous documents when all considered in context.

15 83. The first issue was in relation to the claimant's formal commencement of employment. Technically for the purposes of the claim it was not necessary to determine this. The claimant contends that her employment began in 2005 when she first began working for the respondent. She was not paid a salary until January 2019 but provided services to the respondent on a full-time basis from April 2005 onwards. It was agreed between the claimant and her line manager, Mr Dooley, that she would be paid for these services when the
20 respondent could afford it. The respondent contends that the claimant's continuous employment began in January 2019, when she began to be paid.

25 84. The next issue the parties disagreed about was the conduct of Mr and Mrs Reid. The claimant's position was that James and Karen Reid frequently targeted the claimant at board meetings with personal and unwarranted attacks. The respondent denies that Jim and Karen Reid bullied the claimant. In particular, the respondent did not mock and belittle the claimant's caring responsibilities. The Tribunal considered the evidence carefully and found that the respondent's position was more likely than not to be the case. The claimant perceived Mr and Mrs Reid as acting in a negative way towards her
30 whereas in reality their approach was instead firmly focussed on maximising the value of the business (which was in everyone's interest). The claimant was unable to see how her behaviour and conduct had impacted upon others,

particularly Mr and Mrs Reid and she believed in fact it was Mr and Mrs Reid whose behaviour caused an issue rather than her own. She was unable to take any responsibility for the issues that arose.

5 85. The Tribunal considered that in part this issue arose as a result of the claimant's inability to recognise the impact of her behaviour and approach. The claimant was absolutely committed to the business and genuinely and firmly believed that her husband had worked extremely hard and deserved more, and in particular deserved to enjoy financial success. The respondent was not enjoying such success. The claimant felt under significant pressure and believed that Mr and Mrs Reid were acting unfairly when in fact they were seeking to understand the business and work with the executives to improve the position.

15 86. The next issue in dispute was the position in relation to invoices Mr Reid's company rendered. The Tribunal considered that both parties acted genuinely. Mr Reid believed the invoices were to be paid upon issue while the claimant believed (from her husband) that the invoices were to be paid in the normal way. It was surprising that there was no written confirmation of the position which would have put the matter beyond doubt. The claimant's husband clearly believed that the invoices were subject to the normal terms. It was more likely than not that both parties believed they were correct.

20 87. Mr Reid fairly conceded in cross examination that the claimant's husband may well have been correct in his recollection. Mr Reid believed at the time the invoices were to be paid when issued.

25 88. Another factual dispute related to Mr Reid's asking the claimant for information in connection with a board meeting. The claimant's position was that she would have required at least an hour to download, collate and send the requested information and she had just been asked for the information as she was leaving the office to support her children. The claimant believed the request was made in an attempt to thwart the claimant's departure and make it difficult for her. The Tribunal did not accept that position at all. Mr Reid did not know the claimant's working hours or that she left at specific times to

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support her children. There was no evidence the claimant had told him this. In any event, had the claimant explained the position to Mr Reid, the claimant would have been given more time to provide the information. She did not raise the issue. The conduct was entirely unconnected to disability.

5 89. The claimant also argued that the respondent pressurised the claimant to prioritise payment of investor fees over priority debts including employee salaries, payments to HMRC and bank loans. The Tribunal did not accept this. Mr Reid was working with the claimant's husband, in the normal course, to identify scenarios and planning. All scenarios were being considered. Mr Reid
10 was entitled to seek payment of sums due to him and to consider all options. The Tribunal did not accept that Mr Reid was seeking payment of sums due to his company in preference to statutory creditors. Scenario and cash flow planning and forecasting was taking place to understand the cash flow position.

15 90. Another factual dispute was in relation to comments made by Ms Reid at a board meeting. The claimant argued Ms Reid had essentially demeaned the claimant by reference to how hard the claimant had worked and the effort she had put into the business. The respondent argued the comment in response to representations made by the claimant about her husband's hard work and
20 sacrifice, rather than the claimant's.

91. Having considered the evidence the Tribunal considered the respondent's position to be more likely than not to be what happened. While the claimant may have perceived the comment to have been directed to her, the Tribunal found that Mrs Reid was genuine and sincere in noting that the claimant had
25 repeatedly made reference to how hard her husband had worked and the effort expended in the business. It was more likely than not that Ms Reid had noted such comments had been made before and the focus was better placed on moving forward rather than looking back. The claimant observed matters through the prism of her belief that both Mr and Mrs Reid were being negative towards her, but in reality Mr and Mrs Reid were both trying to work with the
30 team to improve the position and place the business on a firm footing.

- 5 92. A similar issue had occurred in relation to comments about entrepreneurial tax relief which the claimant believed had been directed at her in a board meeting in January 2023. The claimant asserted comments had been made to her which suggested she had only been appointed to the board for tax reason.
- 10 93. One area in which the Tribunal found Mr Reid's evidence to be unclear was in relation to the discussion Mr Reid had with Mr Maynard as to the exclusion of the claimant from the presentation. The Tribunal considered that Mr Reid genuinely believed the claimant's presence at the meeting could endanger the sale of the business given Mr Reid's experience of how the claimant could react in certain situations. The Tribunal did not find the evidence from the parties clear or credible in relation to this issue which was in part due to the time that had passed and the huge challenges facing the company and the parties. Having considered the evidence led, the Tribunal concluded that it was more likely than not that entrepreneurial tax relief had been referred to during the meeting. It was not likely that the claimant had been told by Mr or Mrs Reid that she had been appointed to the board for those reasons since that was factually inaccurate. The Tribunal did not find it likely that a comment had been directed to the claimant. However, the Tribunal had no doubt given 15 the way in which the claimant had perceived comments from Mr and Mrs Reid and her belief that there was animus towards her (which was not in fact present) that the claimant believed such a comment had been directed to her.
- 20 94. Mr Reid's evidence as to discussions and how this arose was unclear given the surrounding facts. While the claimant disputed that there was any erratic behaviour the Tribunal found Mr Reid's position to be more likely than not to be correct. While the claimant had not seen or recognised the impact her behaviour could have, Mr Reid was clear and candid (as was Mrs Reid) in recognising that on occasion (perhaps due to how important the claimant believed matters were and her response to that importance) the claimant would behave in a way that could reasonable be considered erratic. It was 25 more likely than not that Mr Reid had in fact realised that having the claimant present at the meeting created a risk to the sale and that he believed it would 30

be preferable not to have her present at the meeting. The sole reason for this was due to how the claimant had acted in previous occasions in the company of Mr and Mrs Reid.

5 95. The next dispute related to a discussion at a board meeting regarding the claimant's qualifications. The claimant perceived this as another focus on her in a negative way but in fact the Tribunal found it was a discussion about the claimant's qualification given the ongoing sale process.

10 96. In the dispute with regard to comments made around April 2023, the Tribunal found Mrs Reid's position to be more likely than not to be the case. Mrs Reid was concerned about issues affecting the business and had called an urgent meeting. Those matters were capable of being dealt with and no meeting was required. There was no connection between the need for a meeting and disability, the sole reason being urgent financial issues pertaining to the business.

15 97. With regard to the meeting in July 2023, the claimant had argued this meeting had involved discussion around her remuneration which she said her husband had communicated to her. Those discussions were in relation to strategic matters relating to the business and its financial position and were continued discussion about forecasts and finance. No decisions had been taken and the discussions were part of the normal business planning process. There was no discussion which was inappropriate.

20 98. With regard to matters in June 2023, the Tribunal found that Mr Reid and the claimant's husband were engaged in detailed forecasting and financial planning. There was nothing the Tribunal found that suggested any inappropriate conduct towards the claimant. The forecasting involved exploring different options. All options were being discussed and explored.

25 99. The Tribunal found that at the board meeting on 15 August, the claimant had fundamentally disagreed with her husband and there was a very clear and vocal disagreement which was unsettling for Mr and Mrs Reid to watch given the cash flow position that had been set out. While the claimant and her husband genuinely believed the disagreement was professional, it was clear

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this was a fundamental disagreement which created a serious divide and uncertainty.

100. Another area of disagreement related to the claimant's behaviour at work generally. While this was not technically. Something that had to be separately
5 determined, the Tribunal considered how the claimant had acted during her employment and the impact her behaviour had. The Tribunal had no doubt that the claimant had been successful in her role as Marketing Director. She was responsible for sales and marketing as well as general day to day management of the respondent's business. The claimant had made
10 significant contributions to the respondent's business during her employment. The claimant had not, however, been able to see (or take responsibility for) negative aspects of her work. She was so passionate about the business (and her husband) that she often took matters totally personally and instead of being objective naturally considered matters as subjective affronts to her
15 husband or herself and viewed matters from a perspective of assuming there was a campaign to belittle or damage. In reality the Tribunal considered there to be issues as to the claimant's conduct and behaviour but due to her line manager being her husband and the nature of the business and its context, the claimant's husband had sought to manage a fine line. The claimant's
20 husband recognised how hard the claimant had worked and made allowances for that and the personal situation of which he was clearly aware. That affected how matters were dealt with or not dealt with.

101. With regard to the meeting between Mr Reid and the claimant's husband, the Tribunal considered the evidence carefully. There was in essence no real
25 dispute given the meeting was relatively short. The business was in a serious financial position and urgent action was needed. The claimant and her husband had not identified any sustainable solutions. Mr Reid offered to invest his own money provided fundamental changes were made which Mr Reid considered would place the business on a better financial footing. Given the
30 claimant's salary, he considered her departure from the business, while retaining the claimant's husband, would give the business a chance of survival.

102. The discussion that took place was in relation to finding a way to protect the future of the business. No decisions had been taken and the aim was to explore options. The claimant's husband was not prepared to countenance his wife leaving the business in return for the investment and immediately rejected the offer. Mr Reid was prepared to consider any alternatives that would create some financial stability.
103. The claimant's husband chose to tell his wife of the discussion he had with Mr Reid as to Mr Reid's proposed investment. The claimant's husband had made it clear to the claimant that he, as the managing director, has refused the offer and did not wish to proceed with an investment that would result in his wife leaving the business.
104. The claimant had a genuine belief that Mr and Mrs Reid were acting against her and as such their requests were said to be unreasonable and part of a campaign against her. The Tribunal considered the evidence very carefully and did not support the claimant's assertions. Objectively viewed the actions of Mr and Mrs Reid were appropriate and reasonable when viewed in context, save for the one comment Mr Reid made in connection with the discriminatory remark. The claimant's approach skewed her perception and sadly resulted in her actions and approach changing when dealing with Mr and Mrs Reid which in turn led to the claimant acting in a way which gave rise to concerns on the part of Mr Reid. Ultimately Mr and Mrs Reid were acting in a way to protect the company, which was precisely what the claimant and her husband were seeking to achieve. It was regrettable that the claimant had been unable to view matters less subjectively but given the investment placed into the respondent and the work her husband and the claimant had done, it was not understandable.

Law

Constructive dismissal

105. It is for the claimant to satisfy the Tribunal that she was constructively dismissed for the purposes of section 95(1)(c) of the Employment Rights Act

1996. Otherwise, the legal effect is that her employment terminated by a resignation which is not to be treated as a dismissal.

106. The claimant must prove that the respondent was in repudiatory breach of her contract of employment. That entails proving a “significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract” (**Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221). The Court of Appeal expressly rejected the argument that the predecessor provisions of section 95(1)(c) introduced a concept of reasonable behaviour into the contract of employment. An employee is not able to resign and claim constructive dismissal merely because their employer has behaved unreasonably.

The implied term of trust and confidence

107. The claimant relies on a breach of the implied term of trust and confidence. It is uncontroversial that the following fundamental term is implied into every contract of employment. It is a fundamental breach of contract for either party, without reasonable and proper cause, to conduct itself in a manner ‘calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee’ (**Courtaulds Northern Textiles Ltd v Andrew** [1979] IRLR 84, **Malik v BCCI** [1997] ICR 606).

108. Not every breach of a statutory right will amount to a breach of the implied term of trust and confidence (see **Doherty v British Midland Airways Ltd** [2006] IRLR 90) and the facts should be considered as a whole in assessing whether or not the conduct individually or cumulatively meets the test.

109. If the claimant establishes a repudiatory breach of contract then she must also demonstrate that the breach caused her to resign and that she did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

110. Where there is more than one reason for an employee’s resignation then it is not necessary for the employee to prove that the repudiatory breach of

contract was the sole, predominant, principal, major or main cause of the resignation. The crucial question is whether the repudiatory breach “played a part in the resignation” (**Wright v North Ayrshire Council** [2014] ICR 77). The repudiatory breach need only be one of the factors relied on when resigning.

Seriousness of breach of contract

111. A breach of the implied term of trust and confidence is necessarily fundamental (**Morrow v Safeway Stores plc** [2002] IRLR 9) – it is a “fundamental term”. Breaches of other contractual terms may or may not be of the required seriousness. It is essentially a question of fact and degree whether the breach reached the level described in **Western Excavating** (above). The test of whether there was a repudiatory breach of contract is objective, and it neither depends on the subjective intentions of the employer (**Leeds Dental Team Ltd v Rose** [2014] ICR 94) nor on the subjective perception of the employee.

Last straw

112. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (**Lewis v Motorworld Garages Ltd** [1986] ICR 157). As to what can constitute the last straw, the Court of Appeal in **Omilaju v Waltham Forest London Borough Council** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

113. At para. 19 of **London Borough of Waltham Forest v Omilaju** [2004] EWCA Civ 1493, Dyson LJ said:

5 “19. ... *The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

10 20. *I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

15 21. *If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a*

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constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.”

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114. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed and considered the law in this area reminding
10 Tribunals to apply the reasoning from **Omilaju**.

115. At paragraph 45 the Court noted that the principle applies to cases where the employer's conduct has already amounted to a repudiatory breach prior to the final straw, but the employee “soldiered on until the later act which triggers his resignation”. In this case, “the breaking of the camel's back consists in the
15 employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so”.

116. At paragraph 55 the Court recognised there may be “traps for the unwary” and said it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer
20 which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

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

(5) Did the employee resign in response (or partly in response) to that breach?

117. Thus where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence, there is no need for any
5 separate consideration of a possible previous affirmation because the effect of the final act is to revive the right to resign. The focus of enquiry should be on whether the act that precipitated the employee's resignation was part of a cumulative breach (as opposed to a one-off), rather than on whether past breaches had been waived. An employee's response to past breaches is part
10 of the background information that a tribunal should take into account when determining whether the last straw incident was a sufficient trigger to revive earlier acts in the series.

Who is the respondent?

118. One of the issues in this case is deciding whether or not a non-executive
15 director can by his actions bind the respondent (and be considered actions of the respondent which could lead to a constructive dismissal complaint).

119. As a general matter of law, the actions of a Director of a Company can and often will be synonymous with the acts of that Company. Sometimes, however, a Director might not be acting as Director as such, for example
20 where the Director is acting solely as a shareholder and not acting as director.

120. It is also possible for vicarious liability to result in a company being liable. For the purposes of unlawful discrimination, section 109 of the Equality Act 2010 states:

(1) *Anything done by a person (A) in the course of A's employment must
25 be treated as also done by the employer.*

(2) *Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

(3) *It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

(4) *In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*

(a) *from doing that thing, or*

5 (b) *from doing anything of that description.*

(5) *This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).*

121. Determining whether or not there is such a relationship would be decided on a case by case basis. The Employment Appeal Tribunal held in **Lana v Positive Action Training and Housing (London) Ltd** UKEAT/245/00 that
10 *“the authority referred to must be the authority to do an act which is capable of being done in a discriminatory manner just as it is capable of being done in a lawful manner”.*

122. In **Bungay and another v Saini** UKEAT/0331/10, it was held that the
15 respondent company's chairman and director were acting as the company's agents when they performed their directors' duties in a discriminatory manner. The tribunal had found that these respondents had been the “prime movers” in a campaign of discrimination against the claimants which had been carried out in the company name and in their work as directors.

20 123. In **Moore v Bude-Stratton Town Council** [2000] IRLR 676 (Lindsay J at paragraph 23)) the court gave guidance in deciding whether the employer could be responsible for the actions of a third party noting that there is no single test to determine whether the respondent is liable for the acts of the third-party wrongdoer. The following factors are likely to be relevant:

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- Was remuneration paid for the activity in question?
 - Was the activity in question done for the benefit of the respondent?
 - Was the act complained of reasonably incidental to the duties given to the wrongdoer by the respondent?

- Was the respondent in a position of control, not only to order what was to be done but how it was to be done?
- Was the respondent in a position to select who should carry out the activity in the course of which the wrongful act occurred?
- 5 • Could the respondent suspend or stop the activity?
- Was what was done expressly or impliedly authorised by the respondent?
- Was the activity an unauthorised way of doing something which was authorised?
- 10 • Was the activity the performance of an act of a class the wrongdoer was not required to do at all or had been forbidden to do?

124. In **Yorke v Moonlight** UKEATS/0025/06 Mr Yorke, a butcher who had retired and handed over the family firm to his two sons, continued making regular weekly visits to the shop, apparently with his sons' approval, and giving
 15 instructions to the firm's employees. When his brisk treatment of one of the employees led to her resignation, the EAT (overturning the tribunal's decision) held that the firm was not responsible for his conduct. The EAT commented that the conduct of a third party could be relevant in a constructive dismissal case if, for instance, an employer were to fail without reasonable and proper
 20 cause, to take reasonable steps to control the behaviour of a third party who repeatedly caused upset and distress in the workplace.

Time limits for Equality Act claims

125. The time limit for Equality Act claims appears in section 123:

- 25 “(1) *Proceedings on a complaint within section 120 may not be brought after the end of –*
- (a) *the period of three months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the Employment Tribunal thinks just and equitable ...”*

126. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month
5 time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should “have regard to” the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- a. The Tribunal should have regard to the prejudice to each party.
- 10 b. The Tribunal should have regard to all the circumstances of the case which would include:
 - i. Length and reason for any delay
 - ii. The extent to which cogency of evidence is likely to be affected
 - 15 iii. The cooperation of the respondent in the provision of information requested
 - iv. The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
 - v. Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

20 127. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay;
25 the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

128. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment

law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. This is a matter which is in the Tribunal's discretion. The Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

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129. In **Rathakrishnan v Pizza Express (Restaurants) Ltd** 2016 ICR 283 the Employment Appeal Tribunal held that in that case the balance of prejudice and potential merits of the reasonable adjustments claim were both relevant considerations and it was wrong of the Tribunal not to weigh those factors in the balance before reaching its conclusion on whether to extend time.

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130. Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 (in particular at paragraph 14) sets out the legal principles. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed and in particular assess the respective prejudice. These were reiterated by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5. The Court emphasised that it would be wrong to rigidly apply the "Keeble factors" since that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The correct approach in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular the length of, and the reasons for, the delay.

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Harassment

131. In terms of section 26 of the Equality Act 2010:

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"(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.*”

132. It is important to consider the conduct with regard to each element of the statutory test. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim. In that case the Employment Appeal Tribunal held it is a matter for the Tribunal to determine making a finding of fact drawing on all the evidence before it. There must be some feature of the factual matrix identified by the Tribunal which leads it to the conclusion conduct is related to the protected characteristic and the Tribunal should articulate clearly what feature of the evidence leads it to that conclusion. The Tribunal should consider the matter objectively.
133. For example in ***Hartley v Foreign and Commonwealth Office Services*** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant’s managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger’s syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses “*will not readily volunteer*” that a remark was related to a protected characteristic. The alleged harasser’s knowledge or perception of the victim’s protected characteristic is relevant but should not be viewed as in any way conclusive.

Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic "cannot be conclusive of that question".

134. **Warby v Wunda Group Plc** EAT 0434/11 is authority for the proposition that the conduct should be viewed in context in assessing whether the conduct is related to the protected characteristic. The then President of the Employment Appeal Tribunal, Mr Justice Langstaff, upheld a Tribunal's decision that an employee accused by her superior of having lied about a miscarriage was not subjected to conduct "*related to*" her sex within the meaning of the sex discrimination provisions then in force. Langstaff P held that context was important and that the tribunal had been entitled to find that the accusation was made in the context of a dispute over a work matter, about which the employer believed that the employee was lying. Thus the conduct complained of was an emphatic complaint about alleged lying; it was not made because of the employee's sex, because she was pregnant or because she had had a miscarriage. While that case considered the predecessor legislation, the issue was whether the conduct was "related to" the protected characteristic.
135. In **Kelly v Covance Laboratories Ltd** [2016] IRLR 338 an instruction not to speak Russian at work, so that any conversations could be understood by English speaking managers was not related to race or national origins, even though it potentially could have been. The conduct was because the employer was suspicious about what was being said and could not understand. Viewed in the context of the company's business and risks the employer's explanation for the conduct was accepted and the conduct was not related to race or national origins.
136. In **UNITE the Union v Nailard** [2018] IRLR 730 the Tribunal had held that a failure to address a sexual harassment complaint made against elected officials of the union could amount to harassment related to sex "*because of the background of harassment related to sex*". The Court of Appeal considered that went too far. There had been no findings as to the mental processes of the (employed) officials of the union dealing with the complaint and whether they had been motivated by sex discrimination. The Court of Appeal noted that the previous potential liability for third party harassment

under the Equality Act 2010, section 40 had been repealed and there was no automatic liability on the part of the union for harassment by third parties (if that was how the elected officials were to be characterised). The union could be (vicariously) liable for acts of discrimination by its employees but there would need to be a finding that the employees in question were themselves guilty of discrimination. An important point of this case was the reminder that Tribunals should focus on the conduct of the person who carried out the act and determine whether that conduct is related to the protected characteristic (not whether the conduct of someone else or some other conduct is related to the protected characteristic). If the action (or inaction) is because of illness or incompetence it may not relate to the protected characteristic.

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137. At paragraph 7.10 of the Code the breadth of the words “related to” is noted and some examples are provided. It gives the example of a female worker who has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

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138. At paragraph 7.11 the Code states that in the examples there was “*a connection with the protected characteristic*”.

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139. The question of whether the conduct in question “relates to” the protected characteristic requires a consideration of the mental processes of the putative harasser (***GMB v Henderson*** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see ***Bakkali v Greater Manchester*** 2018 IRLR 906). In ***Bakkali*** the question was whether a comment as to whether an individual was said to be still promoting ISIS/Daesh was related to race. The Tribunal found it was not as it related to a previous conversation. The Employment Appeal Tribunal emphasised that context is important and the words used must be seen in context. In considering whether the conduct is related to the protected characteristic there should be an intense focus on the context of the offending

words or behaviour. The mental processes of the perpetrator are relevant in assessing the issue.

140. In **Raj v Capita** 2019 UKEAT 0074/2019 the Employment Appeal Tribunal upheld a Tribunal which had found that the massage at his desk by a manager was not conduct related to sex. The conduct was misguided encouragement by a manager. It was an isolated incident and the context was key: a standing manager over a sitting team member in a gender neutral part within an open plan office. In that case the Tribunal did not expressly consider the burden of proof provisions but had found that the conduct was in no sense whatsoever related to sex.

141. Section 26(4) of the Act provides that:

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

142. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill: *“In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).”*

143. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception

and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus, something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

144. In relation to the effect of the conduct, intention is not a prerequisite and the effect is to be considered from the perception of the claimant. The Code (at paragraph 8.20) gives the example of a club manager at a meeting making derogatory comments and jokes about women to a mixed sex audience. It is not that person's intention to offend or humiliate anyone, however the contact may amount to harassment if the effect of it is to create a humiliating or offensive environment for a man or woman in the audience.

145. Relevant circumstances include the claimant's personal circumstances, cultural norms and previous experience of harassment. The perpetrator being in a position of trust or seniority over the recipient is also a relevant factor.

146. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (Lindsay v LSE 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words "*intimidating, hostile, degrading, humiliating and offensive*" and said "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught*".

147. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Remedy

148. In the event of a breach of the Equality Act 2010 compensation is considered under section 124, which refers in turn to section 119. That section includes provision for injured feelings under sub-section (4). Three bands were set out

£49,300. The Sixth Addendum increased those bands for claims presented on or after 6 April 2023 to a lower band of £1,100 to £11,200, £11,200 to £33,700 and £33,700 to £56,200 respectively.

5 151. Interest is to be applied to awards for injury to feelings at the judicial rate from the date of the discriminatory act (see the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996).

Submissions

10 152. Both parties had been given time to work on written submissions which were exchanged and supplemented orally. Both agents were able to make comments upon the submissions orally. The submissions of both parties have been fully taken into account even although they are not replicated in full.

Decision and discussion

15 153. The Tribunal spent a considerable period of time considering the evidence that had been led in light of the applicable law. Having considered the evidence led, and the position adopted by each party, the Tribunal was able to reach a unanimous decision in respect of each of the issues which are dealt with in turn.

Discussion and decision

20 154. The Tribunal spent a considerable amount of time carefully considering all the evidence that had been led, the submissions and the applicable law and was able to reach a unanimous conclusion. The Tribunal considered each of the issues in turn.

Constructive unfair dismissal

25 155. The claimant relied upon breach of the implied term of trust and confidence. She relied upon a course of conduct of the respondent which was said to amount to a breach of this term. In order to consider this issue, it is necessary to consider each act which was said to contribute to the breach.

156. The **first act** relied upon was that it was said Mr Reid acted unprofessionally in April 2021 seeking to pressure the claimant to pay Sismic fees. The Tribunal did not find that Mr Reid had acted unprofessionally. At this time the financial issues affecting the business were only beginning to develop. Mr Reid had understood the invoices his company issued ought to have been paid upon receipt. The claimant had understood normal credit terms were applicable. Mr Reid had not acted unprofessionally as he had proceeded on the basis of his understanding. Neither party had in fact set out the position in writing as to the terms for payment.
157. The **second act** relied upon was the assertion that Mr and Mrs Reid had placed undue pressure on the claimant to carry out tasks or attend board meetings urgently. The Tribunal did not consider this to be a fair characterisation as to what happened. As matters progressed it was clear that action was needed given the financial challenges facing the company. The respondent was clearly a small business. The claimant and her husband had been working extremely hard “on the ground” to create a viable concern and ensure cash flow was sustainable. Mr and Mrs Reid as investors wished to ensure the business was on a sustainable footing. When concerns arose meetings were requested.
158. The Tribunal did not find any evidence that undue pressure was placed upon the claimant. Urgent issues arose and urgent meetings were requested, which was the nature of the dynamic situation in which the respondent found itself. Mr and Mrs Reid were seeking to protect the business, as much as the claimant and her husband were, albeit with both sides looking at matters from different perspectives. Mr and Mrs Reid had acted professionally at all times. While the claimant may have been unhappy at some of the requests, the requests were reasonable and made in a reasonable way.
159. The **third act** relied upon was when in October 2022 Mr Reid required significant information the day before a board meeting. The claimant believed this had been done to put the claimant under unfair pressure. In fact it was done solely to seek relevant information to allow a meaningful meeting to take place. There was no basis to find the request was in any way connected to

disability or unreasonable. It was a reasonable request for necessary information from the claimant, who was the custodian of the information (and the information ought to have been readily available).

160. The **fourth act** was that at a board meeting on 1 December 2022 Mr and Mrs
5 Reid were said to have made belittling comments about the claimant and not
being able to listen to her. The meetings were challenging given the
respective positions and growing concern as to the financial position. The
Tribunal did not find that comments were made to the claimant which were
belittling. The claimant had repeatedly referred to the efforts her husband had
10 made (and time spent) in relation to the business and how it was challenging.
Mrs Reid wanted instead to focus on moving forward and finding solutions.
There was no belittling of the claimant. While the claimant believed that Mr
and Mrs Reid were seeking to belittle her and treat her adversely, Mr and Mrs
Reid were seeking to do what they thought best for the business and they did
15 not act in an inappropriate manner towards the claimant during the
challenging times for each of the parties, when viewed objectively.

161. The **fifth act** was that at a meeting in January 2023 and prior to the meeting,
the claimant was told not to attend a meeting with a prospective purchaser.
The Tribunal had no doubt that the claimant was hurt by the decision of Mr
20 Reid. It had been agreed that Mr Reid would take control of the sale process.
Given his experience in these matters, he was in charge of how matters were
to progress.

162. The Tribunal considered that Mr Reid had a reasonable basis upon which to
base his decision not to involve the claimant at the relevant meeting. While
25 the claimant did not like the decision (and it may not necessary have been
commercially the best decision) Mr Reid genuinely believed that the conduct
of the claimant and her behaviour could create a risk to the sale process. He
had seen how the claimant had reacted under pressure and her approach to
challenges in other meetings. Mr Reid was concerned the claimant could be
30 erratic. His experience of the claimant had been that she could act in a way
that could be perceived as some as unprofessional (as he had seen at Board

meetings) and he did not wish there to be any risk to the sale of the business by creating a situation where such conduct could be repeated.

163. The claimant was passionate about the business and wanted the best for it (and she clearly believed her husband and herself had devoted huge amounts of time and money into the business). But the claimant had been unable to see how that passion and her behaviour when under pressure could be viewed by others in terms of how she reacted to matters that she perceived as unfair and how her behaviour could reasonable create an impression that she was erratic.
164. Mr Reid genuinely believed there was a risk to the sale if the claimant was present at the meeting. That was despite the massive amount of work the claimant had done and the value she could bring to the meeting. His decision was based, however, on his experience of her performance and behaviour (and not her skills or knowledge). That was a reasonable decision on the facts for him to take and while the claimant would naturally feel that she had been treated unfairly, there was a reasonable basis for the decision Mr Reid took.
165. The **sixth act** was that at the meeting in January 2023 Mr Reid said the claimant should not attend the meeting as she was a woman. This was inappropriate and discriminatory. Mr Reid himself accepted that he should not have said this. Mr Reid chose to rely upon inappropriate cultural stereotypes of Japanese people as his justification for not wishing the claimant to attend, rather than set out his actual reason, which was his belief as to how the claimant could act at the meeting (from his experience). Mr Reid had acted inappropriately in making that comment.
166. The claimant's upset in relation to this issue was that she had been excluded from the meeting. She had not expressed any comment about the discriminatory remark but was upset and concerned about being excluded from the meeting which was pivotal for the business and at which the claimant (and her husband) believed she could add value. Mr Reid's use of the discriminatory remark to mask his concern about the claimant's comment was ill judged.

167. When viewed in context, the claimant's principal concern about what had happened at this time was not the discriminatory comment but instead the decision to exclude her from a meeting which she believed she ought to attend. It was being excluded from the meeting which had caused the claimant
5 anger and upset. It was, however, Mr Reid's decision as he had been appointed by the Board to take control of the sale process and make decisions as to how the sale progressed. While the claimant was angry and upset at having been excluded from the meeting, Mr Reid genuinely and reasonably had concerns about the claimant's behaviour and how that could be perceived
10 at the meeting.
168. The discriminatory comment, objectively viewed, damaged the trust and confidence at the time but in context the claimant's real concern was not that Mr Reid had made an unlawful remark but that in her mind she was being
15 unfairly and unreasonably excluded from the meeting (which in fact, objectively viewed, was a reasonable position for Mr Reid to adopt, even if others would not have made such a decision given the value the claimant had and could (and did) bring).
169. The **seventh act** relied upon was that at the meeting in January 2023 Mr Reid questioned the claimant's qualifications (and sought to undermine her). The
20 Tribunal carefully considered the evidence before it and concluded that the discussion as to the claimant's qualifications was not inappropriate or seeking to undermine the claimant. The discussion was in the context of a sale of the business where information as to qualifications of the senior time would be relevant. It was also said during a challenging discussion in the midst of a
25 potential sale of the business which was facing complex financial issues. It was not unreasonable to discuss qualifications of the claimant. The discussion that took place was not inappropriate.
170. The Tribunal accepts the claimant felt it was inappropriate because she believed she was being singled out and that there was a desire to cause her
30 hurt, but the Tribunal did not accept there was such a desire on the part of Mr and Mrs Reid who were seeking to secure the best value for the business, which in turn would benefit the claimant and her husband. The discussion was

part of a general discussion. The point was clearly made that the claimant was (as with the other members) appointed on merit. That was not in dispute. The discussion was not unreasonable.

5 171. The **eighth act** was that at the meeting in January 2023 Mrs Reid told the claimant she had been appointed to the board for entrepreneurial tax reasons. The Tribunal was satisfied that while it was likely mention had been made of this, it was not likely that the claimant had been told that was why she had been appointed to the Board. The claimant had not been appointed to the Board for that reason. The Tribunal considered the claimant had perceived
10 that the discussion by Mr and Mrs Reid was focused in a negative way towards her but instead objectively Mr and Mrs Reid were trying to do the best they could to protect the company. The claimant was also seeking to do the best for the company but perceived Mr and Mrs Reid as being negative and disparaging towards her when in fact that was not objectively the case. The
15 claimant believed she was being treated unfairly when in fact Mr and Mrs Reid were acting fairly and appropriately in context. There was no inappropriate behaviour on the part of Mr and Mrs Reid in this regard.

20 172. The **ninth act** relied upon was that at a meeting in July 2023 between Mr Reid and the claimant's husband, Mr Reid demanded the claimant's fees be reduced (which her husband communicated to her after the meeting). The Tribunal did not find that this discussion had been in any way inappropriate. Mr Reid was discussing with the claimant's husband ways of managing the financial situation facing the company. All options were being explored. It was
25 entirely proper for executive directors to work on cash flow and scenarios and explore ways of protecting the financial position of the company. No decision was made to reduce the claimant's pay and although her husband told her about the discussion he had with Mr Reid, the discussion was an exploratory discussion in the usual course of business which was in no way detrimental to the claimant.

30 173. The **tenth act** was that following a board meeting in August 2023 Mr Reid told the claimant's husband her behaviour had been unprofessional (which undermined the claimant). Mr Reid was entitled to take a view as to the

claimant's behaviour. The meeting had taken place virtually and the claimant and her husband had been on the same camera. The claimant had vociferously disagreed with her husband and made her disagreement clear. While it is common for disagreements to exist, and entirely proper such agreements take place in these meetings, the Tribunal considered on the balance of probabilities that the way in which the claimant behaved in setting out her disagreement was more likely than not to have been as Mr and Mrs Reid had said, namely unsettling and considered by them to be unprofessional.

10 174. The claimant had been totally immersed in the respondent's affairs and managing on a daily basis huge financial concerns and issues. She was extremely concerned about the financial position of the company and she clearly fundamentally disagreed with her husband's assessment that things would eventually be sorted. She became anxious and the Tribunal preferred the evidence of Mr and Mrs Reid that the way in which the claimant set out her position, in part due to her passion and position regarding the company, was unsettling and concerned Mr and Mrs Reid. Mr Reid was entitled to tell the claimant's husband his view for which there was a reasonable basis given how the claimant had conducted herself.

20 175. The **last straw** was said to be Mr Reid giving to the claimant's husband an "ultimatum" whereby investment would be withheld unless the claimant resigned (which was communicated to the claimant by her husband after the meeting).

25 176. The Tribunal considered this carefully. From the evidence before it, the Tribunal did not consider it was in fact an "ultimatum". Mr Reid had told the claimant's husband that he was concerned that the solutions that the claimant and her husband had offered would not place the company on a sound financial footing. Taking our further loans did not solve the problem and simply delayed solving it.

30 177. Mr Reid considered that one solution would be to inject his own money provided fundamental changes took place. He believed that the claimant's

departure from the company would yield significant cost savings for the business and would give him confidence to inject the required sums into the business.

5 178. The Tribunal accepted Mr Reid's evidence that this was a suggestion (and it was known to both the claimant and her husband that it was just that – a suggestion). Mr Reid was clear that if the claimant's husband had any other solution or proposal, that would be considered. It was clearly in each party's interest to find a solution that was mutually acceptable that dealt with the financial issues facing the company. Mr Reid was not prepared to invest his
10 own sums without placing the business on a more secure footing.

179. The claimant's husband, as managing director, immediately rejected the proposal at the meeting. Mr Reid understood that his offer had been clearly rejected by the claimant's husband and that other suggestions would require to be found. The discussion had taken place between the claimant's husband
15 and Mr Reid as shareholders and investors.

180. The claimant's husband communicated the matter to the claimant as his wife. The claimant understood that a proposal had been made to inject capital into the business subject to her departure and that this had been immediately rejected by the company. In other words the claimant knew the respondent
20 (the managing director) had refused to countenance the claimant's departure from the business, even if that would have resulted in the injection of necessary funds. Other solutions would be needed to find the necessary funds.

181. The last straw was being told by the claimant's husband that as managing
25 director and shareholder he had rejected an offer from Mr Reid to inject his own capital into the business if the claimant resigned as employee and director. She had been told by her husband, line manager, chief executive and shareholder that such an offer was immediately rejected and the proposal had not been discussed further. The claimant's case was that the final straw was being told by her husband the investor director wanted the claimant to
30 resign if he were to invest his own money. There was no suggestion that she

had been instructed to resign. Instead she had been told the proposal had immediately rejected.

182. The Tribunal viewed this in context. The claimant had serious concerns about Mr Reid and believed that he was acting against her and had not valued her. In fact, objected viewed, Mr Reid was doing what he considered right for the company. Mr Reid had no personal animosity towards the claimant. Her view of Mr Reid was incorrect and propelled by her belief her previous work within the company (when she was a volunteer) had not been properly rewarded. She was unhappy with the financial returns Mr and Mrs Reid had secured from the business in contrast to the claimant and her husband given the massive sacrifices they had made.

183. When the claimant was therefore told by her husband that Mr Reid was prepared to inject his own money but on condition the claimant resign, the claimant assumed this was another example of Mr Reid acting in a personal and negative way to the claimant. Objectively viewed, however, the Tribunal considered that in fact Mr Reid was looking at all options and trying to identify ways to protect the future viability of the company. The claimant was paid a large sum of money which Mr Reid considered something the company could ill afford. One way was to reduce the liabilities of the company was to reduce the high salary bill which could be achieved by the claimant's departure.

184. Mr Reid was exploring all options and considered that it was possible to maintain the company's viability if the claimant left the business. The reason for him suggesting this to the claimant's husband was because they were discussing ways to protect the business. The suggestions thus far would not, from Mr Reid's considered and experienced position, solve the issue. Mr Reid believed the work the claimant did could be done by others (possibly including himself) and significant cost savings would be achieved. There was no evidence the claimant was to resign without fair process or that she would be removed against her will. This was simply an option that had been raised which could have been explored further. The option was not discussed and details considered as the claimant's husband immediately rejected it. That was the act relied upon by the claimant as the final straw.

Breach of contract?

185. The Tribunal must assess whether, in light of the facts, the respondent, by its actions, acted in a way that damaged or seriously destroyed the trust and confidence required.
- 5 186. The Tribunal found that Mr Reid had acted inappropriately to the claimant in suggesting that she be excluded from a meeting with Japanese buyers because cultural issues suggested women should not be present at such meetings. That was clearly inappropriate. That act occurred in January 2023. When viewed in context the Tribunal was satisfied there were no other acts
10 that could support the assertion that trust and confidence had been damaged or destroyed prior to the claimant being told of Mr Reid's proposal.
187. Mr Reid wished to exclude the claimant for reasons that were based upon reasonable grounds, his experience of how the claimant had reacted in meetings in other occasions and sought to mask that reason by referring to
15 cultural stereotypes.
188. The Tribunal considered that the inappropriate act did damage the relationship. The claimant did not resign. The claimant did not raise any issue at the time. The claimant attended parts of the meeting. The claimant continued to carry out her work and continued to discharge her duties. The
20 Tribunal did not find at this stage that the conduct of the respondent was such as to justify the claimant resigning and claiming constructive dismissal. The trust and confidence had been damaged but on the facts as viewed by the Tribunal from the evidence the trust and confidence had not been seriously damaged or destroyed. That was a view reached by the panel using its
25 industrial expertise and assessing the evidence before it.
189. The Tribunal then considered the final straw relied upon the claimant and assessed whether that act was sufficient to entitle the claimant to resign in circumstances that amount to a constructive dismissal. The Tribunal decided that it did not do so. While Mr Reid had acted inappropriately to the claimant
30 in January 2023 in making a discriminatory comment, no further acts had occurred that damaged the trust and confidence. The claimant continued to

work until the final straw, There had been no other inappropriate or unreasonable acts for which the respondent was liable.

190. The final straw for the claimant was being told by her husband that Mr Reid was prepared to inject his own money into the company if the claimant were to leave. That angered the claimant and she believed that supported her assertion that Mr Reid had wished to cause the claimant damage. However, it was a proposal, an offer of a way to inject capital. It was also a proposal that was immediately rejected by the claimant's employer (her husband, as managing director) which the claimant knew.
191. The position of the business was such that all options were being considered. The claimant clearly understood how precarious the financial position of the company was. She knew the finances required to be placed on a firm footing. Mr Reid wished to find a solution that saved the company money that allowed him to have confidence in his investment. The offer by Mr Reid had not been properly explored between him and the claimant's husband and the claimant's husband was not prepared to consider it at all. For example, there was no suggestion that if the offer was to be accepted, the claimant would depart without formal (and fair) process being followed. The discussion had been brief and resulted in an immediately rejection by the claimant's husband. The matter had gone no further.
192. Looking at matters in the round and objectively viewed in light of the evidence before the Tribunal, the Tribunal concluded that the final straw was not such as to entitle the claimant to resign. The claimant was unhappy with what had happened. However, the claimant was viewing matters through the prism of believing Mr and Mrs Reid were making this personal to her. The reality was that as investors they wished to find some way to put the company on a sound financial footing. They were prepared to look at all options. The respondent was not prepared to consider any proposal that would result in the claimant leaving and the offer to explore that option was immediately rejected. The claimant was on a high salary and Mr Reid decided he would introduce his own money if the wage bill be reduced.

193. Mr Reid had made an ill judged and discriminatory remark 7 months before his proposal. The parties were under considerable pressure to find a way through the quagmire the company found itself. In August, a proposal was made whereby cash would be injected if the claimant were to leave the respondent. That was immediately rejected with no discussion as to how it would be implemented. The claimant left because she learned, through her husband, that Mr Reid had made that proposal. There was nothing inherently wrong with the proposal (on the assumption the claimant's departure would be lawful and/or of consent). As the proposal was rejected immediately, the details were not explored.
194. The claimant's agent had argued that telling the claimant that further investment in the company would be forthcoming on the condition that the claimant resigned was clearly a repudiatory breach of the implied term of mutual trust and confidence. That was not accepted on the facts of this case. Mr Reid had made a proposal to the claimant's husband as an investor of the company. The claimant's husband, on behalf of the respondent, refused the offer and it was not explored or considered at that time. Mr Reid was open to considering any alternative ways of managing the precarious financial position in which the respondent found itself.
195. The claimant's agent argued that being told of the proposal was devastating and the claimant had no alternative other than to accept the offer. In reality, however, the offer had been rejected by the claimant's husband (the employer) at the time the offer was made and the claimant had been told that the offer had been rejected. The parties required to find other ways to protect the financial position of the respondent. The claimant could have chosen not to revisit the position and accept the offer and resign. She could have stayed and worked with Mr and Mrs Reid and her husband to find some way to place the company on a sound financial footing. She chose not to do so.
196. The Tribunal did not accept the alternative argument of the claimant which was that "it is clear that there was a course of conduct which, if viewed cumulatively, amounted to a repudiatory breach". The only incident which the Tribunal found to be unlawful was the discriminatory remark made to the

claimant. While that remark had damaged the trust and confidence, the Tribunal was satisfied the relationship had not been destroyed.

197. As set out above, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. The final straw does not require to be a breach of contract but requires to be conduct that would entitle the claimant to resign on the facts. The Tribunal considered that the conduct of the respondent was not such as to entitle the claimant to resign given the facts of this case and applying the expertise of the non-legal members. The earlier act was not of sufficient significance such that the last straw relied upon takes the respondent's overall conduct across the threshold, from the Tribunal's assessment of the evidence in light of the applicable law.

198. The final straw in this case was the claimant learning from her husband that an investor was only prepared to invest his own money if the claimant resigned as director and employee. She assumed that was because there was a personal issue with her when in fact the decision was about saving cost and protecting the viability of the company. The claimant had been unable to see this and viewed everything Mr Reid had done as being a personal attack on the claimant which was not what had occurred when viewed objectively.

199. The Tribunal considered that the act relied upon, the claimant learning that Mr Reid would only invest money in the business if she resigned which offer had been immediately rejected was not unreasonable or blameworthy. The act did not in some way contribute to the breach of the implied obligation of trust and confidence. The act was legitimate and was not of itself unfair, inappropriate or unreasonable. While the claimant did not like it, the offer was made in an attempt to protect the company's financial position and was an offer which was immediately rejected, allowing other offers to be considered.

200. Answering the questions from *Kaur*:

201. Firstly the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation was learning from her husband about Mr Reid's offer and that having been rejected by the company.

202. Secondly the claimant resigned shortly following that offer and did not affirm the contract since that act.

203. The Tribunal was satisfied that act by itself was not a repudiatory breach of contract. The offer was made by Mr Reid as an attempt to save cost and protect the business. It was in no way itself an act that destroyed or seriously damaged the trust and confidence when viewed objectively.

204. Next the Tribunal considered whether that act, was nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of trust and confidence, recognising that if it was, there is no need for any separate consideration of a possible previous affirmation. Looking at matters objectively the Tribunal was satisfied the act was not part of such a course of conduct.

205. Looking at matters objectively and on the round, from the evidence presented to the Tribunal, and relying upon the industrial experience of the non-legal members of the Tribunal, the Tribunal was satisfied the respondent's conduct as a whole did not breach of the implied term of trust and confidence. While Mr Reid had made an inappropriate and unlawful comment, which had damaged the relationship of trust and confidence, the discriminatory act had not seriously damaged or destroyed the trust and confidence. The decision to exclude the claimant from the meeting was a decision that Mr Reid was entitled to make and one supported from the information he had before him. It was a decision the claimant did not like or agree with but there was nothing inherently wrong in making that decision.

206. The Tribunal did not consider the last straw to be such as to entitle the claimant to conclude that the relationship of trust and confidence had been destroyed. The claimant believed there had been a course of conduct or a campaign by Mr and Mrs Reid to treat her in a negative and disparaging way. She believed there had been ongoing conduct that undermined and undervalued the claimant and the respondent (including her husband) failed to take action to protect the claimant. The Tribunal did not accept that as an

accurate depiction of what happened, even if it was the claimant's belief. The claimant viewed actions of Mr and Mrs Reid through this lens.

5 207. From the evidence presented to the Tribunal the Tribunal unanimously concluded that there had been no conduct of the respondent that could reasonably be considered as having destroyed or seriously damaged the trust and confidence, whether individually or cumulatively. The business was facing a challenging situation and the claimant, her husband and Mr and Mrs Reid did their best to place the business on a firm financial footing. There was no conduct of the respondent (whether via Mr (and Mrs) Reid or the claimant's
10 husband) which, when viewed objectively, individually or cumulatively destroyed or seriously damaged the trust and confidence required to allow the relationship to continue.

15 208. Having assessed all the evidence and reached the conclusion that there was no breach of the implied term, it was not necessary to consider the other issues under this complaint.

20 209. The Tribunal, in reaching the decision, assumed for the purposes of the complaint that the actions of Mr and Mrs Reid could in principle be capable of being acts of the respondent or acts for which the respondent was liable. On the facts before it, the Tribunal was satisfied there had been no breach of the implied term relied upon and as such the claimant was not dismissed.

Harassment on the grounds of disability

25 210. The first issue was whether the following acts took place:

- i. An email exchange on and around 31 October 2022 regarding Mr Reid's request for information from the claimant in advance of a board meeting; and
- ii. In December 2022 at a board meeting, Mrs Reid said that she could not listen to the claimant 'going on about how hard and tough it was for her'.

211. The Tribunal found that in relation to the communication of 31 October 2022, Mr Reid sought information about the company from the claimant to enable the board meeting to proceed in a meaningful way. The act did occur.

5 212. In relation to the December 2022 discussion, Mrs Reid asked the claimant to cease discussing how much work her husband had done in relation to the business and how hard he had worked. The comment was not directed to how hard the claimant worked or how hard and tough it was for her. To that extent, the conduct had not been established.

Was the conduct unwanted?

10 213. The Tribunal found that the claimant did not want to provide the information to Mr Reid given the pressure placed upon her at the time. To that extent, the conduct was unwanted.

15 214. In relation to the comment about how tough it was, the comment that was actually made was not a comment about the claimant having found it tough but about the claimant having referred to her husband. There was no doubt that the comment was unwanted.

Did it relate to disability?

215. The key issue in both cases is whether the comment related to disability.

20 216. The first issue, the request for company information, was entirely unconnected to disability. The sole purpose of the request was to enable Mr Reid to prepare for the board meeting. He was entirely unaware as to the claimant's departure time and domestic arrangements. The request was entirely unrelated to disability. It was solely about the information.

25 217. The second issue, the request to cease referring to the work that had been done in the past, was also entirely unrelated to disability. It was a comment by Mrs Reid that the directors had worked hard and had found it tough. The comment was entirely unconnected to disability. Mrs Reid was unaware as to the specific circumstances facing the claimant and the comment was about Mrs Reid's wish not to discuss what had occurred in the past but to focus on

how matters could be resolved going forward. The comment was in no sense related to disability.

218. Given neither comment was in any sense related to disability, it was not necessary to consider the other issues in this complaint.

5 219. The complaint that the claimant had been unlawfully harassed by reason of disability is ill founded.

Harassment related to sex

220. The first issue was whether the following acts took place

10 i. In January 2023 at a meeting, Mr Reid said that the claimant should not attend a meeting with a prospective buyer (Yokogawa) because she was a woman; and

ii. In January 2023 at a meeting, Mr Reid questioned the claimant's qualifications for the position she held.

15 221. The Tribunal found that the first comment was made. It was conceded that Mr Reid made those comments.

20 222. In relation to the second comment, the Tribunal found that Mr Reid asked about the claimant's qualifications but had not done so in a negative or unfair way. Mr Reid had asked about the qualifications the claimant had in the course of a discussion. There was no dispute that the claimant had been appointed as a result of merit.

Was the conduct unwanted?

223. The Tribunal found the first comment was unwanted given the claimant wished to attend the meeting.

25 224. From the evidence, in relation to the second comment, on balance asking the claimant about her qualifications was not something she wanted. It was clear she believed the comment was belittling (even although it was a fair question to ask in context).

Did it relate to sex?

225. The first comment was clearly related to sex and conceded to be so by the respondent.

5 226. The second comment was not in any sense related to sex. The second comment was purely about qualifications the claimant had in the context of sale of the business. The claimant was not carrying out a technical role, but was marketing director. It was entirely reasonable to ask about the qualifications the claimant had in the course of the sale process. The question was about qualifications and would have been asked of any person carrying out that role. The sex of the person carrying out the role was entirely irrelevant. 10 Sex was entirely unconnected and not related to the question. The comment was not related to sex and solely about qualifications for the role.

Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant?

15 227. In relation to the first comment, the Tribunal found that the purpose of Mr Reid saying a woman should not be present was because he did not want to hurt the claimant's feelings by telling her the true reason. The purpose was not to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant. 20

228. The second comment had as its sole purpose understanding the qualifications the claimant had.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

25 229. The effect of the first comment was to violate the claimant's dignity, and create an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant. The claimant wished to attend the meeting and being told she was being excluded because she was a woman was discriminatory.

230. The Tribunal would not have found the effect of asking about the qualifications of the claimant was to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating, or offensive environment for her. While the claimant considered there to be an intention to belittle her, it would not be reasonable for the conduct to have the effect on the facts.

Did Mr Reid bind the respondent

231. In deciding the harassment complaints, the Tribunal considered whether or not Mr Reid's actions were actions for which the respondent was liable. The law was agreed to be that as set out above.

232. This was not an easy issue to determine for the purposes of the harassment complaint because as can be seen from the LinkedIn post the claimant issued following her resignation, the claimant clearly knew that Mr Reid was acting as investor (which was materially different from viewing him as an agent of her employer). However, it was equally clear that Mr Reid was acting not solely as investor given the control he had over the company and the approach he had taken. Thus Mr Reid had decided that he would only invest his own money if the claimant were to leave the business and Mr Reid was able to tell the claimant's husband how the business would be run in that event. In other words Mr Reid did have, in certain situations, control over the day to day activities of the business in material respects.

233. For the purposes of the harassment complaint, it was clear that Mr Reid was acting in the capacity of Director. He had been given the power to determine how to progress the sale. It was in relation to the sale that Mr Reid made the discriminatory remark. That was a comment made to the claimant in relation to her status as employee (since she wanted to be present at the meeting and carry out her duties, acting as an employee not as Director).

234. The claimant's agent's submissions that Mr Reid was authorised to communicate with the claimant in the course of her employment and deal with her in that regard were of merit. Mr Reid acted on the respondent's authority as its agent when making the comment he did.

235. The Tribunal took into account the factors set out in **Moore v Bude-Stratton Town Council** [2000] IRLR 676 (Lindsay J at paragraph 23).

236. Firstly both Mr and Mrs Reid were paid director's fees for their activities (from the respondent). Secondly the activity in question was done for the benefit of the respondent. The activity was progressing the sale of the business and in so doing was clearly seeking to place the company on a sound footing for everyone's benefit. The act complained of was reasonably incidental to the duties given Mr Reid had been given the task of taking control of the sale process which was when he made the comment. The respondent was able to control what was being done, since it was done via the directors. The respondent was in a position to select who should carry out the activity in the course of which the wrongful act occurred. Mr Reid had been chosen as the Director responsible for the sale process.

237. The Tribunal did take into account that the comment itself was not done expressly or impliedly with the respondent's authorisation but it was an unauthorised way of doing something which was authorised given it was in the context of a meeting of the company directors and employees.

238. Applying all the facts in light of the legal principles, the Tribunal found that Mr Reid did act in a way which bound the respondent when he made the discriminatory remark and the respondent is liable for his comment.

239. The claimant's complaint that she had been unlawfully harassed by reason of sex when in January 2023 Mr Reid said that the claimant should not attend a meeting with a prospective buyer because she was a woman is well founded. The remaining harassment complaints are ill founded.

25 **Holiday Pay**

240. It was agreed the claimant was due 10 days' holiday pay at the date of termination. A payment of £1,923.10 was to be made by the respondent to the claimant by way of bank transfer by 5pm on 17 May 2024 which failing interest would run on the balance at the judicial rate until payment.

30 **Salary**

241. It was agreed the claimant is due £5,833 in respect of salary for May 2023, which sum would be paid by 5pm on 17 May 2024 which failing interest would run on the balance at the judicial rate until payment.

242. The Tribunal was not satisfied from the evidence before it that the claimant had carried out any work for which payment had not been made. The claimant's agent had conceded at the submission stage no evidence was before the Tribunal as to any tasks carried out by the claimant, other than some bank transactions. The respondent had found no evidence of any work done. The claimant had not discharged the onus of showing work done to justify payment. No further sums by way of salary accordingly fall due.

Time bar

243. Given the Tribunal has upheld the complaint about harassment, the parties agreed that it is necessary to consider time bar. The comment which was unlawful was made in January 2023. The claimant did not take any action in relation to the comment which was made, whether by raising a grievance or Tribunal claim. The claim was not raised until 1 November 2023 (with conciliation running from 7 September until 19 October 2023).

244. The claimant's agent argued that discretion should be exercised in light of the circumstances in which the claimant found herself during her employment. The claimant was line managed by her husband. The claimant's husband was also the Managing Director of the Company. The claimant and her husband had worked together in the respondent's business for many years. They were invested both personally and financially and made significant personal and financial sacrifices to promote its success.

245. The only options open to the claimant to raise a grievance regarding the harassment was to raise a grievance with that line manager – the Managing Director and her husband - or to raise the problems she was experiencing directly with the Board. The claimant had previously attempted to make representations to the respondent's board in 2021 in response to allegations of unprofessional conduct. These were taken up by her husband to some

degree and shared with Mr Reid but ultimately, they were to all intents and purposes, ignored.

246. The claimant and her husband's primary objective was to promote the success of the business they had built together. It was said that bringing a claim against the respondent prior to September 2023 would have meant, in essence, jeopardising her position and raising a claim against a company of which her husband was a key representative. In the circumstances, the claimant had no realistic option but to delay raising a claim until she had left the respondent's employment.

10 **Decision in relation to time bar**

247. The Tribunal required to consider the evidence that had been led in light of the applicable law. The Tribunal balanced the prejudice and hardship to both parties. The Tribunal took account of the length and reason for the delay. Equally there was no issue with regard to the cogency of the evidence. The Tribunal also took into account the promptness with which she acted once she knew of facts giving rise to the cause of action. She delayed raising a claim until her employment had ended. She could clearly have raised a complaint sooner. The key issue in this case was whether a fair hearing possible. There was no doubt a fair hearing was possible.

248. The Tribunal takes the foregoing facts into account and balanced them in determining whether the claim was raised in such period as was just and equitable. The Tribunal recognises the impact the treatment had upon the claimant. It is important that in assessing justice and equity regard is had both to the claimant and the respondent. The outcome needs to recognise the impact upon both parties. Having considered all of the factors in this case, the Tribunal has decided that the harassment complaint was raised within such a period as was just and equitable.

Remedy for harassment

249. The final issue to determine is what award to make in relation to injury to feelings in respect of the unlawful harassment (which is what the parties

agreed the award would be). The Tribunal carefully considered the evidence of the discriminatory act in relation to the claimant. The Tribunal found that her concern was being excluded from the meeting. The claimant was angry and upset that her value and contribution had not been fully recognised and she considered she was being side lined. The issue was with regard to the impact of the unlawful act which was the discriminatory comment made to her.

250. The Tribunal carefully assessed the evidence that had been led. It also considered the legal position mindful that the purpose of injury to feelings is to compensate the claimant for the anger, distress and upset caused by the unlawful treatment. It is compensatory and not punitive. The Tribunal was careful to focus its enquiry upon the actual injury suffered by the claimant in respect of the unlawful acts only. The injury to be considered is the injury to feelings (and not other injuries) and only in respect of the acts found to be unlawful. It is the impact upon the claimant which is to be considered.

251. In this regard the Tribunal considered that it was just and fair to award £1,500 which fell at the lowest end of the lowest band given the impact of the unlawful conduct and the evidence before the Tribunal in this regard, applying the legal principles in this area. It is fair and just to award £1,500 in respect of the losses flowing from the treatment found unlawful in this case.

Interest is awarded as follows. The award is £1,500. The relevant date is 23 May 2024. The calculation date is 10 January 2023. That is 500 days. The judicial interest rate is 8%. Interest is therefore $500 \times 0.08 \times 1/365 \times 1500$ which is £164.39.

Employment Judge: D Hoey
Date of Judgment: 23 May 2024
Entered in register: 31 May 2024
and copied to parties

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