EMPLOYMENT TRIBUNALS

Claimant: Ms S Thaker

Respondent: Prologik Limited

Heard at: Watford Employment Tribunal (In public; In person)

On: **22 to 26 and 29 to 30 April 2024**

Before: Employment Judge Quill; Ms G Bhatt MBE; Ms A Telfer

Appearances
For the claimant: Mr C Sekar, counsel
For the respondent: Mr J Heard, counsel

JUDGMENT and reasons having been given orally on 30 April 2024, and written judgment having been sent to parties on 12 June 2024, and written reasons having been requested on 14 June 2024, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

REASONS

Introduction

1. The Claimant is a former employee of the Respondent. She brings complaints related to the dismissal, and also alleges that there was discrimination during employment. She has also brought Equal Pay complaints, but those are currently stayed, and were not the subject of this particular final hearing. This hearing was liability only.

The Claims and Issues

2. There was ACAS conciliation from 16 February to 30 March 2021 [Bundle A1]. The claim was presented on 6 June 2021. Thus the claim was presented more than a month after the end of conciliation. For time limit issues, the days 17 February to 30 March 2021 will not be counted.

3. The procedural history is set out in the case management summaries produced after the 22 April 2022 preliminary hearing [Bundle A108] and the 9 August 2022 preliminary hearing [Bundle A130] and the judgment sent to parties on 5 May 2022 [Bundle A117] and orders sent 25 June 2022 [Bundle A118].

4. As a result of the judicial decisions and the withdrawals, and the stay applied to the Equal Pay claims, and the decision that this hearing was to be liability only, the issues to be decided at this hearing were agreed to be as follows, at the 9 August 2022 preliminary hearing, [Bundle A132-133]:

<u>Equality Act 2010 claims</u>

7 Was the claimant discriminated against directly because of her sex within the meaning of section 13 of the EqA 2010 in regard to the manner in which she was remunerated? It is her case that the decision that she should receive less, overall, by way of remuneration than her direct comparators, Mr Vincent and Mr Rodrigo, was such discrimination.

8 Was the claimant discriminated against directly within the meaning of section 13 of the EqA 2010 by being dismissed?

9 Was the claimant victimised within the meaning of section 27 of the EqA 2010 by being dismissed? In this regard the claimant relies on statements made by her to members of the respondent's board in March, April and May 2019 as being protected acts within the meaning of section 27.

<u>Unfair dismissal</u>

10 What was the reason, or if not the reason the principal reason, for the claimant's dismissal? It is the respondent's case that it was redundancy.

11 If the reason for the claimant's dismissal was redundancy, did the respondent follow a fair procedure in deciding that the claimant should be dismissed by

11.1 acting within the range of reasonable responses of a reasonable employer in making the decision to select the claimant to be dismissed for redundancy;

11.2 consulting the claimant sufficiently, i.e. carrying out such consultation with the claimant as it was within the range of reasonable responses of a reasonable employer to do; and

11.3 making reasonable efforts to redeploy the claimant?

12 If the principal reason for the claimant's dismissal was not redundancy, was it that she had made the statement claimed in paragraph 9 of the details of the claim in relation to [CL]?

13 If so, was that a protected disclosure within the meaning of section 43B(1)(d) of the ERA 1996, in other words, was that a disclosure of information which in the claimant's reasonable belief was made in the public interest and tended to show that the health or safety of [CL] had been, was being, or was likely to be endangered?

Compensatory issue of principle

14 If the claim succeeds to any extent, applying Polkey v AE Dayton Services Ltd [1988] ICR 142 (if the claim of unfair dismissal succeeds) and/or Abbey National plc v Chagger [2010] ICR 397 (if the claim of a breach of the EqA 2010 succeeds), what would have happened if the wrong that the tribunal determines has occurred had not occurred?

5. On Day 1, both parties agreed that this list was still correct as far as they were each concerned.

6. On Days 1 and 2, we sought to explore with the Claimant's representative what the Claimant's exact position was in terms of paragraph 7 of the list of issues, both in terms of

6.1 the precise details of the alleged less favourable treatment (what the comparators were receiving that she was not, and was she stating that these were non-contractual benefits) and of

6.2 the specific arguments that were going to be relied on in relation to sections 70 and 71 EQA.

7. For the first of these points, we were referred to the Particulars of Complaint and to the Claimant's assertions that it was not possible to be more specific because of lack of disclosure. Subject to that, it was the Claimant's argument that the alleged less favourable treatment was

7.1 No bonus

7.2 No commission

7.3 No dividends and/or no "dividend based renumeration".

7.4 Penson contributions not equal.

7.5 That bonus and commission was not achievable by the Claimant on basis of agreed targets; they should have been on a performance-related basis

8. For the second, it was confirmed that the Claimant was <u>not</u> arguing that there were no "comparators" within the meaning of sections 64, 65 and 79 EQA. On the contrary, it was her argument that her work was ("like work" or) "work of equal value" to that done by the male employees named in paragraph 7 the list of issues. (And possibly also to that done by Azim Karimjee, but we need make no decision, for present purposes, about whether Azim Karimjee is one of the alleged comparators for the Equal Pay claim, or about whether an amendment application will be required in due course). Through her counsel, the Claimant confirmed she understood that that meant that we would analyse sections 70 and 71 EQA on the assumption, but without deciding, that there were men doing "equal work" (as

defined in section 65 EQA). The actual decision about whether there are comparators doing equal work will be made if and when the stay on the Equal Pay complaints is lifted (the Respondent's position being that it denies that assertion).

9. For the alleged protected acts in paragraph 9 of the list of issues, the Claimant is not confining her comments to those solely made in board meetings.

10. For the alleged protected disclosure referred to in paragraphs 12 and 13, paragraph 9 of the Particulars of Complaint read:

> As the Director responsible for HR she also oversaw the health and safety of employees, their furloughing and payment, and any cost-cutting measures necessary to keep the firm going. However, this led to increasing clashes with Mr Vincent who wished to bring back the whole office as soon as possible, notwithstanding government guidance. In July 2020 this came to a head with Mr Vincent insisting on staff returning, despite it being clear that it was inappropriate and unsafe to do so, which Ms. Thaker reported to the Board Specifically, Mr. Vincent wanted [CL], a [specific age stated] manager who was identified as being at particular risk himself and was living next door to his disabled [details of a close relative] who was shielding, to be forced to attend meetings in London, which Ms. Thaker felt was an imminent and specific threat to his and his daughter's health. Although Mr. Vincent eventually agreed to some changes, from that time Mr. Vincent treated Ms. Thaker increasingly with disrespect, often outright rudeness, and in front of employees. These concerns were raised with, and recognised by, Mr Rodrigo at the time.

11. The Respondent disputes that the Claimant's evidence on the subject (which referred to April 2020 in paragraph 51 of her witness statement and to August 2020 in paragraph 61) could be relied upon to establish the protected disclosure alleged in paragraph 9 of the Particulars of Complaint; the Respondent's position is that that paragraph refers specifically to an alleged disclosure in July 2020 (and only then).

12. It is accepted by the Respondent that the only potentially fair reason relied upon is redundancy. "Some other substantial reason" had not been pleaded as an alternative for the actual dismissal (only as a potentially relevant matter for <u>Polkey</u> considerations).

The Hearing and the Evidence

13. The Claimant made an application on Day 1 for strike out of the response. In part the application relied on previous correspondence to the Tribunal which had already been answered by EJ Hyams (on 22 May 2023 at A162 and on 19 October 2023, which was not in bundle).

14. Since it was the Respondent's position that it had complied with its disclosure obligations, we decided that the strike out application would cover the same ground as any submissions by the Claimant that there were relevant documents in

existence which the Respondent had deliberately withheld in circumstances such that we should draw adverse inferences. We therefore did not reject the application, but stated that we would make a decision on it after hearing all of the evidence and submissions.

15. For Day 1, the parties had supplied bundles A to F, which aggregated to over 3000 pages. We had them electronically and in paper format, though the electronic page numbering did not match the printed page numbering.

16. Bundles D and F were entirely irrelevant, as they were remedy documents. The parties each stated that some documents in Bundle C were relevant, and so we ordered that an index which included page number be prepared.

17. Each bundle started at page 1. Thus where we refer to [Bundle AXX], that is to page XX of bundle A, and [Bundle BXX] is page XX of bundle B, etc.

18. In the course of the hearing, some additional pages were added to the back of Bundle B. On Day 5, we received a further 126 pages (electronically and in paper) which we are calling Bundle G. Later on Day 5, we received an electronic folder with 7 subfolders, 3 of which were empty.

19. One witness for each side (Whiting and Berns) gave evidence by video. The remainder where in person. All of the witnesses had prepared a written statement, which they swore to, and answered questions from the other side and the panel.

20. The Claimant's witnesses were herself, and a former colleague, and former employee of the Respondent, Mr Rob Whiting.

21. The Respondent's witnesses were Mr Asela Rodrigo (employee, shareholder and director of the Respondent) and two external HR consultants, Mr Paul Bryant and Ms Sandra Berns.

22. The timetable had been on the basis of there being 2 days of deliberation with a reserved judgment. The parties and the panel agreed that an oral judgment with reasons was preferable. We timetabled the hearing to be evidence on Days 2 to 4, with submissions on Day 5, and oral decision on Day 7. In the event, and partly as a result there being a disclosure application on the morning of Day 4, the evidence concluded at lunch on Day 5, and submissions commenced at around 2.45pm. Each side had presented written submissions which they added to orally.

The findings of fact

The Respondent's company history prior to the Claimant's arrival

23. Prolojik Ltd (the Respondent) designs and manufactures lighting system control that can be integrated within a building's architecture. The company commenced

in 2002. It was started by Asela Rodrigo ("Mr Rodrigo"). Mr Rodrigo has been a shareholder and director throughout the lifetime of the company. At the times relevant to this dispute, he was managing director. He is now chief technical officer. At all relevant times he has been an employee of the Respondent. He has not had a written contract of employment at any relevant time (or at all).

24. In around 2005, Mr Azim Karimjee ("Mr Karimjee") began working for the Respondent via his own company. At the time, his company was to receive £5000 per month, so £60,000 per year, for his services. Later he became a director and a shareholder. On the Respondent's case, he never became an employee of the Respondent, and the only written contract we have seen is the one with his company dated 2005.

25. On or around 31 March 2014, Mark Vincent ("Mr Vincent") became an employee of the Respondent. At all relevant times he was an employee of the Respondent. We do not have the written contract (if any) for the first 8 months of employment.

26. With effect from 1 December 2014, his written contract specified that he was to be "Commercial Director with a seat on the Board of Directors."

27. That contract included, in Clause 3, remuneration.

> 3.1 The Company shall pay to the Employee an annual salary of £120,000 (which shall accrue day by day) monthly in arrears directly into a nominated bank or building society account. The salary will be inclusive of any fees or remuneration to which the Employee may be entitled in respect of any other office or employment in the Company or any associated Company.
>
> 3.2 The rate shall be reviewed on 01 July each year. Any increase in salary shall be at the discretion of the Board of Directors of the Company.
>
> 3.3 In addition to the salary described in Clause 3.1, the Employee shall be entitled to earn commission in accordance with the Company Commission Policy. Commission will be paid at 1% on the gross value of all orders won by the Company. In addition, commission of 2% will be paid on all orders won by the Employee himself. Such commission will be calculated monthly on the invoiced valued of those orders on which commission is due.
>
> 3.4 The commission as calculated in Clause 3.3 above shall only be payable to the extent that such commission exceeds the target in any month. The initial target shall be £1,750.00. Where such commission falls short of the target in any month, any such shortfall will be added to the target for the following month.
>
> 3.5 In addition to the salary described in Clause 3.1 and the commission arrangements described in Clause 3.3 and 3.4, the Employee shall be entitled to options on the Ordinary Shares of the Company granted through the Enterprise Management Incentive scheme under Schedule 5 to the Income Tax (Earnings & Pensions) Act 2003. In the first full financial year after the date of this agreement in which the gross sales value of orders achieved by the Company exceeds £3,000,000, the Employee shall be entitled to options over 1% of the Ordinary Share capital of the

Company then in issue. If in that same financial year, the gross sales values of orders achieved exceeds £4,000,000, the Employee shall be entitled to options over 3% of the Ordinary Share capital of the Company then in issue. If in that same financial year, the gross sales values of orders achieved exceeds £5,000,000, the Employee shall be entitled to options over 5% of the Ordinary Share capital of the Company then in issue.

3.6 In any subsequent financial year the Employee shall be entitled to additional options:

a) over 2% of the Ordinary Share capital of the Company then in issue if either:

i. the gross sales value of orders exceeds £4,000,000 and the Employee already has options over 1% of the Ordinary Share capital of the Company then in issue

or

ii. the gross sales value of orders exceeds £5,000,000 and the Employee already has options over 3% of the Ordinary Share capital of the Company then in issue

or

b) over 4% of the Ordinary Share capital of the Company then in issue if the gross sales value of orders exceeds £5,000,000 and the Employee already has options over 1% of the Ordinary Share capital of the Company then in issue

3.7 The maximum entitlement of the Employee under the arrangements described in Clauses 3.5 and 3.6 is to options over 5% of the Ordinary Share capital of the Company then in issue.

28. Under Clause 6, he was also entitled to £9000 per year as pension contribution.

29. As of April 2016, the company only had share classes "A" and "B". Mr Vincent was not yet a shareholder. Mr Rodrigo had 1,287,063 ordinary (Class A) shares and Mr Karimjee had 418,802 and there were approximately 4 million held by others. [Bundle B19]. Mr Karimjee and Mr Rodrigo (and only them) also had some Class B.

30. Mr Vincent achieved some his targets and exercised his options. In addition, he purchased some more shares. Mr Karimjee, Mr Rodrigo and Mr Vincent decided that there would be a buyout of the other shareholders. As of April 2017, the shareholdings were:

Mr Rodrigo	1286963
Mr Karimjee	1068702
Mr Vincent	444464

31. These were the "ordinary" shares, with voting rights: "Class A". These were still the same in April 2018 [Bundle B34-35 and 98].

32. As noted at paragraph 4 of the Claimant's statement, the percentages of the shares with voting rights were approximately: Mr Rodrigo 46%, Mr Karimjee 38% and Mr Vincent 16%.

33. Prior to 2017, it is common ground that Mr Rodrigo and Mr Vincent received significant salaries (and that Mr Vincent received commission as well). A decision was made to change this, and their salaries went down to just over £8000 per annum. At the same time, the Respondent's articles were changed and new classes of share issued: C, D, E. [Bundle B30].

34. Dividends were paid on these new shares which were issued to each of Mr Karimjee and Mr Vincent and Mr Rodrigo. The income reduction associated with Mr Rodrigo's and Mr Vincent's salary reduction was broadly replaced by dividend payments from these new shares.

35. The company and the individuals received and relied upon professional advice that the change in arrangements was lawful. Mr Rodrigo's opinion was that the new arrangements had income tax advantages in comparison to the old arrangements, because income on share dividends is taxed at a different rate in comparison to similar income received by way of wages paid for an employment contract. It is likely that Mr Vincent had similar views, though we have no evidence from him.

36. There is a dispute between the parties as to whether Mr Karimjee ever had an employment contract, and ever received wages for such contract, and whether he ever received any payments which were subject to PAYE arrangements. There is, therefore, a dispute as to whether Mr Karimjee also had a salary reduction (from whatever his old salary was) to the circa £8000 salary that Mr Vincent and Mr Rodrigo started to receive in 2017. The Respondent's position is that he had no "old" salary (at all) and no "new" salary (of around £8000 or any other amount) from 2017. It is common ground, however, that Mr Karimjee did receive dividend income from 2017 onwards.

37. The Claimant does not seek to argue that HMRC has been misinformed. She accepts that what HMRC has been told was "dividend income" genuinely was, in fact, dividend income. The Claimant, via her representative, did not necessarily concede that the dividends were properly authorised by the company based on the previous year's profits, but our finding is that they were.

38. The payments of dividends were made by 12 (equal) monthly instalments each year.

<u>Role and responsibility documents</u>

39. In around March 2014, each of Mr Vincent, Mr Rodrigo and Mr Karimjee were the author of a document with the title "role and responsibility" in relation to their own respective role.

40. Each of the 3 documents is in a similar format. Mr Rodrigo's as "managing director" says "reports to: Board of directors". Each of the others says "reports to: Managing Director". Each say "Grade: 5".

41. Mr Karimjee's is at [Bundle B7]. It says "Role: Finance Director". The "main responsibilities" are as follows, and some further details are added under most of these headings

    Finance and accounting
    Human resources
    Legal
    Supply chain (placing orders for materials and managing stock)
    Production (preparation and shipping of equipment to site)
    Administration
    Health & Safety
    Board meetings

Mr Karimjee's departure and the Claimant's arrival

42. During 2017, Mr Vincent and Mr Rodrigo had concerns about Mr Karimjee's performance and Mr Rodrigo spoke to him. Following what Mr Rodrigo and Mr Vincent perceived as insufficient improvement, further discussions were held which resulted in agreement that he would cease the performance of his duties. On the Respondent's case, the contract with his service company would end; on the Claimant's case, his employment contract would end. In an email to staff on 30 June 2018, Mr Rodrigo stated:

> Over the past 12 years, Azim has steered the finances of Prolojik from a business of just 6 people, to where we are now with almost 45 people and a turnover of almost 5 times. We have gone from the tough times of the 2008-2012 recession, to the tremendous growth we have seen in the past three years. Sadly, the end of June sees Azim stepping down as part of a strategic restructure of the business. I hope you will join me in thanking Azim for his tremendous contribution to making us what we are and wish him well for the future. Please also put a date in your diaries for the evening of 20th of July to raise a glass to Azim – details to follow.
>
> The restructure is the conclusion of the process I outlined at the Town Hall meeting back in September. …

43. His email of 16 July [Bundle B110-112] stated:

> We are still working through some items with Azim and feel it would be best to postpone the get-together until everything is wrapped up. I will keep you updated.

44. In around March 2018, the Respondent advertised for a "Director of Finance and Operations", and engaged a recruitment company. The role was advertised with a salary of around £80,000 (the Claimant's recollection) or £85,000 (Mr Rodrigo's).

Two men and two women were shortlisted and interviewed. Following two interviews, by the directors, and a test given by the external consultant, Paul Bryant ("Mr Bryant") the Claimant was offered the job.

45. The Claimant had worked in finance since the early 1990s. She part qualified as an accountant in 2000. She started as a financial controller and worked her way up having worked in purchase ledger, sales ledger, payroll and all aspects of finance to becoming a Finance Director and company secretary as well as managing the office and IT.

46. An offer was made to her. Following negotiations, the Respondent increased the salary beyond what had been advertised, and a £95,000 starting salary was agreed. The written contract is dated 1 August 2019 [Bundle 209]. The contract commencement date is stated to be 1 June 2018. The Claimant's first day of work was Monday 4 June 2018.

47. Mr Rodrigo's 30 June email, as mentioned above, had included:

> In preparation for Azim's departure, we started the search for a new Finance Director who could help us develop the business to its full potential and streamline the complete business delivery. As you will know from meeting her at the new office opening, we have brought on board a highly capable Finance and Operations Director in Sangeeta Thaker. Sangeeta has over 25 years' experience in Sangeeta will help us make Prolojik a positive environment to work in, her experience in getting her pervious company to be in the Sunday Times 100 best businesses will help us to look afresh at what matters. Sangeeta will head-up the office-based teams, with Administration, Finance, Operations, ProCare and Sales Office being her direct reports.
>
> Sangeeta steps up to her full scope from the beginning of July, and can been reached at the office number or by email at …

48. The contract stated that the Claimant's pension arrangements would be the auto-enrolment scheme which it operated. In other words, she was not offered/given the same clause as Mr Vincent which stated a £9000 per year contribution. Mr Rodrigo also did not have that clause at the time.

49. There were no clauses for commission, or for bonus or for share options.

50. The notice clauses (in so far as is relevant) specified 3 months notice to be given by either party, and that the Respondent had the right to make payment in lieu of notice (and also to place the Claimant on garden leave during notice).

51. The Claimant was issued with the "Job Description And Role Profile" document that is at [Bundle B91]. In other words, she was not given the same 2014 document that Mr Karimjee had had [Bundle B7]. It stated:

This is an important role within the Senior Management team, the role takes overall responsibility for the finance and operations of the organisation. The post leads finance, IT, facilities management and office administration at both a strategic and operational level.

Job Purpose: The Director of Finance and Operations contributes to the overall success of the organisation by taking strategic oversight and day-to-day responsibility for all financial and operational aspects of the business.

• Strategy and planning alongside the board and senior management team in order to develop a strategy for driving the future success of the organisation.

• Oversee an operational business plan for the company, provide regular reports to the Directors.

• Financial accounting and reporting.

• Develop and maintain timely and accurate financial statements and reports for the Director General and Board, including production of the Annual Report.

• Establish guidelines for budget and forecast preparation.

• Working with the team to develop and maintain financial accounting systems for cash management, accounts payable, accounts receivable, credit control, and petty cash.

• Ensure appropriate policies, processes and controls are in place, to meet all relevant legislative, regulatory and accounting requirements.

• Prepare all supporting information for the annual audit and external auditors as necessary.

• Review Information technology, ensuring that the IT provision is sufficient to meet the needs and requirements of the business

• Develop and implement policies and procedures to ensure that personnel and financial information is secure and stored in compliance with current legislation.

• Take overall responsibility for management of data within the company.

• Risk management.

• Office administration: Oversee and supervise the administrative function of the organisation.

• Ensure adherence with UK legislation including Health and Safety laws, and up to date policies are in place.

• Advise on whether appropriate human resources policies and procedures are in place, and meet relevant legislative and regulatory requirements.

Person Specification:

• Experience of working at a senior level in a similar position (Finance, Resources or Operations).

• Knowledge of generally accepted accounting principles

• Excellent written and oral communication skills including experience of report writing

• Reliability and efficiency - excellent time management and an ability to prioritise

• Experience of managing a team with a supportive and inclusive leadership style

• Financial understanding and awareness in relation to running an organisation

• Enthusiastic, motivated and highly organised individual

• Experience of working at a strategic level, and of leading teams, including during periods of change.

• Accountancy qualifications is essential, as would a degree in a relevant subject

• Understanding of Manufacturing would be an advantage.

52. During 2018, agreements were reached in relation to Mr Karimjee's shareholdings such that, by April 2019, the only shares with voting rights were held by Mr Rodrigo (just under 75%) and Mr Vincent (just over 25%). [Bundle B169].

53. In February 2019, the Claimant became company secretary and a company director. (From June 2018 to February 2019, she was one of several employees who had "director" in their job title, but who were not on the board of directors). Mr Karimjee ceased in those roles.

54. So, from February 2019 onwards, until 2021, the board of directors was made up of Mr Rodrigo, Mr Vincent and the Claimant, who had one vote each in board meetings, and non-executive director, Garry Turner, who did not have a vote.

<u>Pay discussions March 2019</u>

55. The Claimant's contract specified that there would be a salary review each July. This was just after the close of the company's accounting period, which was 30 June. Neither side envisaged that there would be a review in July 2018, just after she started. Therefore, the first review was due in July 2019.

56. From June 2018 to around March 2019, it became apparent to the Claimant that she was responsible for – as well as the finance department:

56.1 IT: improving the timesheet system, and general IT, and working with the IT specialists.

56.2 Operations: which involved managing the Operations manager (Adam Baxter) and his team.

56.3 Procare: "Procare" was the servicing of existing Prolojik commissioning of lighting as an extra revenue stream. The Claimant's role included managing the Procare Manager

56.4 Office: the Claimant's opinion was that there was a toxic atmosphere and poor timekeeping, which she sought to address

56.5 HR: this included dealing with redundancies and (after March 2020) furlough and other matters. The Respondent had the assistance of Paul Bryant, HR Consultant of PAB Consulting, who was a long term acquaintance of Mr Vincent and who had been providing HR consulting services since 2015. As well as liaising with him, the Claimant's role included liaising with the Respondent's solicitors where there were legal issues or Tribunals threatened.

57. By around March 2019, the Claimant's opinion was that she had successfully achieved the objectives that had been notified to her at the outset, and she wished to have discussions about pay, and about setting further objectives or KPIs, and about financial reward if she achieved those. Furthermore, she formed the opinion that she was significantly underpaid compared to Mr Rodrigo and Mr Vincent. She was aware that they each received a fairly small salary (under £10,000) and that most of their income from the company came from dividends paid to them as shareholders. She was also aware that, in Mr Vincent's case, he also received commission on sales and pension contributions. She had this information as part of her general duties as finance director, and because she was in charge of payroll (which was operated by an external provider).

58. According to her witness statement, she formed the opinion that she could be granted some shares analogous to the C shares (for Mr Rodrigo), D shares (for Mr Karimjee) and E shares (for Mr Vincent). In other words, some shares that did not have voting rights but upon which a dividend could be paid. Her opinion is that she would not have had to own any Ordinary Class A shares (those with voting rights) for this to be done. Mr Rodrigo disputes the Claimant's interpretation; he accepts that, in principle, a new Class F could have been created for the Claimant, but believes that she would also have had to own at least some Class A too. We do not need to decide between these two conflicting opinions, because it suffices to say that:

58.1 The February 2017 resolution [Bundle B30] was that some class A shares already held by Mr Rodrigo, Mr Karimjee and Mr Vincent were converted to C, D, E respectively.

58.2 There would need to be appropriate resolutions and changes to the articles of association (regardless of whether the Claimant is right or Mr Rodrigo is right) to create the Class F shares.

58.3 For the Claimant to obtain the shares (whether Class F only, whether Class A that would be converted to Class F, or whether Class A and also Class F) she would have to make a payment for them.

58.4 That the company uses an external expert to value the shares where necessary (typically Sephton & Company LLP, which prepares it accounts).

58.5 That, if the Claimant had acquired shares, it would have been at a discount. [In Mr Rodrigo's opinion, the discount would have been fixed by Sephton; in the Claimant's it would have been a matter of negotiation.]

59. Some time shortly prior to 11 March 2019, the Claimant approached Mr Rodrigo to discuss her remuneration. Mr Vincent was not aware of these discussions at the time. The discussion led to Mr Rodrigo's email sent to the Claimant (only) just after midnight on 11 March 2019. This was a draft of an email which he planned to send to the Claimant and Mr Vincent. 11 March 2019 was a Monday, and his intention was that the items in the email would be discussed when they got together on Wednesday 13 March 2019. That meeting was not planned to be a formal board meeting, but a discussion of various issues between the directors.

60. In his 12 point email, the first two related to Mr Rodrigo seeking that the company buy back his Class B shares, and arrange for his personal guarantee to be cancelled. The fourth related to his lack of a written employment contract. Points 7, 10 and 11 were about sorting out the paperwork with companies house to reflect the Claimant's appointments and Mr Karimjee's removals. Point 6 was about his and Mr Vincent's commission. The other 5 points were of relevance to the Claimant's remuneration.

61. At 9.26am, the Claimant replied stating that the draft was good, and commenting further on point 6. At 10.41am, she wrote (again to Mr Rodrigo only) as follows. MAV is Mr Vincent.

> I forgot to add. MAV commission from Jul 18 – Feb 19 totals £44,477.00. Because of his current personal situation he didn't want to be paid it all in Jan/Feb so I've held back £4,120.81 for the two months. This reduces his liability to £40,356.19.
>
> As an FYI, I have the commission payable data on one spread sheet which goes back to Jul 15 and commission has been payable every month from then to Feb 19.

62. The Claimant and Mr Rodrigo then had a text exchange between around 1pm and 6pm [Bundle B148 to 151]. Mr Rodrigo wanted to know if Mr Vincent had potentially hit the £5m sales target that would maximise his share options.

63. At 2.13pm, she emailed Mr Rodrigo:

> Please see attached commission spread sheet.
>
> MAV commission paid from Jul-Feb was £42,242 (minus the £4121 still owed to him). The attached says it should be £42065, so there's a nominal diff of £177. Note the spreadsheet has the revenue from Jun 18-Jan 19 and not Jul 18-Feb 19, this is because the commission is physically paid in the following month (in case you were wondering!).
>
> Based on the spread sheet, MAV has received 2% of £753k i.e. £15k of commission on revenue invoiced against projects he has brought in. He has also received £27k of

> commission on 1% of total revenue. Interestingly, this 1% is calculated on the total revenue including his original £753k so on his own revenue he has earned 3%.
>
> Hope this makes sense to you. I'm not sure it is correct and the spread sheet may have been designed wrong? Surely he should receive 2% on his own revenue, plus 1% of the remainder generated by others? It's so confusing…

64. Following the discussions with the Claimant, at 10.45pm, he sent the following email to the Claimant and Mr Vincent [Bundle B143] with the subject line "Directors House Keeping". Mr Vincent was on holiday at the time, and Mr Rodrigo had not yet spoken to him, or written to him, about these matters.

> Please see below the items for resolution at our session on Wednesday evening.
>
> The fairest approach to incentivise ST is to take a common approach and timeline to that taken for MAV when he joined the business.
>
> There are also some significant inequalities in the ways that the directors are compensated, which also need to be levelled-up. The key points we need to agree on Wednesday evening are as follows:
>
> 1. Payback of AR B Shares valued at parity of £20,300 over the next 4 months.
>
> 2. Removal of AR PG of £30,000 and move to a business liability.
>
> 3. Parity over pension contributions for all 3 Directors. Currently the company is paying MAV alone £9,000 per annum.
>
> 4. AR does not have an employment contract. This needs to be established..
>
> 5. AR and MAV have share option's which will broadly off-set one-another's. Sephton have been asked to provide a statement of the relative positions to allow the person with the higher level to purchase the difference at the associated option rate. Once completed a legal document will be drafted to document the transaction.
>
> 6. Performance metric to allow ST to achieve a shareholding options of up to 5% ordinary shares in the company. MAV was given his options for his contribution to the growth in the business sales from circa £2M to £4M+ We need to define a set of criteria which are comparable and measurable for ST. Option share value set with discount by Sephton.
>
> 7. ST has already established significant operational and cultural change, particularly wrt financial reporting, service provider rationalisation and company culture. This should form the basis of the first set of targets for item 6. Remaining criteria to be agreed moving forward.
>
> 8. AR commission plan is 3% of his sales, MAV commission plan is 2% of his sales and 1% on all sales if monthly target is met. Note, the 1% portion of MAV will be effected by the missed targets in the financial year.
>
> 9. AP01 Director status for ST
>
> 10. MAV moved from £99k –£ 120K between 31/03/2014 and 01/12/2014. I recommend this be replicated for ST as her impact has been comparable in the first 8 months.

11. The next salary review was in 07/2016 – or 18 months when we hit AK, AR , MAV salary parity. We should aim for the same timeline for the 3 of us. ST to be staged up during intervening reviews subject to performance.

12. AP03 Company secretary status for ST .

13. TM01 and TM02 remove AK from Companies House .

14. Company share buy-back protocol and insurance policy, in the event of death or incapacitation of a director.

15. Reporting structure – review reporting lines and ensure that chain of command is clear and consistent.

16. If strategies like Arm Go and DEWA are successful, MAV will make his numbers and earn 1%. We need to put in place a equivalent plan for the remaining director, as they will have also been instrumental in the delivery of these outcomes.

17. If we are collectively delivering the process, products and sales, how do we have a set of team objectives which incentivise all of us?

65. Item 15 was new, and added at the Claimant's request. The comments about commission were more detailed than in the draft, and based on information supplied by the Claimant during the course of the day. Items 5, 7, 14 and 16 were also new. The remainder was similar to the draft which Mr Rodrigo had sent to the Claimant for discussion.

66. The Claimant asserts that she regarded this email as a formal offer to her. We do not accept that. The Claimant was aware, at the time, that matters were being put forward for discussion between the directors, and that part of what Mr Rodrigo was suggesting was to seek agreement to certain things that would benefit him. The Claimant's communications that day show that she was also alert to the fact that Mr Vincent might have a different opinion, in relation to commission, to that which was communicated in the email. Furthermore, on her own account the discussions between her and Mr Rodrigo had included about her purchasing shares, and she knew that there was a lot which had to be discussed and agreed about that (price, amount, timescales, whether the company would make a loan, what type of shares, etc).

67. At 6.42am the following day, Mr Vincent sent a reply to Mr Rodrigo only [Bundle 598]:

Asela,

I am amazed at this email this has not been agreed.

You have promised a near 30% increase to Sang that I don't agree with and you know I don't.

You have just driven a wedge between the board.

I suggest we cancel tomorrow nights meeting until this is given some careful consideration.

68. There were discussions over the following days, which did not reach in concluded agreement on all the points raised in Mr Rodrigo's email. Mr Rodrigo informed the Claimant that he would continue the discussions with Mr Vincent. All 3 of the directors were aware that sales were not necessarily as high as expected and that this was something which required attention.

69. A board meeting was held on 18 March 2019. We do not have the minutes for it. The fact that there was a meeting that day is confirmed in the minutes of the 2 May 2019 meeting. Those minutes state, under matters arising from the 18 March minutes:

> Prior to the discussions of the previous minutes there was a long conversation around Board remuneration and Directors housekeeping. Appointment of ST as a Companies House Director and Company Secretary had already been implemented. The following points were further agreed; cash flow permitting, the same pension scheme for all Board members would be implemented; ST's package to be reviewed and put together by 31 May; removal of the £30k personal guarantee against AR; to write an employment contract for AR with the same terms as MV; ST to provide AR and MV with her KPI's; to review the company buy back scheme and insurance policy in the event of death or incapacitation of a director.

70. In April, the Claimant circulated some draft KPIs for discussion. These included for her, and also for Mr Vincent. Her opinion was that sales were a "mess" and that the commission payment system so obscure that she did not fully understand it and that these were matters that she wished to resolve and the draft KPIs could be part of that process. In her witness statement, she comments

> My proposed KPIs were an attempt to start the process for delivery of order and the order/fulfilment process and trying to understand the sales commission better – but both were opposed by Mr Vincent as he did well financially out of the existing chaotic system – an issue Mr Rodrigo was well aware of

71. At the 2 May 2019 meeting, the Respondent's financial situation was discussed, and the comments included:

> As a result of the shortfall in revenue and cash, all (director) spending is curbed for the foreseeable future and any purchases over £1k will now require director approval.
>
> …
>
> … revenue was down against budget by £192k for the month and £754k YTD. Products revenue was down £511k YTD and services combined was down £243k YTD.
>
> GP was down 22%, costs were down 12% and an EBITDA profit of £27k was made for the month.
>
> There was no obsolete stock written off in the month.

YTD revenue and GP were 19% and 16% down against budget, costs were 12% down. EBITDA profit YTD amounted to £41k at a margin of 2%.

Against the same period last year, Products revenue was down 28% and Services generated the same revenue. GP was down 19%, costs were down 4% and the EBITDA variance was £392k (down).

ST advised the forecast for Apr, May, Jun currently stood at £403k, £336k and £233k respectively. Orders in amounted to £1.63m. She felt Apr's revenue would be approx. £380k, but with the additional costs on recruitment and bad debt, Prolojik would b/e for the month. She felt May would break even and based on the current revenue of £233k, June could see a year end loss of approx. £120k.

…

ST advised approx. £110k savings could be made in [reference to two people] should the decision to let them both go be made.

…

The first draft budget was then discussed. ST ran through the forecast to Jun 19 and the 19-20 budget and advised the following:

Based on the current revenue stream, total revenue is anticipated at £4.1m, GP at £2.68m, costs of £2.81m with an EBITDA loss of £129k translating into a 5% margin loss.

Revenue had dropped against 17 and 16, 14% and 10% respectively because of 1) a shuffle in our top ten clients, underperforming sales team and GO not taking off as quickly as expected. Whilst there would be a 10% saving in costs this was not enough to cover the loss in revenue.

…

At present staff costs did not include any growth in staff numbers and this was because of only a 10% growth in revenue. Rob Whiting the new Sales Director was the only new employee budgeted. There was also no salary rises budget, however commission costs for AR/MV and overtime had been included. A margin of 72% of staff costs to revenue is clearly too high, therefore ST advised there was not enough revenue or there were too many staff for the level of revenue budgeted. ST further advised, staff costs did however include the salaries of [same two people], so there was approx. £110k available against the bottom line if required.

72. The Claimant's opinion is that the non-executive director, Mr Turner, was rude to her during the meeting and disputed that she should receive a pay rise. She states that each of Mr Rodrigo and Mr Vincent apologised to her for Mr Turner's attitude and that, in due course, so did Mr Turner.

73. The discussion about staff reduction (and especially about one of the two people named in the 2 May minutes) continued via text in early June. [Bundle B183 to 197]. Mr Turner expressed the view that matters should be appropriately handled (and we infer he meant in terms of only dismissing fairly and in accordance with proper procedure) and:

> at least 3 heads should go as we agreed?

74. On 14 May, Mr Rodrigo wrote to the Claimant and copied in Mr Vincent [Bundle B199].

> Further to our recent discussions, I write to confirm that effective 1st June 2019 you salary will increase by 7% to £101,650. I would also advise that in refection of the KPIs already achieved during the previous year, you will receive a bonus payment of £10,000.00 with your June 2019 salary. Additionally, we will be establishing a common pension policy for all directors effective form the 1st of July into which you will also be enrolled. As you are aware, the cash position of the company may mean that we need to schedule the payments to fit cashflow, however any delayed payments will be back dated and accrued.
>
> We also discussed the possibility of shares by either investment or EMI scheme. If you would be interested in looking into this, we would need to arrange a fair valuation by Sephton using the same mechanisms as deployed previously.
>
> I thank you for your valued contribution and look forward to developing the business to achieve its full potential in the coming year.

75. The Claimant replied on 13 June [Bundle B198].

75.1 On immediate salary increase, she countered with a request for £105,000 from 1 June 2019.

75.2 She commented on the fact that the other two received dividends as well as salary. She implied that there should be an overall package for her (of salary plus dividends) such that the aggregate for her should be the same as the aggregate for them. She asked for a discussion about when that would be achieved.

75.3 On pension, she agreed.

75.4 On bonus, she agreed, and requested that a bonus arrangement for the future be discussed.

75.5 On deferring payments, she agreed.

75.6 On shares, she stated:

> I would like Sephton's to put a valuation on the business so we can set up / include me in the EMI scheme. I hope this reflects the longer term commitment to you and Prolojik.

76. On 5 July, the Claimant chased for a response. [Bundle B605].

77. There was a discussion on 1 August 2019, which Mr Rodrigo summarised in his email late that evening. The Claimant replied the following day [Bundle 607-608].

> Thank you for meeting with me yesterday and I wish to confirm that your email below is exactly as we discussed. I am happy to defer my salary, bonus and pension until such time the business is able to support it. I am also happy to review the investment position at Prolojik until such time that collectively, we feel comfortable on its timing. Please be assured this decision is not at all a reflection of my commitment to you both, just more so about protecting my personal financial position.
>
> Just a couple of minor points to clarify if I may, we agreed the salary uplift should start from 1 June 2019, so I hope it is still possible to accrue from this date as opposed to the 1 July? I am also thinking that I accrue for the month of June as well as the £10k bonus in the 18-19 financial year, so that it does not affect our new year. I hope this is also ok?
>
> I am convinced our contribution will in time display the hard work and effort we put in to making Prolojik a truly successful business.

78. Although not mentioned in her written statement, the Claimant claimed in cross-examination that Mr Rodrigo and Mr Vincent misled her about the company's financial prospects on 1 August 2019, and suggested that it was not a good time for her to be investing in the business, and that is why (a) she agreed that Sephtons should not do the work to value the shares and (b) she made the comments in the last two sentences of the first paragraph of the email.

79. Mr Rodrigo disputes the Claimant's recollection of the conversation.

80. We are satisfied that each is doing their best to recall the conversation accurately. However, if the Claimant had believed, nearer the time, that she was being misled, then it is likely that she would have said so prior to her oral evidence four and a half years later. In any event, we are satisfied that the Claimant had access to the company's financial information, and she had referred to the previous financial years (that is, before she joined the company) in the board meeting of 2 May 2019.

81. Regardless of whether Mr Rodrigo and Mr Vincent (or either of them) shared the opinion that it was potentially a bad time to invest in the company, and regardless of whether either of them said so on 1 August 2019, the Claimant made up her own mind, and her email of 2 August 2019 confirms that she was not seeking to purchase any shares at that time.

82. The reason why Mr Rodrigo decided not to instruct Septhons to do the valuation, at that time, was because of the cost involved (his estimate was up to £20,000 for all the work up to and including changing the articles of association) and because the Claimant had confirmed that she did not wish to proceed.

83. The Claimant's pension contributions, £10,000 bonus and salary increase to £105,000 were formally agreed. None were paid immediately. They were accrued until such time as the directors decided that the company could afford to make the payments. The bonus was paid around June 2020 and the salary increase was

paid with effect from around July 2020. The accrued pension contributions were paid as a lump sum in March 2021.

Dividends to Mr Rodrigo and Mr Vincent

84. In around December 2019, because of the company's financial situation, the shareholders, Mr Vincent and Mr Rodrigo, agreed to defer 30% of their monthly dividend payments.

Adjustments because of Covid

85. In March 2020, the covid pandemic became a major issue in the UK, and the government began making a series of announcements about lockdowns and its Coronavirus Job Retention Scheme ("CJRS"),

86. All 3 directors were engaged in plans for the Respondent's reactions to the problems.

87. With effect from 1 April 2020, a large number of employees were furloughed, using CJRS. The directors were not furloughed. The Claimant wrote to the others [Bundle B237], thanking Mr Rodrigo for his "generous suggestion" that she remain on full pay (being the £95,000 per year that she was actually receiving plus the £10,000 that she was accruing with effect from 1 June 2019, but which was not yet actually being paid). She commented on the fact that Mr Rodrigo and Mr Vincent had been deferring 30% of their dividend payments, and offered to match that arrangement. In other words, she would defer an additional part of her salary, in addition to the £10,000 already deferred, to bring the aggregate up to 30%. This was on the basis that she would receive the deferred part in due course, once cashflow allowed. This offer was accepted. It is common ground that she returned to full pay in September 2020, and, by the last salary payment, at the latest, was reimbursed for all of the deferred payments.

87.1 Thus, up to February 2020, the Claimant's monthly gross payment was £7916.67, equivalent to £95,000 per year. [Bundle B831 to 821].

87.2 For April and May 2020, the payments reduced to £6125 gross. [Bundle B820]. So that was a £1791.67 reduction for each of those months, or about 22%. Compared to a salary of £105,000 per year (which would be £8750 per month), the Claimant's payments of £6125 represent exactly 70%, with exactly 30% being deferred as a loan to the company.

87.3 So, for April and May, the Claimant's additional deferred salary (so not including the pay rise) was £3583.34.

87.4 In June, she received £6750, plus the £10,000 bonus which had been agreed the previous year, and which had been deferred. [Bundle B819]

87.5 In July, she received £6750 again, plus £10,000 as backpay (representing one years pay increase, so presumably for June 2019 to May 2020) [Bundle B819]

87.6 She received £6750 in August.

87.7 So, for June to August, rather than £8750 per month (equivalent to £105,000 per year), she received £2000 less each month, a total of £6000.

87.8 So, for April to August, the aggregate amount which the Claimant had deferred was around £9583.34

87.9 In each of September and October 2020 and January and February 2021, she received £10,357.14. That is equivalent to the rate of £8750 for each of those months, with an additional £1607.14. Thus, in aggregate, she received £6428.56 for those months, in addition to normal pay.

87.10 In each of November and December, she received £8750. So that was unadjusted pay, equivalent to £105,000 per year.

87.11 In her final salary payment, in March 2021, the component for backpay was £4,821.44 and the Claimant does not dispute that that amount is correct.

88. The initiative to increase the payments to the directors, and to reduce the rate at which the company's liability to the directors was accruing came from Mr Vincent's query to the Claimant [Bundle B639], and Mr Rodrigo's 18 June 2020 suggestion, having digested the information supplied by the Claimant [Bundle 634]. It was his suggestion that the Claimant would receive the respective payments of £10,000 in each of June and July and that the amount paid to her monthly would increase to £6750 from June. The Claimant's opinion is that Mr Rodrigo's and Mr Vincent's motivation was that they had tax bills which they needed to pay.

<u>Alleged protected disclosure</u>

89. Around 15 April 2020, the directors were discussing bringing some employees back off furlough, and discussing the regulatory and health and safety implications. Amongst other things, where the Respondent's operatives were going to be working on a third party's site, it was important for the Respondent to know that third party's requirements, and to make sure that its employees would comply.

90. The Respondent's engineers were managed by the Head of Major Projects ("CL"). CL was, at the relevant time, in his mid-60s. He had a close relative who had a disability and he lived next door to that relative.

91. CL was included in the email trail about potentially bringing some of the engineers back to work around 15 April 2020 [Bundle B245-259].

92. Mr Rodrigo's 11.45am email included: "*The safety of our team and their families is foremost in our considerations, therefore we will be extending our own additional safety measures beyond those of the SOP, specifically*". There was also reference to regulatory requirements. This was a draft of an email that he was proposing would be sent to all staff.

93. CL's reply at 14:01 [Bundle B252] made some comments on the draft, and on the decisions that would be needed in due course. It made no mention of any concerns for his own safety or well-being. Mr Rodrigo replied suggesting that, initially, the Respondent was likely to only bring volunteers back.

94. The Claimant replied, including about how she thought CJRS rules might affect the plans. While in broad agreement that there was a lot of uncertainty, and that the Respondent would seek volunteers, suggested that part of the criteria would be:

> Volunteers
>
> Experience
>
> Moaners and groaners - who we may decide not to bring back at all if the opportunity arises.

95. About 20 minutes later, she added:

> In a worst case scenario - if we re-mobilise too quickly and a member of staff caught the virus they could choose to prosecute us, whether they win or not is dependant on the precautions we put in place, the duty of care we show them and the rules we follow, but employment law is a mine field and would be a real ball ache long term! We would be prone to losing this case more than losing against a contractor who wants to sue us for nonattendance.

96. Mr Vincent responded to say:

> Not if we had given all the correct amount of PPE.

97. The Respondent did bring staff back off furlough. One example is the email sent by the Claimant on 25 June, notifying an individual that he would be back with effect from 1 July 2020. [Bundle B335].

98. The evidence relating to April to July 2020 does not demonstrate any particular disagreement amongst the directors about who should be brought back off furlough, or when, or which duties they should be allocated.

99. On around 24 August 2020, the Claimant and MV exchanged the following messages [Bundle B388-389]:

> **Claimant**: I don't think we should let CL go to site. He feels very uncomfortable and he is more vulnerable than us...

Mr Vincent: Fuck him, he can't have everything his way

Claimant: Agree but this is an H&S issue - for his age I think plus he has a disabled [relative] too doesn't he.

Mr Vincent: He was happy last week

Claimant: Where did he go last week?

Mr Vincent: He didn't but we agreed to go. My point is, he's not doing his job

Claimant: Totally agree, but that's a separate issue you should raise outside of going to this site.

100. The directors had a discussion the following day by video, which included a discussion about which of the Claimant's team should work from the office, and how often.

101. Both the Claimant and Mr Rodrigo recall Mr Vincent making a comment in a meeting that the Claimant was lucky not to have been put on furlough.

101.1 The Claimant says it was during this 25 August discussion about return to work arrangements.

101.2 Mr Rodrigo believes that it was in response to the Claimant asking that the Respondent should compensate her for the additional income tax liability as a result of some of her 19/20 earnings being paid in 20/21.

101.3 On balance, it is more likely that the Claimant is correct taking account of her message exchange with Mr Rodrigo [Bundle B390 to 395].

101.4 The Claimant says in her witness statement that that Mr Vincent apparently thought the comment was funny. In the message exchanges, Mr Rodrigo stated:

> I suspect that you not backing down on the return to work lead him to his comments.
>
> Sometimes things said in banter or the heat of conversation would never see the light of day if we considered how it will be received.

101.5 In her reply, the Claimant stated:

> Making insensitive comments whether in banter or not should not be the attributes of a Director

<u>The Claimant's dismissal</u>

102. The discussion about the Respondent's finances had continued through 2019 and 2020.

103. On 11 May 2020, the Claimant emailed the other 3 directors with subject line Salary cuts and Redundancy plan [Bundle B631], and attaching a spreadsheet.

> Ahead of our call tomorrow of 08:00am, please see attached plan of potential savings to be made as a result of putting in place the following:
>
> A - Salary cut at 15% and 20%
>
> B - Salary cut at 20% and 22%
>
> C - Redundancy only
>
> D and E - Combination of salary cut and redundancy.
>
> Mark and I discussed this morning that the criteria for salary cuts could be 15% up to £35k and 20% for those that earn over £35k: This is subject to discussion and approval. I thought it useful to carry out the same exercise (for comparison) at 20% up to £35k and 22% for those that earn over £35k.
>
> The savings made per month were as follows:
>
> A £17.5k
>
> B £20.5k
>
> C £27.5k
>
> A + C £40.5k
>
> B + C £42.5k
>
> I think the optimum solution is A + C. However we do not know how much saving we actually need to make…

104. During 2020, the Respondent decided it was necessary to reduce the cost base of the business. The Claimant was aware of and involved in the redundancy of two salespeople, a project coordinator, and three engineers.

105. The Claimant alleges that (at least) one of these was handled very badly by Mr Vincent, which potentially caused the Respondent to have to make a payment it might otherwise have avoided. However, we do not consider the points made in her witness statement at paragraphs 49 and 52 to be relevant to any issue which we have to decide, and we do not need to make findings about the rights and wrongs of that particular matter.

106. In the September 2020 board minutes, the Claimant's report to the board included:

> ST advised revenue to June was £226k against a target of £413k, resulting in a 44% drop against budget. ..
>
> …
>
> YTD revenue totalled £3.2m with £109k generated through furlough. This was 32% behind the budget set for the year and 24% behind June 19. Costs finished at £2.1m, £441k below budget. Over £300k of this saving was made in staff costs. £38k in travel, £31k in consultants and £36k in marketing was also saved. Costs were 13% less than

> June 19. Whilst this saving was significant it did not fall in line with the loss of revenue of 2019-2020.
>
> The business made a profit (outside of dividends) of £90k YTD (4%), however pre-tax profit after dividends saw a loss of £200k. AR advised this was the first time Prolojik had made such a loss in its history. ST further confirmed EBITDA was 74% behind on 2019.
>
> ST also confirmed that the poor numbers could not be put solely down to Covid as measuring the business pre covid (to March 20) showed it was already 22% behind revenue and had already made a pretax loss of £150k at that point.

107. As of around September 2020, the Finance and Operations team included a Finance and Operations Director (the Claimant), an Operations Manager, a Warehouse Supervisor and an Accounts Assistant, as well as external payroll and auditing support. Starting in around September 2020 Mr Vincent and Mr Rodrigo had discussions and formed the opinion that they needed to address the cost base of the Finance and Operations team. Their discussions led to them formulating a plan to remove the Claimant's role from the structure and redistribute the duties.

108. On 6 November 2020, there was a discussion with the Claimant and this was the first time she was alerted to the fact that her own job might be at risk.

109. Prior to 6 November 2020, the Claimant was not asked to prepare any projections or business plans or suggestions about any reorganisation which potentially affected the Director of Finance and Operations. These were not topics raised in board meetings, or any other meeting attended by the Claimant.

110. In fact, Mr Vincent and Mr Rodrigo had been discussing the possibility of having no role of "Director of Finance and Operations". They took some advice from Mr Bryant and he sent them a draft letter on around 18 October 2020.

110.1 The heading on the draft letter was "Potential Redundancy Situation".

110.2 The draft included:

> To this end, I regret to inform you that the Company are considering making the role of Financial Director redundant and as the current incumbent of that role, you are therefore at risk of redundancy.
>
> A redundancy process will now ensue which will involve a period of consultation during which time both parties should engage in meaningful discussions and communication to determine whether there is any way to avoid this redundancy occurring. I would stress that you have not been made redundant at this stage and that we are just putting you on notice that redundancy is being considered from January 2021 in light of strategic needs of the business.

110.3 A very similar version of the letter was sent to the Claimant on 12 November 2020. [Bundle B412]. We note the differences. The main ones are that the first

paragraph is significantly re-worded and the penultimate paragraph of the draft does not appear in the final version.

111. On Friday 6 November 2020, the Claimant attended a meeting with Mr Rodrigo and Mr Vincent which she expected to be business as usual, but which resulted her being informed about the Respondent's intentions. There is a dispute about whether Mr Rodrigo and Mr Vincent told the Claimant that they were definitely going to get rid of the role of Director of Finance and Operations (which is the Claimant's case) or whether they made comments consistent with Mr Bryant's advice and draft letter (which is the Respondent's case).

112. On Wednesday 11 November, the three of them had a conference call. The Claimant made a recording of this conversation without informing either of the other attendees. She prepared a transcript, which is [Bundle B402 to 407]. There are no significant disputes about its accuracy and we are satisfied that we can rely on it, while being aware of possibility of some typos and/or errors by the voice recognition software that was used. The Claimant relies on this evidence as supporting her case that the outcome was pre-determined; the Respondent asserts that what was said is consistent with its case that everything was subject to consultation and later decision-making.

113. On 12 November, Mr Rodrigo sent the Claimant the finalised version of the letter which Mr Bryant had drafted in October. His first two paragraphs read:

> Further to our meeting of 6th November 2020 and follow-up discussion of 11th November 2020, we write to confirm the following. In light of the financial impact that the COVID-19 pandemic has been having on this business over the past nine months and its likely continued impact in the future, Mark and I have been reviewing the existing structure and make-up of the Prolojik executive team. We have been considering how best to reduce overheads and structure the business in such a way as to give us the best chance to not only remain a financially robust organisation in trying times, but to enable us to recover and grow as quickly and as efficiently as possible in this post-COVID environment.
>
> We both feel that from 2021 onwards, the position of Finance and Operations Director is no longer going to be a viable one and that the current needs of the business can be more adequately and more economically met with a Financial Manager role and with other operations and ancillary duties currently performed in the Finance and Operations Director position, being re-allocated internally or externally among existing resources.

114. Details of the duties and salary of the proposed Finance Manager role were provided and the Claimant was told that it was potentially available for her, but there would be external recruitment if she did not wish to take it.

115. The letter suggested there be a further meeting on 19 November (so one week later) and the intended final meeting would be three weeks later, with the Claimant having the right to be accompanied to the latter.

116. The Claimant commenced a period of sickness. On 19 November, she emailed to say that, for that reason, she could not attend the proposed consultation meeting, adding:

> … I do have some fundamental concerns as to the basis for this meeting, which we will have to discuss during the postponed meeting

117. On 23 November, the Claimant provided a fit note which covered up to 7 December 2020. [Bundle B417].

118. On 24 November, the Claimant submitted a grievance. [Bundle B419 to 422].

118.1 The grievance gave details of how hard the Claimant had worked for the Respondent, and of why those efforts had been of considerable benefit to the Respondent.

118.2 It stated that Procare had not been part of her duties on appointment, but she had acquired it in the first few months (with no extra salary for it). She stated that Mr Vincent had an intimidating manner, and that her relationship within him had "soured" after the Claimant had objected to requiring CL to travel to London and the office. (She did not give names, dates and details of the exchange of messages on 24 August, but our finding is that that is what she was referring to.)

118.3 The grievance said that she was the only senior female in a male dominated environment.

118.4 It had a heading "Discrimination/Equal pay violations" and alleged that there had been a commitment in June 2019 that "salaries would be evened out". It stated that this had not happened, and implied that the reason for that was that she was female.

118.5 It had a heading "Failure to provide Equal Pay (and/or discrimination on the grounds of sex)". This referred to lack of bonus structure and KPIs, and made allegations about what Mr Vincent and Mr Rodrigo earned by way of commission. It said: "*I have been directly discriminated on the grounds of my sex. I have also been significantly underpaid and under-rewarded compared to male counterparts*".

118.6 There was a heading "unfair dismissal" and the Claimant gave an account of what she alleged was said on 6 November and 11 November, which was

summarised: "*I was … upset and surprised that … my termination was being presented to me in such a definitive way and without any due process*".

118.7 In relation to the 12 November letter, she said: *"I was upset and angry to receive the letter as it was quite clear that the Company was purportedly commencing a redundancy process when the decision had already been made meaning any such process was a sham*".

118.8 She added: "*It is clear to me that a decision has been made as to my termination with no fair process nor indeed any statutory process at all and that no consideration has been given as to any alternatives to redundancy*".

119. On 4 December 2020, Mr Bryant wrote [Bundle B423]:

> **Your Grievance Correspondence dated 24th November 2020**
>
> Following your recent email to Asela Rodrigo on the 24th November in which you raise a number of grievances against the organization and its Directors, I have been asked to oversee the investigation into your allegations in my capacity as HR Consultant to Prolojik.
>
> I understand that you have currently been signed off of work by your GP until 7th December and although being medically unfit to work does not preclude you from attending meetings, can I suggest that we arrange to have an online meeting via Team or Zoom once your period of absence has expired and we can discuss your grievance in more detail.
>
> I will not be involving myself with your current redundancy consultation, nor will I be addressing your Data Access Request

120. On the same date, Mr Rodrigo wrote to the Claimant to ask her to suggest a date for the meeting which had been due to take place on 19 November 2020. [Bundle 425]. The Claimant replied to say:

> With regards to the consultation meeting, you will have seen from my grievance that I do not consider the process to be fair or lawful. I fail to understand how a meeting will assist, given that you and Mark have already explained to me that I am being terminated from my role.

121. On 9 December, Mr Rodrigo replied [Bundle B434], in a letter which included:

> The Company has therefore taken the decision to restructure the role of Finance and Operations Director, and the Company is proposing to create a new role of Finance Manager. During our initial discussions I invited you to consider accepting this position. You verbally declined however it remains our intention to engage in meaningful consultation with you and we would like to you to reconsider accepting the role of Finance Manager as part of our formal consultation process.
>
> Aside from the above, the Company will be continuing to explore alternative ways of avoiding compulsory redundancies and minimising the number of employees

> affected. If you have any other suggestions on ways to avoid redundancies, please let me know.
>
> In accordance with the Company's obligations to you as an employee, I must inform you that if after a period of meaningful consultation the Company decides to adopt its proposal as set out in this letter, you decide to not accept the new proposed role of Finance Manager and there is no other suitable alternative employment available for you within the business, your employment will end by reason of redundancy.
>
> However, I must stress to you that no final decision about whether to adopt the proposal or otherwise has been made by the Company at this stage.

122. The letter informed the Claimant of a consultation meeting on 15 December 2020, and that she could be accompanied. It stated:

> Issues for discussion at the Consultation Meeting may include:
>
> • Why the Company has decided that it is necessary to generate a proposal for restructuring the role of Finance and Operations Director;
>
> • Any counter-proposals you may have of your own prior to any final decision being made, including any ideas you may have for avoiding redundancy;
>
> • The new proposed role of Finance Manager;
>
> • Any possibilities for alternative employment within the Company; and
>
> • The terms on which any redundancy would take place.
>
> Whilst, I appreciate how this news will affect you personally, we would encourage you to engage with us.
>
> If you have any questions or issues that you want to discuss prior to the Consultation Meeting on 15th December 2020, please do not hesitate to contact me.

123. On 11 December, the Claimant replied [Bundle B437] to say:

> The Company has already made it clear that my role is being terminated and therefore the purported consultation process is clearly a sham. On this basis, I will not be attending

124. On 19 December 2020, the Claimant discussed the grievance with Mr Bryant [Bundle B441]. She spoke about past issues, including pay, and we have taken those comments into account. In relation to the recent discussions, she stated:

> The grievance is against the whole company but I believe that my termination has come about because of my relationship with Mark and believes that he finds me a pain. I do not believe that an organization can run without an FD, particularly in Covid times. Once MV makes up his mind or doesn't like someone - that's it. Doesn't believe that MV finds value in me.

And

Way process started was unlawful. Called into the meeting on the pretense of a management meeting. Not given a letter. I know how to do redundancies - usually write to them.

I was told that the role was being made redundant. No discussion has taken place strategically as a board. As FD not involved in discussion. Offered a more junior role at a salary between E50-E60K.

Pushed into a second meeting very quickly within three days by Mark and meeting put into diary.

…

Told them at the next meeting the reasons why it didn't make economic sense. Believed that junior role would not be able to support you and that FD's were the most important role. Was prepared to reduce salary but not halve it. Not possible to outsource. Gave them financial side.

MV wasn't interested. He clarified that the salary of the new Finance Manager role would be £55k. I Said to both of them that you have already made up your mind. I told them that you are not supporting or listening to me. I have saved £6k in the last month and that they were being short-sighted. No guarantee that the person would be able to do the job.

MV said - Sang we are making the F & Ops Director role redundant. Clear that they were not going to listen. Told them I was taking legal advice. MV said that was a low blow and jumped off the call. Carried on with conversation with Asela. I said that MV didn't like the fact that I didn't just roll over.

I have held salary, bonus and pension back and done everything I could possibly done and now suddenly it is being made redundant. Makes no sense. Put it down to the fact that I challenged MV in that meeting as a duty of care I have to staff to treat them fairly and that I am considered a hindrance.

What is going to be a positive outcome of this redundancy process?

125. Upon being asked about what a positive outcome would be, the Claimant stated that she was willing to have a protected conversation. She implied that even if the current proposals were withdrawn she would expect the Respondent (and, by implication, Mr Vincent) to call her role into question in the future.

126. In due course, having interviewed Mr Vincent and Mr Rodrigo and Mr Turner, Mr Bryant wrote to the Claimant on 12 January 2021 [Bundle B492]. He rejected the Claimant's objection that he was not suitably independent. He did not uphold the complaints about pay or Mr Vincent's treatment. In relation to comments about the redundancy process, he stated that he did not agree with the Claimant's assertion that she had already been dismissed and/or that the outcome was a foregone conclusion. He added:

I have seen no documentation or evidence which indicates that legal process has not been followed. I do feel that it would have been better practice for the letter provided to you on the 12th November 2020 to have been given to you during your initial

meeting on the 6th November 2020. The understandable shock of being informed that your position was at risk of redundancy would, I feel, have been better received if you had a document to refer to immediately, which echoed what was said in that meeting. Having said that, I do not consider that receiving that letter 6 days after your initial meeting in any way undermines the due process

127. The Claimant was on sick leave from around 21 December 2020 to around 4 January 2021. The first consultation meeting proceeded in her absence on 7 January 2021. It was conducted by Mr Vincent and Mr Rodrigo. [Bundle B448]. It was stated in the minutes that:

> The business rationale as to why the Company had taken the decision to place ST's role at risk of redundancy has been provided to ST during initial discussions on 6 and 11 November and formally by letters dated 12 November and 9 December. ST has so far through this process continued to take the view that her redundancy is a foregone conclusion, however we have on a number of occasions made clear to ST that her role is at risk. No final decisions have been made. ST has not expressed any other views and/or asked any questions in relation to the business reasons as to why her role is at risk of redundancy.
>
> The demands of the business for financial and ancillary activities were discussed. It was agreed that apart from negotiation of funding, contracts and HR activities the majority of actions were routine in nature.
>
> A discussion of the input of AR, MAV, F Walsh and P Bryant in these specialist activities was discussed. It was agreed that as with the negotiation of Funding Circle, KGX1 and HR issues, the use of the existing accessible skill base has and would allow these activities to be redistributed without an increase in base costs.
>
> A discussion of the input to the operations process was discussed. It was agreed that whilst ST has administered the process, the reduced turnover could not justify duplicated management of the process. It was agreed that A Baxter remained in day-to-day control of the process and had demonstrated his ability particularly through the preceding 8 months.
>
> A discussion of the process development impact within the Operations department. It was agreed that there had been little change to the procedures and protocol which were in place from initiatives setup by GAT in 2017.
>
> It was acknowledged that ST has had a positive impact on the normalization and consistency of the business finance and HR functions.
>
> Market value was discussed for the role specific to finance. The previous assertions that the role could be supported by an individual with an income in the region of £55k has been reaffirmed by market testing.
>
> 3 Conclusions
>
> Whilst the business had aspiration for growth beyond £5M heading towards £10M, which was a pre-requisite of the role Finance and Operations Director in 2017/18, the changing economic climate driven by both Brexit and more recently COVID-19 means the business must re-evaluate its position. The demands of the business are now necessitating the reduced role. As a consequence, the business considers that the

position of Finance and Operations Director is no longer viable, and the current needs of the business can be more adequately and more economically met with a Finance Manager role.

ST had been offered the role of Finance Manager however to date has expressed no desire in accepting this role.

We considered if there were any other alternatives to making the role of Finance and Operations Director redundant. At this point in time, we have been unable to identify any other alternatives. ST has also not provided to us any ideas to avoid redundancy for our consideration.

At the present time there are no other suitable vacancies other than the Finance Manager role within the Company.

ST's role remains at risk of redundancy…

128. The Claimant was invited to a further consultation meeting on 13 January 2021. She declined to attend. The notes of Mr Rodrigo's and Mr Vincent's discussions are [Bundle B500]. They included:

It was recorded that ST has declined to once again engage in the consultation meeting (email on 12/1/2021 18:26). It is noted that ST is back at work full time effective from 6/1/2021 and that despite adequate notice (8/1/2021) being given, ST has not engaged in the consultation process and attend the second consultation meeting. ST has been provided with the option to submit written submissions. No written submission from ST has been provided ahead of this second consultation.

AR wrote to ST 13/01/2021 (14:15) offering to extend the deadline until COP Thursday 13/01/2021 for any written submission or to accept the Finance Manager's role previously offered.

129. This is an accurate summary of Mr Rodrigo's and the Claimant's email exchange prior to the meeting. After the meeting, the Claimant wrote:

As I have explained on a number of occasions, I have been an FD for 15+ years and the credibility, integrity and worth on my CV, within the organisation and with all future prospects would be in tatters and I am not prepared to jeopardise my future career, for which I have worked all my life for, by accepting such a junior role. As you also know, I am not in a position to take a 50% drop in my salary. That is simply ludicrous.

130. By letter dated 15 January 2021, the Respondent notified the Claimant that she was dismissed with effect from 15 April 2021. It set out the history of what was (according to the Respondent) the consultation process. It said the reason for dismissal was redundancy. It stated that she had the right to appeal the decision by 22 January 2021. The letter did not specify to whom the appeal should be sent, but it was signed by Mr Rodrigo, and it said that, if there was appeal: "*I will then appoint an Appeal Officer to chair your Appeal*." By implication, the appeal was supposed to be sent to Mr Rodrigo. In any event, it did not state that the appeal should be sent to someone other than to the Respondent.

The Claimant's appeal

131. By letter dated 19 January, the Claimant wrote to Mr Bryant. [Bundle 507]. The letter was not outside the time limit for appealing against the dismissal. The Respondent's agent, Mr Bryant, received it and if there was to be any technical issue about the fact that the letter was not sent directly to Mr Rodrigo or to the Respondent, then there was nothing preventing the Respondent raising that promptly.

132. The heading said: "Appeal against investigation into my Grievance dated 12 January 2021 and Redundancy". The bulk of the letter commented on the Claimant's grievance and why she disagreed with Mr Bryant's outcome letter. Towards the end, she stated:

> On Friday 15 January, the company purportedly concluded its investigation and confirmed that it was making my role redundant; this decision is unlawful. There are also a number of inaccuracies in the calculations by the company with regards the holiday owing to me and my pension calculations. I assume these will be rectified but reserve my position in the event that the company fails to do so.
>
> I repeat the contents of my grievance and am disappointed to note that the company continues to misrepresent its position. It is also quite notable that minimal effort has been made to deal with the whistleblowing aspects of my claim. I reserve my position with regards all claims set out in my grievance dated 24 November 2020, as well as the further acts of victimisation detailed above.
>
> I look forward to hearing from you.

133. Mr Bryant replied on 28 January 2021 [Bundle B511]. He said the Claimant's letter was appeal against the grievance decision.

134. On 13 February 2021 [Bundle B513], the Respondent's solicitor wrote to the Claimant asserting that she had not appeal against the dismissal. The Claimant responded on 15 February 2021, stating, amongst other things:

> For the avoidance of doubt, I confirm that my appeal on the grievance relating to the Company's decision to service notice of termination in January 2021, also constitutes my appeal on the termination

135. Sandra Berns of Centric HR was appointed to deal with appeal about the grievance outcome. She reiterated to the Claimant that she was not dealing with any appeal against the dismissal.

136. The appeal outcome was sent to the Claimant on 5 March 2021 [Bundle B529]. We note that the appeal outcome is wrong to state that the other directors were not employees, because they were employees. This is a false statement that is repeated in Mr Rodrigo's witness statement for these proceedings, as well as elsewhere. The appeal partially upheld the Claimant's argument that Mr Bryant

had failed to properly take account of the fact that the Claimant had agreed to defer elements of her remuneration, having noted that Mr Rodrigo and Mr Vincent had deferred part of their entitlements.

137. Under the heading: "You do not accept that a process of proper consultation in relation to being at risk of redundancy has taken place", the Claimant's appeal was rejected for the reasons given by Ms Berns.

138. The letter concluded:

> At the end of our meeting, I asked you what you wanted in respect of your grievance and how you envisaged resolving this issue. You explained that you did not wish to continue to work for Prolojik but would welcome a further without prejudice discussion. You confirmed to me that you had provided all the information that you wished to share and would provide me with the evidence that we discussed, which you did.
>
> In summary, I have investigated your grounds of grievance appeal, taking the time to carefully consider all the facts and undertake further investigation. I do not uphold the points of your grievance appeal except for Point 3, which was partially upheld.
>
> I have passed your request to Prolojik to re-enter into discussions.
>
> I would like to thank you for your time and wish you all the best for your future.
>
> There is no further right of appeal; this decision is final.

139. We reject Ms Berns' cross-examination claims that the Claimant could have taken the letter as an invitation to discuss things further with her.

140. However, Ms Berns' comment that the Claimant had said she did not wish to continue working for the Respondent is accurate.

141. By letter dated 8 March 2021 [Bundle B540], the Claimant's employment was terminated with immediate effect. The letter stated that she would be paid in lieu of notice and gave details of her other entitlements.

<u>Mr Vincent's attitude to women / people in general</u>

142. [Bundle G120] is a disciplinary outcome letter sent to Mr Vincent on 25 July 2022. It refers to 6 alleged incidents, the earliest being 17 June 2021 and the latest being 11 February 2022. In other words, the earliest incident was several months after the end of the Claimant's employment. All of incidents relate to Mr Vincent's conduct towards the same individual whom we will call F. F was a female employee who was working for the Respondent during the time that the Claimant was working there.

143. The disciplinary outcome was given by a panel chaired by an external HR consultant, and which included Dan King, Product and Operations Director and Mr Turner, Non-Executive Director.

144. The Claimant's witness, Mr Whiting, gave evidence about the situation from his perspective. F's grievance was presented after the end of Mr Whiting's employment; he supplied his comments as part of the initial investigation, and the appeal.

145. Prior to the disciplinary, Mr Bryant had investigated F's grievance. His stage 1 decision did not lead to the disciplinary hearing. The disciplinary hearing followed the decision on F's appeal.

146. Taken collectively, the allegations against Mr Vincent would demonstrate an extremely inappropriate attitude from Mr Vincent to F, and the inference could easily be drawn that there was harassment of a sexual nature, and bad treatment as a result of his being rebuffed. The disciplinary hearing did not uphold specific allegations about Mr Vincent allegedly inviting F to his hotel, or about asking for information about who she was spending her time with. It did uphold allegations which included comments about F's appearance and questions about her sexual orientation. For the 3 allegations that were upheld, one was deemed to merit final written warning and two a written warning. The Respondent did not uphold the other 3.

147. Around 12 months after this, Mr Vincent ceased to be an employee. In due course, he relinquished his role as a director and his shares, and Mr Rodrigo became sole shareholder.

148. We take account of the comments which Mr Vincent made about CL (a man) as quoted above, and about the former employee (a man) on [Bundle B182] and about the male employee that the directors were considering dismissing in May/June 2019 [Bundle B188], and the other evidence about his style and personality. He was blunt (and we would say rude) to and about various people. That, of course, does not prevent a decision that particular examples of rude comments might have been because of sex, or because of protected act, or because of protected disclosure, but is a relevant factor for us to take into account.

<u>The contracts of Alan Lester and Dan King</u>

149. Alan Lester commenced employment with the Respondent from 1 February 2022. His contract (dated 12 August 2021) is [Bundle B698]. He was appointed to the role of Managing Director and Mr Rodrigo became Chief Technical Officer. His starting salary was to be £130,000. The contract did not contain share options. It referred to right to join company pension scheme.

150. Dan King had started his employment on 1 January 2019. With effect from 1 January 2022, his role became Product and Operations Director. We accept that the document added to the bundle genuinely represents the actual document executed around January 2022, notwithstanding that it includes the Claimant's name in Clause 5 as a supposed point of contact. The salary was to be £92,000.

Pension was referred to in clause 6, with no mention of £9000 per annum employer contribution. The contract did not contain share options.

151. Subsequently, Mr Lester and Mr King have each reached agreement with the company about share options clauses.

<u>Document disclosure issues</u>

152. The Board minutes of 18 March 2019 were a relevant document. We are satisfied that minutes were produced, because they were referred to in the 2 May 2019 minutes. No specific reason for their non-availability has been proffered, simply the assurance that a reasonable search has been undertaken.

153. Whether any other missing Board minutes supported either side's case, or undermined either side's case, is something that we cannot know because we have not seen them. On the one hand, the Respondent says that it has searched for all documents within the terms of EJ Hyams' orders, on the other hand, we know that the 18 March 2019 minutes were not located. What is not in dispute is the fact that the Respondent concedes that any potential reorganisation of the Finance and Operations team, and/or of the Claimant's duties, was not discussed in any board meeting, and so the documents would not support either side's case, or undermine either side's case as far as that is concerned. We do not doubt the Claimant's representative's submission that the company's financial situation would have been discussed in those minutes, but that, in itself, does not mean that the documents contained information that undermined the Respondent's position.

154. Mr Rodrigo has stated on oath that there were no other written communications between (just) him and Mr Vincent about the alleged reorganisation and/or about redundancy consultation and/or about the reason for the Claimant's dismissal. It is not inherently implausible that the two of them would have discussed these things face to face or by phone or video, and we do not find that he has deliberately suppressed the disclosure of such documents.

155. Mr Rodrigo has stated on oath that there were no other written communications (whether including Mr Vincent or not) between him and Mr Bryant or him and other people (barring privileged communications) about the alleged reorganisation and/or about redundancy consultation and/or about the reason for the Claimant's dismissal. This is a more surprising claim. We also take note that we were assured on Day 1, and later, that the Respondent had done reasonable searches, and complied with EJ Hyams' orders, and yet, after the witness evidence was concluded, the Respondent finally provided the draft letter from Mr Bryant which had been sent to Mr Rodrigo, and even later than that, and only in response to specific questions from the panel, Mr Bryant's covering email was disclosed.

156. We do not draw the inference that there is any particular specific item that exists which has been deliberately withheld because it contains evidence that would be

detrimental to the Respondent's defence, and (therefore) we make no findings about what such a hypothetical item specifically said.

157. However, there is sufficient evidence that we should be sceptical about relying on the Respondent's claim that all reasonable searches were carried out and/or that the Respondent and/or its solicitors properly understood which items ought to have been disclosed to comply with EJ Hyams' orders. This is something we have taken account throughout our findings of fact above, and in our analysis below.

The Law

Equality Act 2010 ("EQA")

158. The burden of proof provisions are codified in s136 EQA. S136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

159. It is a two stage approach.

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

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

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

160. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of

Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

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

162. It does not necessarily have to be a great deal more. (Deman v Commission for Equality and Human Rights 2010 EWCA Civ 1279). For example - depending on the facts of the case - a non-response from a respondent, or an evasive or untruthful answer from a respondent or an important witness, could be the "something more" that is required. Against other factual circumstances, it may simply be the context of the act itself. In SRA v Mitchell, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation of the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services.

163. Recent EAT cases have re-emphasised the importance of actually adhering to the two stage approach set out in section 136. We have taken note of the comments in Field v Steve Pye and Co (KL) Limited and ors [2022] EAT 68 and of the fact that several subsequent EAT decisions have cited those comments with approval.

164. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one.

164.1 That does not mean that we must ignore the rest of the evidence when considering one particular allegation.

164.2 The opposite is true. When there are multiple allegations, and/or a lot of facts found as part of the background information, a Tribunal has to stand back and consider all of the evidence in the round to consider whether any inference of discrimination/victimisation should be drawn: see Qureshi v Victoria University of Manchester. There must be no failure to consider 'the bigger picture', as it was described in Humby v Barts Health NHS Trust [2024] EAT 17.

164.3 It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

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

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

166. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

167. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run (for a complaint based on that decision), regardless of arguments about whether the policy itself is discriminatory.

168. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good

reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

169. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

170. The factors that may helpfully be considered include, but are not limited to:

170.1 the length of, and the reasons for, the delay on the part of the claimant;

170.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

170.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

171. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) “whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)”: Abertawe Bro Morgannwg University Local Health Board v Morgan Neutral Citation Number: [2018] EWCA Civ 640.

Direct Discrimination – section 13 EQA

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

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

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

174. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. Paragraphs 54 to 65 of Martin v The Board Of Governors Of St Francis Xavier 6th Form College [2024] EAT 22 provide a recent and clear summary of the types of arguments about

comparators (and the proper role of section 23 EQA) that might be presented to us, and we have taken it into account.

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

176. The mere fact alone that a respondent, or a particular individual, has behaved unreasonably and/or treated the claimant badly or unfairly will not, in itself, be sufficient to cause the burden of proof to shift. For one thing, there may also need to be consideration of whether the “bad” treatment is comparable to the way in which others were treated. However:

176.1 The greater the difference between the Claimant’s treatment and that of another employee in similar circumstances, the more likely it is that the Tribunal will decide that an inference of discrimination could be drawn. Likewise, the more closely the circumstances of the claimant and the alleged comparator match, and/or the greater the number of comparators who have had “better” treatment, the more likely it is that the burden of proof will shift.

176.2 The more unreasonable the treatment, the more likely it is that the Tribunal will decide that it calls for an explanation and the more likely that the Tribunal might decide that it is possible to infer that a hypothetical comparator would have been treated differently.

176.3 Where the Respondent offers an explanation for the Claimant’s treatment (and/or the differences between the Claimant’s treatment the alleged comparator’s treatment), then the burden of proof might shift where the Tribunal decides that the explanation is dishonest, and/or if different explanations have been put forward which are contradictory to each other.

Equality of Terms

177. Chapter 3 of Part V EQA (“Chapter 3”) is headed “equality of terms”. Because of the stay placed on the Claimant’s Equal Pay claims, this hearing is not listed to decide (in accordance with the jurisdiction granted by section 127 EQA) any complaint relating to a breach of the equality clause (defined in section 66 EQA) in the Claimant’s contract of employment.

178. We do, however, have to have regard to Chapter 3 because we are being asked to decide a direct discrimination complaint. Within Chapter 3, it is specified:

70 Exclusion of sex discrimination provisions

(1) The relevant sex discrimination provision has no effect in relation to a term of A's that—

(a) is modified by, or included by virtue of, a sex equality clause or rule, or

(b) would be so modified or included but for section 69 or Part 2 of Schedule 7.

(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision—

(a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a);

(b) the failure to include in A's terms a corresponding term as referred to in section 66(2)(b).

(3) The relevant sex discrimination provision is … [section 39(2) EQA]

71 Sex discrimination in relation to contractual pay

(1) This section applies in relation to a term of a person's work—

(a) that relates to pay, but

(b) in relation to which a sex equality clause or rule has no effect.

(2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 ...

179. The effect of these sections is that a claimant cannot rely on section 13 EQA and section 39(2) EQA, if (a) there is an employee (of the opposite sex) doing “equal work” (as defined in section 65 EQA) and (b) the argument is either that:

179.1 The Claimant’s contract of employment and the other person’s contract of employment confer a particular benefit, but in such a way as to be less favourable to the Claimant (because of sex)

179.2 The other person’s contract of employment confers a particular benefit that the Claimant does not have (and the failure to provide that benefit to the Claimant is less favourable treatment because of sex).

Those particular alleged contraventions of EQA have to be brought exclusively in reliance on Chapter 3 (either in the civil courts, or else, if brought in the Employment Tribunal, under the jurisdiction granted by Section 127, rather than Section 120.)

180. Where the alleged direct sex discrimination is <u>not</u> based on an allegation that another employee has a term in their contract that means that they are being treated more favourably than the Claimant, then it can be brought as an alleged contravention of section 39(2). Furthermore, such a complaint would not be one captured by the stay in this case in relation to the Equal Pay complaints.

181. In general, where there was no employee of the opposite sex doing “equal work”, then the combined effects of sections 64 to 66 and 70 to 71 would be that the complaint of alleged less favourable treatment in relation to pay could be brought

in reliance on sections 13 and 39 EQA. However, that is not the argument pursued in this case. In this case, it is the Claimant's position that there were, at all relevant times, employees (of the opposite sex) doing "equal work".

Victimisation – section 27 EQA

182. Victimisation definition is in s.27 EQA.

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

183. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

184. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

185. A person subjected to a detriment if they are placed at a disadvantage; there is no need for the claimant to prove that their treatment was less favourable than a comparator's treatment.

186. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

187. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

188. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint will succeed if the protected act had a significant influence on the decision making. An influence can be significant even if it was not of huge

importance to the decision maker. A significant influence is one which is more than trivial.

189. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

190. S136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

Protected Disclosure

191. As per section 43A ERA “protected disclosure” means a “qualifying disclosure” which is made by a worker in accordance with any of sections 43C to 43H

192. Section 43B defines “qualifying disclosure”:

> (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

193. In order for a communication to be a qualifying disclosure

193.1 Firstly, there must be a disclosure of information.

193.2 Secondly, the worker must believe that the disclosure is made in the public interest.

193.3 Thirdly, if the worker does hold such a belief, it must be reasonably held.

193.4 Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1).

193.5 Fifthly, if the worker does hold such a belief, it must be reasonably held.

Unless all five of these conditions are satisfied there will be not be a qualifying

disclosure. See Williams v Michelle Brown AM UKEAT/0044/19/OO.

194. There must be a disclosure of information. A disclosure of information can be made as part of making an allegation, see for example Kilraine v London Borough of Wandsworth. Neutral Citation Number: [2018] EWCA Civ 1436.

194.1 The information disclosed has to have sufficient factual content and specificity such as to be capable of satisfying all of the requirements mentioned in the previous paragraph.

194.2 However, the worker does not need to specifically use the words from the section in order for the disclosure to qualify.

195. The public interest parts of the requirement were considered in Chesterton Global Ltd v Nurmohamed. Neutral Citation Number: [2017] EWCA Civ 979. Some of the relevant points that were highlighted are:

195.1 The Tribunal has to ask whether the worker believed at the time that they were making it that the disclosure was in the public interest and whether, if so, that belief was reasonable.

195.2 The Tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal might need to form its own view on that question as part of its analysis of what (on the balance of probabilities) the employee, in fact, did believe at the time. However, it is not the Tribunal's view of the public interest that is determinative of this point.

195.3 The necessary belief is simply that the disclosure is in the public interest. The particular reason(s) that the worker believes that it is in the public interest are not of the essence. What matters is that the claimant's subjective belief was objectively reasonable.

195.4 While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be the predominant motive for making the disclosure.

195.5 Parliament has deliberately chosen to not define the phrase "in the public interest" and the reason for that is that it is Parliament's intention to leave it to Employment Tribunals to apply that phrase as a matter of educated impression. There is, therefore, no "checklist" of factors that will determine whether it was reasonable for the worker to believe that the disclosure was in the public interest. However, the type of things that might often be relevant include:

195.5.1 the number in the group affected by the wrongdoing;

195.5.2 how the wrongdoing affected people and the extent to which they are affected;

195.5.3 the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

195.5.4 the identity of the alleged wrongdoer.

196. Where a qualifying disclosure is made to an employer, it is a protected disclosure. (Section 43C).

Dismissal because of protected disclosure

197. Within Part X of the Employment Rights Act, s.103A specifically deals with dismissal where the principal reason is that the employee has made a protected disclosure.

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

198. The dismissal reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

199. When an employee has less than two years' service, and presents a claim of unfair dismissal, the onus is on them to persuade the tribunal that the dismissal reason was one of the reasons for which two year's continuous employment is not required. For employees with greater than two years service, the approach is that set out in Kuzel v Roche Products Ltd [2008] ICR 799, and the general rule that the onus is on the employer to prove the dismissal reason applies.

199.1 We might make a decision, on the balance of probabilities, that the claimant was dismissed for the reason which the respondent is relying on, or we might make a decision that the claimant was dismissed for the reason that the claimant is relying on. However, we are not obliged to choose just between those two options only; we do not simply have to decide which of those is more likely than the other and to decide that that, therefore, is the dismissal reason. It is open to us to reject both proposed reasons, and to decide that neither side has proven, on the balance of probabilities, that the reason was the one that they argued for.

199.2 In other words, it is open to the Tribunal to decide that the dismissal was not for the reason asserted by the employer but also that it was not because of the protected disclosure either.

200. A crucial part of reaching a conclusion about the reason for dismissal is to decide which person or persons took the decision to dismiss.

201. If the Tribunal accepts the Respondent's case about the identity of the decision maker, and that person attends the hearing and gives evidence, then the decision about the dismissal reason will be largely about whether that person's evidence on oath is believed, including an analysis of whether that evidence is consistent with the contemporaneous documents, and whether there was any unconscious motivation.

202. Evidence about whether that person knew about the disclosure, and/or evidence about whether anyone else sought to encourage them to dismiss the claimant is likely to be relevant and important.

203. If the employer is found to have lied about the identity of the decision-maker, or claims not to know the identify the decision-maker, and/or if the decision-maker does not give evidence, then the Tribunal will have to decide whether or not to draw adverse inferences. It does not follow that the Claimant succeeds by default in these circumstances; however, nor does it follow that – just because we are unable to hear first hand evidence from the person who made the decision - we are unable to make decisions about the reason why the employee was dismissed.

204. Where the decision-maker has been identified, and their subjective reason for deciding to terminate employment has been identified, the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55 might be relevant in some cases. If an investigator or senior manager deceived the decision-maker about the true facts, and the dismissal decision was taken because the decision-maker believed that false version of the facts, then the motivation for the deception can be attributed to the employer as the dismissal reason. In other words, a potential route for a claimant to succeed under s.103A is to show that someone else, other than the decision-maker, was motivated by the protected disclosures and successfully tricked the decision-maker. The deception could consist of positively making up false facts, or of concealing some relevant true facts.

205. However, the mere fact alone that a claimant has made a protected disclosure and that one or more colleagues has been aggrieved by it and/or complained about it, is not necessarily enough for the claimant to succeed in showing that their later dismissal fell within section 103A. In the absence of the Jhuti type scenario, the opinions or beliefs of people other than the dismissing officer are not necessarily relevant to the Tribunal's decision about what was the "real reason" for the dismissal. It will be up to the Tribunal to analyse the actual decision maker's reasoning and to decide whether that decision maker made the decision to dismiss (for the reasons which they have claimed or for some other reason or) because of the protected disclosure

<u>"Ordinary" Unfair dismissal</u>

206. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

207. Section 98 ERA states, in part:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

208. Provided the respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

209. In considering this general reasonableness, taking into account the respondent's size and administrative resources. Typically, the tribunal's analysis includes the question of whether the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, the tribunal decides whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached.

210. In carrying out the analysis, it is important for the tribunal to make sure that it does not substitute its own decisions for those of the employer. In particular, it is not relevant whether the tribunal members would have followed a different process ore

reached a different decision, so long as the employer's decisions were not outside the band of reasonable responses.

<u>"Redundancy" as alleged dismissal reason</u>

211. Section 139 ERA states in part

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.
>
> (2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
>
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

212. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation.

213. In an unfair dismissal case, where the employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence.

214. If there was such a state of affairs, then, as made clear by the House of Lords in <u>Murray v Foyle Meats Ltd</u> [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "*wholly or mainly attributable to*" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

215. The latter step is a crucial part of the reasoning. It is not merely sufficient for the tribunal to be satisfied that a redundancy situation existed. The reason in the <u>Abernethy</u> sense must be determined. See, for example, <u>Kellog Brown and Root (UK) Ltd v Fitton & Ewer</u> UKEAT/0205/16/BA UKEAT/0206/16 at para 24. In that

case, the reason was found to be not the closure of a work location (though that would have been a redundancy situation) but the employees refusal to move to a new work location. Thus, the dismissal was not "wholly or mainly attributable" to the redundancy situation, and the correct label for the dismissal reason was not "redundancy".

216. Subject to the points just mentioned, for the tribunal to be persuaded that the reason for the dismissal was redundancy, the employer does not have to prove:

216.1 why the "redundancy situation" existed. [Of course, where the claimant's argument is that the employer is simply giving a "sham" reason, the claimant is entitled to ask the Tribunal to decide that the employer has lied about the state of affairs that is said to have led to the dismissal; that is an argument that the dismissal was not "attributable" to a redundancy situation (if any).]

216.2 or that there was nothing that the employer could have done to avoid it. [That comes into the unfair dismissal considerations as part of section 98(4), not section 98(1).]

217. The Claimant has asked us to take into account of the EAT decision <u>Pillinger v Manchester Area Health Authority</u> EAT/225/79. We have done so. On the facts of the case, the tribunal had decided that the employee had been fairly dismissed by reason of redundancy, but, if they were wrong about that, he had been fairly dismissed for "some other substantial reason" [often shortened to "SOSR"] as now defined in section 98(1)(b) ERA. The employee's appeal was successful. For the redundancy issue, the EAT's reading of the facts was that the employee had been replaced by another employee doing exactly the same work, for lower pay. This did not meet the definition of redundancy. In reaching its decision, it noted:

> Now, if it were possible to say on the evidence that the kind of work which this newly appointed more junior Scientist did was in some way different and, or intended to be different, from that which would have been done by Dr. Pillinger, then it might be possible to say here that the requirement for Dr. Pillinger to do his particular branch of the research had ceased or diminished.

218. As noted by the EAT in <u>Corus and Regal Hotels plc v Wilkinson</u> UKEAT/0102/03, when a business reorganises the way in which it conducts its business, and/or reallocates work amongst its employees, that does not necessarily mean there is a "redundancy situation" or that the dismissal of employees would be by reason of redundancy. Each case must be decided on its own particular facts: "*The mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of redundancy*."

219. In <u>Mitie Olscot Ltd v Henderson</u> UKEAT/0016/04 employees were dismissed for what the employer claimed was redundancy. The tribunal was not persuaded that there had been any diminution in the business's requirements for employees to

carry out work of a particular kind. The employer's appeal failed. The EAT observed:

> 'the tribunal were more than entitled to conclude that the real reason behind the dismissal was economic problems and an attempt to renegotiate contracts, which, if it had been successful, would not have resulted in job losses to any material extent. That does not meet the definition of redundancy since the need for the employer was not lack of work but economic improvement.'

220. The words of the legislation are paramount, and clear findings of fact needed. The question under Section 139(b)(i) is not whether the need for "work of a particular kind" has diminished, but whether the requirement for employees (to carry out work of a particular kind) has diminished. Thus findings of fact about exactly which "work of a particular kind" the Respondent is relying on, and analysis of the Respondent's arguments for asserting it has a reduced requirement for employees to do *that* work will be required.

Fairness of alleged redundancy dismissal

221. As regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunals must remember that it is guidance, and does not replace the wording of section 98(4).

221.1 The employer should give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment, either with the Respondent, with an associated employer, or elsewhere.

221.2 The employer should consult (usually with representatives) as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer should seek to agree the selection criteria with the representatives, and be willing to continue to engage about the processes for applying those selection criteria

221.3 The employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

221.4 The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations as to errors or unfairness in the selection.

221.5 The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

221.6 In Elkouil v Coney Island Ltd [2002] IRLR 174 at [14]:

> The warning, the giving notice of risk, that is spoken of there is an essential prerequisite of the consultation process, because without it the representatives of the employee will not be able to formulate a strategy or consider what suggestions they can put to the employer. In this case it is true that a single person was being made redundant and no union was involved, but the principles are exactly the same.

222. The nature of fair consultation was considered in R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [1994] IRLR 72 at [24]:

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
> Fair consultation means:
> (a) consultation when the proposals are still at a formative stage;
> (b) adequate information on which to respond;
> (c) adequate time in which to respond;
> (d) conscientious consideration by an authority of the response to consultation.

223. In Compair Maxam, it was emphasised that

> The purpose of having, so far as possible, objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for quite other reasons, e.g. for union activities or by reason of personal dislike.

224. In Teixeira v Zaika Restaurant Limited [2022] EAT 171, the EAT pointed out that it was established by Capita Hartshead Ltd v Byard [2012] ICR 1256 that the tribunal must not substitute its own views, for that of the employer, on the issue of the appropriate pool from which the employee to be dismissed might be selected. That applies even if the pool consists of just a very small number.

225. When deciding on whether the dismissal was fair or unfair, the tribunal's analysis might include, as well as the size and resources of the employer; whether it has relevant policies and procedures, and if so have they been followed; has it followed the same method and processes as in previous similar exercises, and, if not, was there a reason for acting differently this time; was there an urgent need to act quickly to save the business. There is no single uniform process for redundancies that must be followed by every single employer. It is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant.

Analysis and conclusions

226. We do not strike out the response. It would not be proportionate. We are not satisfied that the Respondent carried out a search for relevant documents that was up to the standards that we would expect from any respondent, let alone from one which has been professionally represented throughout. However, we are satisfied that we have evidence before us from which we can reach the correct decisions on the merits, and it would not be in the interests of justice to strike out the response. That does not mean, of course, that we condone their approach to disclosure, and we have considered whether to draw adverse inferences.

Victimisation

227. The alleged protected act is set out in paragraph 9 of the list of issues.

228. Our findings of fact, in relation to the pay discussions between March 2019 and August 2019, show that during that time the claimant did not bring proceedings under the Equality Act, or state an intention to do so.

229. Our decision is that her comments made to the other directors in that time period did not amount to making an allegation whether expressly or implicitly, that there was a contravention of the Equality Act. She neither stated nor implied that her remuneration was too low because of her sex, and nor did she state or imply a breach of equal pay protection.

230. In fact, what the claimant alleged was that she believed she deserved to be paid more because of the way that she performed in the first nine months (as of the start of the discussions) and in the first year (by the end of the discussions).

231. These discussions about pay involved the claimant making clear to Mr Rodrigo and Mr Vincent that she believed her performance was good enough to merit a higher level of pay. It was comparable to the discussions prior to the start of her employment in which the Claimant argued that her personal attributes were such that they should offer her more than the advert. She was now suggesting that her performance had been above expectations, and should receive a higher reward going forward. She was not stating or implying that her sex was the reason they were not paying her more than they were paying her, or hinting at an equal pay claim.

232. She did raise the issue of what they were being paid. However, her arguments were not, even by implication, that she was comparing their pay to hers because they were male and she was female. She was seeking to persuade them that she was offering a high value to the business.

233. As a result of the Claimant's discussions with Mr Rodrigo, he came to the view that there were potentially some aspects of his own remuneration that should

potentially be addressed. Furthermore, there were some elements of the commission scheme that the claimant believed might be resulting in Mr Vincent receiving high rewards and Mr Rodrigo also wanted clarity over that issue.

234. Not only did the claimant fail to do a protected act during these discussions, but Mr Vincent and Mr Roderigo did not believe she had done a protected act or that she was likely to do a protected act in the future. That is, they did not perceive the Claimant’s arguments as having anything to do with sex discrimination or equal pay rights (as per EQA); they perceived them as being purely about the Claimant seeking a pay rise (and/or other increase in remuneration package).

235. Although we will comment further below about the claimant's assertions that the pay discussions partly motivated the eventual dismissal, the fact that we have decided that there was no protected act means that the victimisation complaints therefore fail.

Protected Disclosure

236. Paragraphs 12 and 13 of the list of issues show the alleged protected disclosure.

237. We have taken account of the respondent's arguments that what is contained in the list of issues (which cross-references paragraph 9 of the details of complaint) does not match the witness evidence given by the Claimant.

238. However, we are satisfied that the date of July 2020, mentioned in the particulars of complaint does not mean that the claimant could not rely on an alleged protected disclosure made, for example, in August 2020, or thereabouts. It is clear that paragraph 9 of the Particulars of Complaint is describing a set of circumstances which was the background to the alleged disclosure. The text discussion on 24 August 2020 is sufficiently similar to what is set out in paragraph 9 of the details of complaints that it is in the interests of justice to deal with the complaint on its merits. The claimant has referred to this disclosure in her witness statement and the Respondent has had the opportunity to cross-examine her about it.

239. We are satisfied that in the message which the claimant sent at around 1116 on 24 August 2020, the claimant was clearly identifying a health and safety issue, both for the individual CL and also his disabled relative.

240. The context was the previous exchange of messages on Bundle B388 within the previous four minutes. The discussion was that the claimant was suggesting that CL should not go to sites and then the Claimant was replying back to Mr Vincent's assertion that he should do so.

241. The claimant did believe that she was providing information to Mr Vincent that tended to show that there would be a breach of a legal obligation and/or a danger to health and safety if the respondent insisted on CL attending the site.

242. It was reasonable for her to believe that the disclosed information tended to show those things.

243. She also believed that her disclosure was in the public interest. The fact that CL's relative was not an employee of the respondent would not necessarily, in itself, be sufficient to demonstrate a public interest element. However, the broader context of the matter is that the government was issuing daily bulletins in 2020, about the public health effects of Covid and about why it was important that all inhabitants of the country do their utmost to alleviate the danger, not only to themselves but to other people.

244. We are satisfied that the claimant did believe that there was a public interest element to her suggestion that CL be relieved of the obligation to attend the site in question and we are also satisfied that it was reasonable for her to hold that belief.

245. Our decision, therefore, is that the claimant's 24 August email does amount to a protected disclosure and we will deal with the allegation that that was the reason for her dismissal on the merits.

<u>Remuneration issues</u>

246. We next consider the remuneration issues at paragraph 7 of the list of issues.

> Was the claimant discriminated against directly because of her sex within the meaning of section 13 of the EqA 2010 in regard to the manner in which she was remunerated? It is her case that the decision that she should receive less, overall, by way of remuneration than her direct comparators, Mr Vincent and Mr Rodrigo, was such discrimination.

247. This will require us to decide which of the arguments within that paragraph can be brought as alleged breaches of section 39 EQA and which of them could only be brought in reliance on chapter 3 of part V EQA.

248. However, the first thing we will say is that we are satisfied that the claimant's starting salary had nothing whatsoever to do with the fact that the Claimant is female. The role was advertised at around £85,000 or so. The witnesses differ slightly in their recollection of the exact figure in the advert, but, either way, the role was advertised at a significantly lower starting salary than the salary which the claimant negotiated, which was £95,000 per year. To labour the point, after they knew that the Claimant was a woman, and that the Claimant was their preferred candidate, Mr Rodrigo and Mr Vincent agreed to pay a higher amount to the postholder than they had previously intended. They did not set her starting salary be £95,000 (rather than a higher figure) because she is female, in circumstances in which they would have paid more to a man.

249. There are no facts from which we could infer that a man would have been offered a higher starting salary in 2018. There are also no facts from which we could conclude that a man would have had share options. There are also no facts from which we could conclude that a man who had been appointed as Director of Finance and Operations in June 2018 would have been offered arrangements for pension contributions or commission which matched Mr Vincent's.

250. In terms of the discussions that took place between March 2019 and August 2019 which eventually culminated in the pay increase - effective from 1 June 2019, but deferred - and also in the agreement to pay a bonus - which was also deferred – and also an agreement to pay £9000 a year pension contributions - which was also deferred - we comment as follows.

250.1 The decision was finalised by no later 2 August 2019. Therefore, for a direct discrimination complaint, the time limit clock starts running from 2 August 2019 in relation to the first annual salary review, unless the Claimant can show it was part of a continuing act. [This is on the hypothesis that it could be brought as a direct discrimination complaint, which is a point we will address below. There are, of course, different time limits for Equal Pay complaints, but we are not addressing Equal Pay complaints in this hearing.]

250.2 In relation to salary, there are plainly terms in the claimant's contract and that dealt with her salary.

250.3 Mr Rodrigo did not have a written contract, but we have made a finding that he was an employee. At the relevant time (June 2019), he was being paid a fairly small salary of around £700 per month, or around £8400 per year. This was a because there was a term in his contract of employment entitling him to such payments as salary.

250.4 Mr Vincent's 2014 contract had salary clause in it. As per the findings of fact, that clause was varied in around 2017, when he took a significant salary reduction. Nonetheless, as with Mr Rodrigo, Mr Vincent remained on a contract of employment and that contract included terms about the salary which the Respondent was contractually obliged to pay him.

251. As we discussed clearly with the parties on both Day 1 and Day 2 of the hearing, it is the claimant's case in this litigation that each of Mr Rodrigo and Mr Vincent are comparators within the meaning of chapter 3 EQA. In other words she regards them as doing "like work" to her, or else "work of equal value". They are alleged to be comparators (of the opposite sex) doing work that is equal to her work, because either section 65(1)(a) or else section 65(1)(c) EQA is said to apply.

252. The claimant has expressly confirmed that she is not withdrawing the arguments mentioned in the previous paragraph. We could not decide that those arguments were incorrect in this hearing, because the Equal Pay part of the claim are stayed,

and we are not deciding those issues this week. Therefore, as the Claimant has acknowledged our decisions this week have to be on the assumption (though without deciding) that the arguments mentioned in the previous paragraph are correct, and that Mr Rodrigo and Mr Vincent are each “comparators” for the Equal Pay claim.

253. For that reason, section 71 EQA does not apply in relation to the terms of the Claimant’s contract that relate to her salary. The requirement in section 71(1)(b) is not met. It is not true (because of the assumption mentioned in the last paragraph) that “in relation to [the terms in the Claimant’s contract about salary] a sex equality clause or rule has no effect”. It is not true she has no appropriate comparator, applying the definitions in sections 64, 65, 66 and 79 that she has no comparator to use so that a sex equality clause could bite.

254. The claimant is actually alleging (in relation to salary) that a clause of her contract is less favourable than the corresponding clause in her comparator’s contract. It follows, therefore, from the operation of section 70(2)(a) that that argument can only be brought as an equal pay claim and not a claim under section 39.

255. Therefore, the direct sex discrimination claim in relation to salary fails for that reason, even apart from any time limit issues.

256. In relation to commission, the claimant did not have a clause in her own contract, entitling her to commission. However, Mr Vincent had a written contract which entitled him to commission and Mr Rodrigo had an unwritten employment contract which entitled him to commission.

256.1 The fact that Mr Roderigo's commission was dictated by his contract is demonstrated by the fact that the claimant was able to calculate it during her employment based on her understanding of what the arrangement was and the arrangement was also confirmed in the email exchanges of 11 March 2019.

257. Therefore, for commission, again this is a complaint which is excluded from consideration under section 39 EQA because section 70(2)(b) EQA applies. The claimant is alleging that there is no corresponding clause in her contract of employment which gives her the same benefits which her comparators have as a result of clauses in their contracts.

258. Therefore, the direct sex discrimination claim in relation to commission fails for that reason, even apart from any time limit issues.

259. In relation to pension contributions, from August 2019 onwards the respondent did agree to include pension contributions for the claimant and therefore that would raise time-limit issues.

259.1 However, for the period prior to August 2019, a complaint that there was sex discrimination because she was treated less favourably than Mr Vincent fails for the same reason the commission complaint would fail. That is, the argument would be that he had a term in his contract of employment, and there was no corresponding term in hers. However, section 70 EQA prevents that argument being brought as an alleged contravention of section 39 EQA.

259.2 Meanwhile, for the period prior to August 2019, a complaint that there was sex discrimination because she was treated less favourably than Mr Rodrigo would fail because she was not treated less favourably than him. At the same time that the pensions contributions clause for Mr Rodrigo was amended to match Mr Vincent's, it was amended for the Claimant as well.

260. For bonus, we are satisfied that none of the Claimant, Mr Rodrigo and Mr Vincent had a contractual term entitling them to bonus. Thus, section 70 does not prevent the Claimant bringing the claim as one of direct sex discrimination, relying on sections 13 and 39 EQA. However, in relation to the £10,000 bonus payment that the Claimant was awarded in summer 2019 (though paid around 12 months later), this was a one off decision, and is well out of time. Furthermore, she has not proven that either Mr Rodrigo or Mr Vincent received higher bonuses, let alone persuaded us that there are any facts from which we could conclude that, in relation to bonus, she was treated less favourably than any actual or hypothetical comparator because of sex. We are satisfied that the company's financial situation in summer 2020 was the reason that no bonus was paid then (most staff were on furlough, the Claimant was deferring part of her salary, Mr Rodrigo and Mr Vincent were deferring part of their dividend payments).

261. In relation to share options:

261.1 these were a term of Mr Vincent's contract with effect from 1 December 2014.

261.2 We have not been provided with evidence that either Mr Roderigo or Mr Karimjee had such terms. Their history of involvement with the respondent was different and long predates the claimant's appointment (and Mr Vincent's).

261.3 Therefore, for the share options clause, an allegation that the Claimant was treated less favourably, because of sex, than Mr Vincent is excluded from consideration under s39 EQA by the operation of section 70 EQA.

261.4 She has not proven, on the facts, that Mr Rodrigo had such a clause. As per the findings of fact, he started the company, with the assistance of outside capital, and eventually bought out the outside investors. There are material differences between his circumstances and hers. The Claimant has not been treated less favourably – because of sex – than Mr Rodrigo in relation to share options.

262. However, and in any event, the Respondent has satisfied us that (a) the fact that the Claimant did not have share option clauses in her contract of employment after the August 2019 review/decisions and (b) the fact that the Claimant did not come into possession of shares in the company after the August 2019 review/decisions each had nothing whatsoever to do with the fact that she is a woman.

263. It is true, as we said in the findings of fact, that between March and June 2019 the claimant was suggesting that she wanted either shares in the company and/or payments to be made to her by way of dividend and/or potentially share options which could be performance related. However, as of 1 August 2019, the claimant made clear to the respondent that she was no longer seeking those things. (There was a discussion that day, which Mr Rodrigo and the Claimant described in their email exchange of 1 and 2 August 2019, cited in the findings of fact).

263.1 Regardless of the exact details of what was said in the conversation, it was the claimant's own decision as an intelligent, professional person that it was not in her best interests to purchase shares at that particular time.

263.2 It is common ground that, in order to acquire shares, she would have had to make some payments.

263.3 If she did invest in the shares and the company failed and then she would potentially lose some or all of that investment.

263.4 Furthermore, and in any event, in the course of closing submissions, the Claimant accepted that if she and the company had reached an agreement that she acquired shares (Class F, say) and was going to receive significant payment by way of dividends then (as with Mr Rodrigo and Mr Vincent previously), there would have been reductions to her salary.

263.5 Indeed, if she wished to match exactly the arrangements which Mr Rodrigo and Mr Vincent had then had salary would have reduced to less than £10,000 per year with any other income from the company being by way of dividend.

264. We are satisfied based on the wording of the email exchange of 1 and 2 August that the claimant had decided, for whatever reason that she did not want to do all of that. Whether it was that she did not wish to risk the capital investment, or that she did not wish to replace a guaranteed annual salary with a non-guaranteed dividend, or both, it was her decision rather than the Respondent’s, and it was not less favourable treatment because of sex.

265. The allegation that it was direct discrimination that the Claimant did not have shares fails. Further, the reason why she did not receive dividend payments is that she did not have shares. So any allegation that it was direct discrimination that she did not receive dividend payments fails.

266. That leaves the overarching suggestion that it was direct discrimination that her overall remuneration package was less than Mr Rodrigo's and Mr Vincent's.

266.1 On the Claimant's argument, the overall package should include whatever each of the three of them get for: salary plus bonus plus commission plus pension contributions plus share dividends.

266.2 One problem with that, as we raised during the Claimant's evidence, and during closing submissions, is that it is NOT her allegation that the sums declared to HMRC as "share dividends" for Mr Rodrigo and Mr Vincent were actually a sham, and were actually employment income.

266.3 Thus the fact that Mr Rodrigo were shareholders and the Claimant was not is a material difference in their circumstances, and is the reason why they got share dividends and she did not.

266.4 Take away the share dividends, and the Claimant's remuneration package was much higher than Mr Rodrigo's and Mr Vincent's.

267. The submissions on the Claimant's behalf appeared to be that, by one method or another, the Claimant ought to have been paid an aggregate sum to match the aggregate that the others received (including, in their cases, the dividends). Even apart from the problems mentioned in the previous paragraph, the other problems are:

267.1 If the suggestion is that it should have been a sum paid by way of a higher contractual salary for the Claimant, then that cannot be a section 39 claim for the reasons we have already stated.

267.2 If the suggestion is that it should have been by way of a discretionary bonus, then that would overcome the restrictions which section 70 EQA imposes. However, that would then lead to the question of how big should the bonus have been on the Claimant's case? Should it have been so that she matched (what she argued was) Mr Rodrigo's remuneration package or Mr Vincent's? They did not receive the same as each other. And should it have been to match their net or their gross? The Claimant's tax arrangements (on a bonus) would have been different to theirs (as the payments which she is arguing should have been matched were paid to them as share dividends).

267.3 In our assessment, a bonus payment to the Claimant so that she matched (what she argued was) their aggregate package would not have been placing her on the same footing as them, but would have been treating her more favourably. They had taken the risk with their capital of investing in shares and they were taking the risk to their incomes that the company would be able to declare a dividend to match what they had had the previous year. The Claimant was

seeking to make no investment, and to have a guaranteed salary, but also receive the same overall income as they had.

267.4 In any event, more simply, there are no facts at all from which we might conclude that a hypothetical man in the Claimant's position would have been paid such a bonus, or would have received payments, by whatever method, to match Mr Rodrigo's or Mr Vincent's gross or net payments from company (when their payments under employment contracts were aggregated with their share dividends).

268. For the argument that the Claimant should have received a higher bonus than she did, it fails on the merits for the reasons discussed above. For completeness:

268.1 A bonus of £10,000 was declared in summer 2019. A claim would have had to have been brought (or early conciliation commenced, at least) by 1 November 2019.

268.2 The reason why no bonus was declared in summer 2020 was not sex, it was the financial position of the company (which included redundancies that year, even prior to the Claimant's). For that reason, the bonus decision in 2020 cannot be a continuing act with the bonus decision in 2019. Although, for the reasons we will mention below, even had the 2020 lack of bonus been a continuing act with the 2019 bonus decision, the 2020 lack of bonus was also out of time.

268.3 To the extent that the argument is that there was an omission in that they did not award a bonus to the claimant in 2020, it would have been obvious to the Claimant by July or August 2020 that no bonus was going to be declared for that year. The time limit clock for the 2020 (lack of) bonus would have started then. The 3 month time limit had expired no later than the end of November 2020, long before the Claimant commenced early conciliation in February 2021.

268.4 Thus, when the claim was presented in June 2021, it was more than 6 months out of time for bonus (even based on an omission to award bonus in 2020).

268.5 We do not consider it to be just and equitable to extend time. By the time the claim was presented, it was 12 months after the 2020 salary review had been due to take place, and it was around two years after the 2019 salary review had resulted in salary increase and £10,000 bonus. Events were no longer fresh in people's memories. A lot of evidence would have depended on recollection of oral discussions.

269. Thus none of the complaints outlined in paragraph 7 of the list of issues succeed.

Dismissal

270. The remaining complaints all relate to dismissal.

271. We reject the claimant's assertion that Mr Vincent's made any unilateral decision that the claimant should be dismissed and that he insisted to Mr Rodrigo that that should happen. We accept Mr Rodrigo's account that the two of them discussed matters and mutually agreed what the two of them, and therefore the company, would do during the process that led to the discussions with the Claimant, and eventually to the termination of her employment.

Was the dismissal because of a protected disclosure?

272. In relation to the suggestion that the dismissal was because of a protected disclosure, our finding is that Mr Vincent was not particularly angry about the claimant's comments to him on 24 August.

272.1 We do take into account that the claimant says that there was a further oral discussion the following day and that his remark to her on that occasion about having been lucky not to have been furloughed upset her greatly. We also take into account Mr Rodrigo's contemporaneous recollection that the comment was potentially motivated by the claimant not backing down in relation to return to work issues.

272.2 Two things have to be said about that, however.

272.2.1 Firstly, on the claimant's own account, the 25 August discussions and decisions were about something else, not about CL. It was about covid "bubbles" and about office-based staff and about staggering their returns to work and/or their working schedules so as to manage how much contact they had with each other.

272.2.2 Secondly, the exchange with Mr Rodrigo at the time and the claimant's own witness statement both acknowledged that even though they regarded it as a misplaced remark that was not actually funny, it had, in fact, been Mr Vincent's poor attempt at humour.

272.3 Earlier in the lockdown, when discussing return to work options, the Claimant herself had made comments about what the respondent's approach should be. At that time, she had slightly disagreed with Mr Rodrigo's suggestion that the Respondent might decide to make return to work purely voluntary. The Claimant had said that it would also be appropriate to take into account the experience of those who they might need to bring back from furlough; she also expressed the opinion that the Respondent could take into account whether the individual in question had a poor attitude. On the evidence, we are satisfied that Mr Vincent did not regard himself and the Claimant as being on opposite sides

of some fence, with him seeking to have everybody back, come what may, and the Claimant acting as some barrier to his wishes. They exchanged views frankly and each commented on the risks of various hypothetical options. We are sure it was a dynamic situation for the three of them (Mr Vincent, the Claimant and Mr Rodrigo) as it was for all employers. We take into account that opinions could change as the pandemic continued and more information was available. However, there were ongoing discussions between all of the directors around the time of the Claimant's protected disclosure (late August 2020) about the pros and cons of lifting furlough and returning people to work and we are not satisfied that Mr Vincent's attitude to the Claimant became different after those discussions than it was before. Indeed the Claimant makes complaints about rudeness, etc, that he allegedly exhibited to her before the protected disclosure, as well as referring, by way of background, to his alleged attitude to other people who had no connection to the Respondent's decisions about which people to bring off furlough, or when, or about what the distancing, etc, protocols would be, or about what where CL would be required to go, and when.

272.4 We think it is also relevant to note that CL himself was not dismissed.

272.5 As per the findings of fact, we have also noted that Mr Rodrigo's own comments (albeit much earlier around 15 April 2020) were compassionate about the need to safeguard the respondent's employees, and we are satisfied that he would not have allowed Mr Vincent to retaliate against the Claimant (even if Mr Vincent had wanted to, which we have decided he did not) for making the protected disclosure about CL's safety.

273. In summary, we are satisfied that the principal reason for the claimant's dismissal was not the fact that she made a protected disclosure on 24 August 2020.

<u>Alleged Redundancy Situation</u>

274. We accept that the respondent did ultimately decide that the claimant's duties would be redistributed.

275. The perception of Mr Rodrigo and Mr Vincent was that, if they went ahead with the proposed restructuring:

275.1 The Claimant's duties would not all go to an existing employee or all to a new employee.

275.2 Their contemplation was that some of the duties previously performed by the Claimant would be performed in the future by a new post of Finance Manager.

275.3 Other parts of her duties would be performed by Dan King in the future.

275.4 Other parts were to be performed by making greater use of the external consultant, Paul Bryant.

275.5 Mr Rodrigo and Mr Vincent believed that they might have to take on some extra responsibilities themselves.

276. We accept that these were the decisions which the respondent (acting though Mr Rodrigo and Mr Vincent) made prior to dismissing the claimant and it was the Respondent's genuine intention at that time to make this redistribution of her duties and that is in fact what they carried out after the decision to dismiss the Claimant.

277. The reason the respondent decided to redistribute the claimant's duties was a financial one. Mr Rodrigo and Mr Vincent came to the view in around September and October 2020 that there could be a costs savings if, rather than have those duties performed by one individual, namely the claimant, and pay a salary to that individual of around £105,000 per year, the work could be performed at a saving if the duties were redistributed.

278. Their thought processes included that Dan King was already an employee, and some of the Claimant's duties could be moved over to him. Their thought processes included that, rather than have a Director of Finance role, with all the extra duties performed by the Claimant, they could hive off some of the finance aspects of the claimant's work and have that work performed by a new role of Finance Manager, at a much lower salary than the Claimant's. They believed other aspects of her work could be picked up by themselves, at no extra cost to the business. Some of the HR functions would not be done at all by any employee, but by the external consultant, Mr Bryant. This latter change would, of course, potentially result in an extra outlay on consultancy costs, that would have to be offset against whatever saving they made on the Claimant's salary.

279. The net effect of the decision that they proposed and - which was, in fact, later adopted and implemented - was that there was a reduced requirement for employees to do the kind of work which the claimant had been doing. Her work included, everything discussed at paragraph 56 above (running finance department and performing the full range of duties as per the job description, plus some responsibility for overseeing general IT issues and working with the IT specialists, Operations, Procare, managing office based staff, HR issues). The Respondent's requirement for an employee to do all of that had gone from the need to have one employee doing it all to having zero employees doing it all. There was going to be zero employees in future doing particular kind of work that the claimant had been doing.

280. The overall number of employees (sometimes referred to as "headcount") was not going to change as a result of these particular proposals (though there had been other redundancies as well) because Dan King was already an employee, as were

the existing directors. Mr Bryant was not an employee and was not going to become one. But, in headcount terms, the deletion of the Finance Director role was cancelled out by the creation of the new Finance Manager role (with different duties to those of Finance Director). If the Claimant had moved into the alternative role of Finance Manager then, as well as the number of employees remaining the same, the identities of the employees would also have remained the same. However, if (as turned out to be the case), the Claimant left and someone new was appointed as Finance Manager, then the number of employees would be the same as before the reorganisation of duties.

281. Our assessment is that the proposal meant there was a “redundancy situation”. The situation matched that defined by section 139(1)(b)(i) ERA.

282. In terms of whether the dismissal was fair or not, there are two main strands to the Claimant’s arguments:

282.1 Firstly, that the whole thing was just a sham excuse to get rid of her. We have rejected the argument that there was a protected act (as alleged) and also the argument that the principal reason for the dismissal was the protected disclosure (as alleged). However, on general fairness principles, the onus is on the Respondent to show that the dismissal reason was redundancy, and not some hidden reason (eg animosity towards the Claimant for any reason, etc).

282.2 Secondly, that the process was not fair, and that by the time she was first notified of what Mr Rodrigo and Mr Vincent had discussed, they had already made up their minds that they would definitely go ahead with the plan.

These are not mutually exclusive arguments, of course. If the first is true, it implies that the second is true as well. However, the second argument also operates independently and could potentially make the dismissal unfair even if Mr Rodrigo and Mr Vincent had actually hoped that the Claimant would choose to stay on as Finance Manager.

283. We have considered carefully the wording of the various communications to her, and in particular of the transcript of what was said on 11 November 2020. It is clear that in some parts of the discussions, the words used clearly imply an expectation that the reorganisation itself will definitely happen and the contents of the consultation would be about the details of the new role and whether the claimant would accept the new role or not.

284. However, it is important to put all the relevant comments and document in their proper context.

284.1 On 11 November, the claimant knew that she was making an audio recording and the other two individuals did not. The transcript contains large chunks in which the Claimant is doing the talking and the Claimant is putting specific

arguments as to why it would be a mistake to for the business to do away with her role. She focuses a lot on why somebody else brought in at a much lower salary could not replicate her role (as well as, quite understandably, the reasons that it would be unfair to expect her, the Claimant, to do the same work that she had been doing at a much lower rate of pay).

284.2 Given these specific comments from the Claimant, it is not surprising or suspicious that the two people who created (what the Respondent claims was) the proposal would defend it. Defending the proposal, in itself, would not make the process unfair; we have to decide if the evidence shows that they had a closed mind.

284.3 Amongst other things Mr Vincent said that the claimant was an asset to the business but that, in his opinion, saving costs was a priority.

285. We do not agree with the Claimant's assertion that the respondent only decided to commence consultation because - on 11 November - the claimant said she had taken legal advice. The Respondent (and/or its legal representatives) deserve to be criticised for the lateness of the disclosure, but nonetheless, the documents disclosed during the hearing show that the Respondent (acting through Mr Vincent and Mr Rodrigo) had received advice from Mr Bryant in October and that he had drafted a consultation letter for the Respondent to use. We are satisfied that the Respondent did intend to follow Mr Bryant's advice and had always intended to issue the Claimant with a version of the letter that he had drafted (which stated clearly that all aspects of the decision were to be discussed during consultation and that the decision to delete the claimant's role was not already predetermined). We agree with what Mr Bryant wrote in the grievance outcome letter that it would have been better practice for the Respondent to have issued the Claimant with that letter straight after first orally notifying her of the plan (and certainly before speaking to her again on 11 November). However, we are satisfied that it was Mr Rodrigo's and Mr Vincent's plan all along to have consultation (and they did not simply pivot to this position in reaction to what the Claimant said on 11 November).

286. The claimant points out that the eventual decision was very similar to the plan outlined to her on 6 and 11 November 2020. She is correct about that. However, in itself, that would not prove that Mr Rodrigo and Mr Vincent already had closed minds as of 6 and 11 November.

287. In all potential redundancy consultations, there is always, by definition, a time before any redundancy has been proposed and, later, a time after a redundancy has been proposed. Similarly, there is always going to be a time before an employee is aware that they are at risk, and a time after they know that they are at risk (which, in some cases, might actually coincide with being told they are dismissed). A fair redundancy consultation can include telling the employee that there is, in existence, a plan of action which, if implemented, will result in

redundancies. For a process to be fair, it is not a requirement that the employees are consulted before the employer has come up with a plan which (if implemented) would mean that there would be dismissal.

288. The test for whether the consultation part of the process was fair or unfair is whether or not the respondent was genuinely intending to listen to what was said, and potentially change (or cancel) the proposed plan of action. The test does not require the employer to prove that it actually did change the proposed plan of action.

289. Had the claimant engaged in the process after 11 November, then we would have had direct evidence of what was said in the consultation meetings and that would have helped us form a view about whether Mr Vincent and Mr Rodrigo had had closed minds prior to the start of the consultation.

290. We are not naïve enough to assume that just because the written documents say that the consultation is going to be genuine that that necessarily means that it will be. However, the fact of the matter is that the claimant did not attend the meetings.

290.1 We are not able to assess what their reaction would have been, therefore, to any specific proposals that a different redundancy pool be used, etc.

290.2 There had been other redundancies that year (with the Claimant's knowledge and input) and she was well-placed if she had wanted to suggest that there was any specific aspect of the proposed consultation process for her that should be varied and/or was different to the process adopted for other employees.

290.3 We take into account the Claimant's argument that, as a board member, she had been involved in the discussions about the other redundancies, and, in her finance role, had provided advice about the effects of, and costs of, those other redundancies, and that that did not happen in her case. However, the fact that it did not happen prior to 6 November does not – in itself – prove that the Claimant had no opportunity to have input in the decision. The fact that she was not warned, or consulted, about any aspect of the proposal prior to 6 November is just another re-statement of the dispute between the parties about whether, as of 6 November, there was a proposal about which there was to be consultation (the Respondent's position) or presentation of a fait accompli (the Claimant's position). If the Respondent's position on that point is correct, then the process is not rendered unfair because the Claimant did not have an earlier opportunity to comment on it, or supply financial information about it.

290.4 The Respondent did vary the timetable from that which was originally laid out. It pushed back meetings to take account of the Claimant's availability, but the Claimant did not attend the delayed meetings in any event.

290.5 The time gap from 6 November (telling the Claimant that she was at risk) to 15 January (letter to the Claimant giving notice of dismissal, and the date which the Respondent says the decision was made) is slightly in excess of two months.

290.6 While the time gap, in itself, does not prove that the Respondent was genuinely consulting, rather than going through the motions, we reject the Claimant's assertion that that she was actually told at the start of November that the decision had already been made.

291. We have already said that the victimisation claim fails because there was no protected act. However, in case we are wrong about that, we have considered whether or not there are any facts from which we could conclude that the claimant's comments during the March to August 2019 pay negotiations were the reason for (or a significant influence on) her dismissal. Our decision is that there is not. This was well over a year later, and a lot had happened since, most notably the Covid pandemic.

291.1 There is an inconsistency between the Claimant's argument that, on the one hand, there had been ill-will towards her ever since her comments in that period, but, on the other hand, there is evidence that the main reason for her dismissal was her 24 August 2020 protected disclosure.

291.2 When the claimant submitted a grievance (which was after she was told about the possible redundancy), the claimant sought to allege that her relationship with Mr Vincent had taken a marked a turn for the worse after the protected disclosure. That was a year later than the pay negotiations and by implication, therefore, she was suggesting – at the time of the grievance, when her memory was fresher - that their relationship from the middle of 2019 to the middle of 2020, had not been a poor one.

291.3 Furthermore, Mr Rodrigo's position about the pay negotiations was genuinely set out in, for example, his 11 March 2019 email and his 1 August 2019 letter.

291.4 Certainly it is true that the Claimant's salary level (as of late 2020) was a factor in the Respondent's reasons for deciding to propose a reorganisation that included deletion of the post. However, we are entirely satisfied - from the entirety of evidence – that specific comments made by the claimant when seeking the pay increase (between March and August 2019) were, in no sense whatsoever, consciously or unconsciously, a contributory factor to Mr Rodrigo's and Mr Vincent's decisions to propose redundancy in late 2020.

Direct Discrimination

292. The claimant is female. Mr Rodrigo and Mr Vincent, the other board members, and the decision-makers on behalf of the Respondent are male.

293. Our decision is that there is no actual comparator. Although there were three people on the board, and the Claimant was the only female, and the only of the three proposed for redundancy, the three directors had significantly different roles within the company.

294. Therefore, we need to consider a hypothetical comparator: a male finance director, whose circumstances were exactly the same as the Claimant’s including salary, responsibilities, and length of service. To apply section 136 EQA , we need to decide if there are facts from which we could conclude that such a hypothetical comparator would have been treated differently.

    294.1 We take into account Mr Vincent's final written warning and the reasons for that warning.

    294.2 We take into account that the respondent's disclosure showed that the respondent's approach to disclosure of documents is much lower than the standards we would expect from any respondent, still less one that was acting with legal advice.

    294.3 However, our decision is that we have not found facts from which we could conclude out that the claimant's sex either consciously or unconsciously played any role in the decision to dismiss.

295. Indeed, we are satisfied by the evidence that we have heard from Mr Rodrigo, which is not contradicted, in our opinion, by any contemporaneous documents, that the only reasons the respondent sought to introduce the significant changes to the finance and operations departments were to make financial savings. We are satisfied that a hypothetical comparator (whose circumstances were the same as the Claimant’s but who was a man) would have been treated in the same way.

296. The direct sex discrimination claim fails.

Conclusions on dismissal reason and fairness

297. We are satisfied that Mr Rodrigo always did intend (as of 6 and 11 November) that there would be genuine consultation. We are satisfied that, as far as he was concerned, it was at least potentially possible that things the claimant raised during the consultation would change his mind.

298. The evidence demonstrates that both Mr Vincent and Mr Rodrigo thought it was quite unlikely that the claimant would come up with things that would change their minds (given the savings that they believed would be achieved, and that they thought were essential for the business) but an opinion that the Claimant would not be able to come up with solutions that they had not already considered is not the same as an opinion that it did not matter what the Claimant said, because they were going to dismiss her come what may.

299. The respondent did go the extra mile in terms of trying to persuade the Claimant to engage with the consultation process. For example, they offered her the opportunity to make written submissions as well as changing the dates of meetings.

300. The claimant was expressly and unambiguously clear that she was not going to attend meetings or make submissions. There was no requirement for the Respondent to delay things any further by the time they reached 15 January 2021.

301. We do not think that there was anything "sham" about the reasons which the Respondent gave to the Claimant. It wanted to make savings, and, in order to achieve savings, came up with a proposal to reorganise. The reorganisation (that was the specific subject of this specific proposal) involved the deletion of the Claimant's role, and the Claimant's role only. (There were other redundancies dealt with separately, also for costs savings reasons.) The proposal was that, after the restructuring, the Respondent would still have the work done (some of it by a contractor, but most of it by employees) but the work would be redistributed and performed at a lower overall cost.

302. The Claimant's eventual dismissal was attributable to the Respondent's decision to (first propose and then) implement the plan described in that last paragraph. We are satisfied, therefore, that the reason for her dismissal meets the definition of redundancy.

303. Redundancy is a potentially fair dismissal reason.

303.1 In all the circumstances, we find that the Respondent followed a warning and consultation process that was not outside the band of reasonable responses. It was a defect that the written confirmation about the consultation process was not supplied as quickly as it should have been, but that defect is not so serious as to render the procedure as a whole unfair.

303.2 There was, as both parties agree, no potential alternative employment for the claimant other than at the Finance Manager role. The Claimant did not wish to accept that role.

303.3 The respondent has not alleged that that meant that she should lose their entitlement to redundancy payment and she received a redundancy payment. In other words, there is no suggestion by the Respondent that there was an unreasonable refusal of suitable alternative employment. However, it is true that the Respondent did inform the Claimant that she could take the alternative role if she wished. In the circumstances, there was no failure by the Respondent to consider alternative employment.

304. In terms of appeal, in itself, we would have been likely to treat the respondent's refusal to treat the Claimant's 19 February letter as an appeal against dismissal as unreasonable.

305. However, taking account of the circumstances as a whole, including the facts that:

305.1 the claimant made clear to Mr Bryant that she was interested in a negotiated termination,

305.2 the Claimant refused to attend any of the consultation meetings,

305.3 after receiving the notice of dismissal (but before the expiry of that notice) the Claimant made clear to Ms Berns that she was not interested in carrying on working for the respondent and instead sought conversations to reach another solution,

the failure to follow a formal appeal dismissal process (separate to the grievance appeal process) was not so unreasonable that it renders and the dismissal as a whole. unfair.

306. Thus, our decision is that the Claimant's dismissal was not unfair.

Outcome and next steps

307. All of the complaints which we were dealing with in this particular final hearing have failed.

308. The Claimant was ordered to write in by 28 May 2024 to either apply to lift the stay on the equal pay claims (and seek case management orders) or to withdraw those claims, or to request more time to consider her position.

309. The intention is that the same panel which dealt with this hearing will deal with the Equal Pay claims in due course.

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Employment Judge Quill

Date: 15 July 2024

WRITTEN REASONS SENT TO THE PARTIES ON – 07/8/2024

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FOR EMPLOYMENT TRIBUNALS
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