EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms. Penaluna	v	**All About Venues Limited**

Heard at: **Birmingham** **On:** **29,30,31 July 2024 & 1 & 2 August 2024**

Before: **Employment Judge Wedderspoon**
Mr. J. Reeves
Mr. R. Virdee

Representation:
Claimant: **Ms. Penaluna, In Person**
Respondents: **Mr. E. Walker, Consultant**

JUDGMENT

1. The respondent dismissed the claimant on 8 March 2023.
2. The claim for unfair dismissal is well founded and succeeds.
3. The adoption of a different procedure would have resulted in a fair dismissal of the claimant by reason of misconduct within 4 weeks of 8 March 2023.
4. The ACAS uplift to applied to the compensatory award is 20%
5. The claimant was guilty of blameworthy conduct and the Tribunal assesses this at 50%
6. The Tribunal determined that it should reduce the basic award by 50% by reason of the claimant's conduct.
7. The claimant is awarded a basic award of £3,692.32 (including deductions).
8. The claimant is awarded a compensatory award of £924.15 (four weeks net wage and pension loss and including ACAS uplift and deduction for contributory fault)
9. The total monetary award payable to the claimant for unfair dismissal is £4,616.47.

10. The prescribed element is £924.15

11. The period of the prescribed element is from 9 March 2023 to 2 August 2024.

12. The difference between the total award and prescribed element is £3,692.32.

13. The claims of discrimination because of pregnancy and/or maternity are not well founded and are dismissed.

14. The claims of direct sex discrimination are not well founded and are dismissed.

15. The claim of indirect sex discrimination is dismissed upon withdrawal.

16. The claims of harassment related to sex are not well founded and are dismissed.

REASONS

1. An oral judgment was given on 2 August 2024. The claimant sought written reasons. These are the written reasons.
2. By claim form dated 12 April 2023 the claimant brought complaints of unfair dismissal discrimination because of pregnancy and or maternity, direct sex discrimination, and related to sex harassment. Early ACAS conciliation started on 21 February 2023 and ended on 21 March 2023. The claimant withdrew her complaint of indirect sex discrimination on day 4 of the hearing.
3. The claimant's case is that following her return from furlough and maternity leave her role significantly changed. She had previously worked full time for the respondent in a senior position as a director of the business. She had significant responsibility managing a team of approximately 8 to 9 staff. On her return to work the staff headcount was reduced. She returned part-time and believes that she was no longer fully involved in business development; networking; hospitality; sales; project management of big events and most aspects of human resources management including recruitment performance management attendance and conduct issues. She claims she was dismissed or constructively dismissed and subject to discrimination.
4. The respondent disputes the claims. Its case is by reason of COVID the business suffered losses and reduced its employees to 5 in total. The work carried out of the business was significantly reduced. The claimant was furloughed, and the owner of the business took on the responsibilities of the claimant. The claimant was dissatisfied with the changes in the business on her return from furlough and maternity leave and wished to leave the business. As a result, the parties entered into settlement negotiations. On finding out that the claimant wanted to set up her own business in competition with the respondent, the respondent instigated a disciplinary procedure which was not completed because of the claimant's illness. The respondent's case is that the claimant left by reason of mutual agreement on the date of the incomplete settlement agreement. Neither party contend that

the settlement agreement was effective in any other respect. Both parties agree the claimant's employment ended on 8 March 2023.

List of Issues

5. Time Limits

5.1 Given the date the claim form is presented and the dates of early conciliation any complaint about something that happened before 22 November 2022 may not have been brought in time;

5.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide

5.2.1 was the claim made to the tribunal by the claimant within three months plus early conciliation extension of the act to which the complaint relates;

5.2.2 if not, was their conduct extending over a period;

5.2.3 if so, was the claim made to the tribunal within three months plus early conciliation extension of the end of that period;

5.2.4 If not, were the claims made within a further period that the tribunal thinks is just and equitable. The tribunal will decide

5.2.4.1 why were the complaints not made to the tribunal in time;

5.2.4.2 in any event is it just and equitable in all the circumstances to extend time.

6. Unfair dismissal

6.1 Was the claimant dismissed under section 95 (1)(a) Employment Rights Act 1996;

6.2 If not, was the claimant dismissed under section 95 (1)c) of the Employment Rights Act 1996;

6.2.1 Did the respondent to do the things set out below

6.2.2 Did that breach the implied term of trust and confidence? The tribunal will need to decide

6.2.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent and

6.2.2.2 Whether it had reasonable and proper cause for doing so

6.2.3 Did that breach any other term of the claimant's contract of employment

6.2.4 Was the breach a fundamental one; the tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end

6.2.5 Did the claimant resign in response to the breach; the tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation

6.2.6 Did the claimant affirm the contract before resigning; the tribunal will need to decide whether the claimant's words or actions show that they chose to keep the contract alive even after the breach.

6.3 What is the reason or principal reason for dismissal related to pregnancy childbirth maternity or maternity leave; if so the claimant will be regarded as unfairly dismissed.

6.4 If not, what was the reason or principal reason for dismissal; the respondent says the reason was conduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct

6.5 If the reason was misconduct did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant; the tribunal will usually decide in particular whether

6.5.1 there were reasonable grounds for that belief;

6.5.2 at the time that belief was formed the respondent had carried out a reasonable investigation;

6.5.3 the respondent otherwise acted in a procedurally fair manner;

6.5.4 dismissal was within the range of reasonable responses.

7. Remedy for unfair dismissal

7.1 Does the claimant wish to be reinstated to their previous employment

7.2 Does the claimant wish to be re engaged to comparable implement or other suitable employment

7.3 Should the Tribunal order reinstatement? The tribunal will consider in particular whether reinstatement is practicable and if the claimant caused or contributed to dismissal whether it would be just

7.4 Should the tribunal order re engagement; the tribunal will consider in particular whether re engagement is practicable and if the claimant caused or contributed to dismissal whether it would be just

7.5 What should the terms of the re engagement order be

7.6 If there is a compensatory award how much should it be. The tribunal will decide

7.6.1 What financial losses has the dismissal caused the claimant

7.6.2 How's the climate taken reasonable steps to replace their lost earnings for example by looking for another job

7.6.3 If not for what period of loss should the claimant be compensated

7.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason

7.6.5 If so, should the claimant's compensation be reduced by how much

7.6.6 Did the ACAS code of practise on disciplinary and grievance procedures apply

7.6.7 Did the respondent or the claimant unreasonably fail to comply with it

7.6.8 If so, is it just and equitable to increase or decrease any award payable to the claimant; by what proportion up to 25%

7.6.9 If the claimant was unfairly dismissed did she cause or contribute to dismissal by blameworthy conduct

7.6.10 If so, would it be just and equitable to reduce the claimants compensatory award by what proportion

7.7 what basic award is payable to the claimant if any

7.8 would it be just and equitable to produce the basic award because of any conduct of the claimant before the dismissal? If so to what extent

8. Pregnancy and maternity discrimination

8.1 Did the respondent treat the claimant unfavourably by doing the things set out below

8.2 Did the unfavourable treatment take place in a protected period

8.3 If not did it implement a decision taken in the protected period

8.4 Was the unfavourable treatment because of the pregnancy

8.5 Was the unfavourable treatment because the claimant was on compulsory maternity leave/the claimant was exercising or seeking to exercise or had exercised or sought to exercise the right to ordinary or ordinary return to leave?

9. Direct sex discrimination

9.1 Did the respondent do the following things :

9.1.1 The respondent making fundamental changes to her job duties from her return to work on 8 March 2022 so that her role primarily involved administration, venue saucing and small events and no longer gave her opportunities for human resources management, business development or significant sales or projects;

9.1.2 The following comments by Michael Aves

9.1.2.1 5 October 2022 why would I pay for more members of staff when I already have to carry two-part timers;

9.1.2.2 5 October 2022 your role isn't needed anymore there is a new business model and your role cannot be done in three days anyway. The company cannot continue to accommodate part timers;

9.1.2.3 20 October 2022 what I think you should do Catherine is go home and be a stay-at-home mum

9.1.2.4 20 October 2022 why don't you resign and come back to work when your daughter is at school;

9.1.2.5 20 October 2022 your role cannot be done part time in three days this comment was also repeated on numerous other occasions;

9.1.2.6 20 October 2022 why don't you become more flexible with your hours and instead of having coffee with your mum friends on a Monday you could work

9.1.2.7 20 October 2022 there is no need for you to do site visits and client activities or sales visits I'm taking a new approach and there is a new business model

9.1.2.8 1 November 2022 I don't think that the team will like you doing your role as you did before you went on maternity leave

9.1.2.9 2 November 2022 nice e-mail whoever wrote that for you this is now not going to be amicable between us

9.1.2.10 2 November 2022 you are due to attend a meeting or appointment what would you do if your daughter is ill? You wouldn't be able to attend.

9.2 Excluding the claimant from the following work events meeting or appointments;

9.2.1 16 August 2022 the entire team apart from accounts manager along with Mike attended a large client sales/business development meeting to discuss opportunities for upcoming events. The claimant was not invited to attend

9.2.2 16 September 2022 the entire team had a celebratory lunch to reward new business this was arranged on one of the claimants non-working days and she was not invited to attend by Michael Aves. The claimant did receive a last minute invite at 11:54 from another member of the team;

9.2.3 22 November 2022 the claimant notice that Michael Aves had a number of business development and sales meetings planned in his diary none of which she had been invited to. These meetings were arranged on the claimant’s working days

9.2.4 30 November 2022 the claimant was excluded from the interview and recruitment process for a new member of the team. Two other current members of the team that she had previously managed were invited to meet the candidates for a lunch to help in the selection process

9.2.5 30 November 2022 Michael Aves held individual praise all meetings with all other team members accepted the claimant. In these meetings the team members received a pay review the claimant had no pay review.

9.2.6 Did the respondent do these things (and they occurred outside the protected period and did not implement a decision taken in the protected period)

9.3 On or around 1 or 2 November 2022 Michael Aves pressured her to resign as the director;

9.4 On or around 1 or 1 November 2022 Michael Aves pressured her to resign her employment

9.5 In November or December 2022 in response to complaints that she raised with Michael Eaves she was offered a settlement agreement to terminate her employment

9.6 Dismissing her

9.7 Was that less favourable treatment

9.8 If so, was it because of sex

the Tribunal will decide whether the claimant was treated worse than someone else was treated there must be no material difference between their circumstances and the claimants. If there was nobody in the same circumstances as the claimant the tribunal will decide whether she was treated worse than someone else would have been treated. The claimant has not named anyone in particular who she says was treated better than she was.

10. Harassment related to sex

10.1 Did the respondent do the things above

10.2 If so, was that unwanted conduct

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

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

11. Remedy for discrimination or victimisation

11.1 Should the tribunal make a recommendation that the respondent takes steps to reduce any adverse effect on the claimant? What should it recommend

11.2 What financial losses has this discrimination caused the claimant

11.3 Has the claimant taken reasonable steps to replace lost earnings for example by looking for another job

11.4 If not for what period of loss should the claimant be compensated

11.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that

11.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that

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

11.8 Did the ACAS code of practise on disciplinary and grievance procedures apply

11.9 Did the respondent or the claimant unreasonably fail to comply with it

11.10 If so, is it just and equitable to increase or decrease any award payable to the claimant

11.11 By what proportion up to 25%

11.12 Should interest be awarded? how much?

The Hearing

12. The Tribunal was provided with an agreed bundle of 580 pages. The claimant gave evidence along with her former colleague, Lauren Blythe, Operations Director. Jessica Tansey, Events Co-ordinator was unable to attend, and the Tribunal accepted her witness statement as a written representation attaching little weight to the same because she had not attended to be cross examined. The Director of the respondent Michael Aves gave evidence. The Tribunal read all the statements and relevant documents referred to prior to starting evidence on the afternoon of day 1. The claimant had referred in her witness statement to without prejudice communications between the parties; paragraphs 51,57,59,70,75,89, 99 and 107 along with without prejudice communications for a settlement at paragraph 81. The respondent stated it was happy to waive any privilege in respect of without prejudice communications. The claimant was given time to consider whether she wished to waive privilege/disclose these confidential matters. The claimant said that she was happy that the Tribunal read all of this information. On day 3 the respondent provided a text message from Lauren Blythe to Jessica Tansey about "announcements"; the Tribunal deemed that this was relevant to the issues and in particular the date when the claimant's departure from the business was announced and admitted the same.

Facts

13. The claimant commenced her employment with the respondent in December 2006 as an Events and Venue Co-ordinator. Prior to this employment, the claimant had previous experience of this type of work with another agency. The respondent is an international event services company which provides a free and independent venue finding service as well as full event management. The respondent recruited the claimant because at the material time Mr Aves, the Managing Director and his wife had adopted three children. For the period of her 16 years of employment with the

respondent, the claimant and Mr. Aves enjoyed a good working relationship, were friends and knew each other's families.

14. In 2015 the claimant was promoted to the Director of Operations and Events where her duties were expanded to include strategic decision making, development and official management of a team of colleagues. The claimant was the second most senior member of the team. Mr Aves described her as his “right-hand person”. The claimant made decisions for the managing director in his absence.

15. Occasionally the claimant and Mr. Aves had disagreements about the business discussing different ideas, but they did not fall out and resolved any issues promptly. Prior to 2022 the claimant did not witness or suffer any sexist behaviour by anyone including from Mr. Aves within the business. The claimant had no disciplinary action, grievances or performance related issues on her file.

Terms and conditions

16. The claimant’s statement of main terms of employment (see page 82) dated and signed 13 June 2019 represented the relevant terms and conditions applicable to the claimant’s employment. The claimant’s job description (page 128) described her role of Director of Operations and Events and broadly consisted of assisting the Director Mr. Aves with the running of the company, All about Venues Limited. Her responsibilities included but were not limited to general director duties; complete management of the operations team; sales and marketing; business development and complete management of HR.

17. The claimant’s employment was also subject to the handbook see pages 86 to 127. In respect of other employment at page 105 *“it is stated you are expected to devote the whole of your time and attention during working hours to our business. If you propose taking up employment with an employer or pursuing separate business interests or any similar venture you must discuss the proposal with the director in order to establish the likely impact of these activities on both yourself, and the company”.*

18. Furthermore, as a director of the business the claimant owed a fiduciary duty to the respondent.

COVID

19. Prior to COVID the respondent’s business was profitable. COVID presented a very challenging time for the respondent with no events being held or booked at venues. The business effectively closed, and the claimant was furloughed in March 2020. The claimant then started maternity leave on or about March 2021. She returned to the business from maternity leave on or about March 2022.

20. By reason of the reduction of work during COVID the respondent suffered significant financial impacts and closed in March 2020. The losses incurred amounted to a reduction in revenue of £2.5 million with actual losses of £141,000. Mr Aves took a bounce back loan of £50,000 to keep people employed. On the reduction of furlough payments to 80% Mr Aves topped this up by about £163 a month as a gesture of goodwill and to minimise the

financial impact on the claimant. As a result of the closure of the business due to COVID the respondent lost a significant percentage of the workforce reducing from 10 employees to approximately five employees only. All employees reported directly to Mr Aves as the Managing Director and were advised of the need to be flexible with their employment contract. The business was running very much in a survival mode. Mr Aves told employees to consider the respondent as a startup focusing on trying to Keep people employed. Betsy Williams was employed as a Venue and events coordinator and was not involved in any business development activities nor the duties and responsibilities of a director.

Return to work

21. On 8 March 2022 there was an agreement from the respondent that the claimant could return to work from maternity leave with reduced hours namely 3 days per week and remain in the same role as Director of Operations and Events (see page 85).

22. At the time of the claimant's return to work the claimant's team which was approximately 10 employees had been reduced by 50%. In the circumstances there was no longer a need for the claimant to manage a team and individuals directly reported into Mr Aves. In her evidence the claimant accepted that removing employees from the business and adopting a different management structure were not acts of sex discrimination. The claimant accepted with a more "flat" management structure it made sense that the employees reported into Mr. Aves.

23. The claimant accepted that the industry was different after COVID and there were very few on site visits as people were worried about COVID. A number of business meetings took place online. When she returned to work from maternity leave the claimant continued to work on social media for the respondent. Periodically during maternity leave the claimant was in touch with the respondent.

24. On the claimant's return to work from maternity leave she stated she was only involved in small meeting bookings namely day-to-day meetings about 10 people in a hotel which she felt "was below her" and not commensurate with her seniority in the business. She stated she was no longer involved in larger bookings for example big roadshows and Xero events. The claimant stated that the majority of the business on her return to work was small work and said that Betsy was actually involved in the larger works but was unable to give any precise examples to the Tribunal. The Tribunal did not accept the claimant's assertions. The claimant stated that Betsy seemed to be more senior to her although she did not report to Betsy and she was still reporting to Mr Aves and the claimant remained a Director. She was no longer managing the team.

25. The claimant stated that she believed there was some client meetings referring to pages 507 to 509, but they had been removed from the diary. She was unable to say what client meetings had taken place. The Tribunal rejected this on the balance of probabilities in the context of a complete lack of corroborative evidence that any client meetings had been removed from the diary as alleged.

26. On 16 August 2022 the respondent met with the client Xero. The meeting was for introductions to be made with the client's wider team and junior staff of the respondent. Mr Aves attended with Lauren Blythe and Betsy Margaret Williams. The claimant was not in attendance on that day because she had a meeting with another client; it was a significant client Nanno (see page 504) and someone senior with experience was needed to cover the office. Lauren and Betsy had worked with the Xero client while the claimant had been on maternity leave and therefore the people who had been working with Xero were given the option to meet them and build relationships; the claimant had already met and worked with this client previously. This is a contract which the claimant had pitched for some two years ago but had no direct contact with them since then. Mr Aves (page 144) asked the claimant as the "senior bod" could she stay in the business so if anything untoward occurred she could sort. He left the claimant in charge of decision-making. The claimant clarified in cross examination she did not allege that calling her "the senior bod" was discrimination. The claimant also asserted she was left out of other client meetings but was unable to identify in her evidence any other examples.

27. On 16 September 2022 the team were informed about winning an event that day. Betsy informed Mr. Aves and Mr. Aves told her to inform the rest of the team. The respondent decided to hold an impromptu celebration lunch of M&S sandwiches and crisps in the office. This took place on one of the claimant's non- working days. The claimant was invited by Betsy via message at 11:54 to attend (page 156) but the claimant took the view she lived 30 minutes away and she was looking after her daughter that day and the respondent should have put off the impromptu lunch until Tuesday of the following week when she was in work. The claimant also took affront that Mr. Aves had not personally invited her. The claimant replied, *"thanks for including me guys but I'll leave it".* She accepted under cross examination that having the lunch or Mr. Aves not personally inviting her was not an act of sex discrimination or harassment related to sex.

28. On 26 September 2022 (page 157) the claimant and Mr Aves exchanged text messages. The claimant was making jokes with Mr Aves and being positive about work. On 27 September 2022 (page 158) the claimant thanked Mr Aves for wine he had bought her. Mr. Aves would buy team members a gift of wine when they had a particularly hard week and if they had been working especially hard. She replied to the text message *"you are the best"*. It indicated a good working relationship between the claimant and Mr Aves.

29. On 5 October 2022 a meeting is alleged to have taken place between the claimant and Mr Aves. There is a conflict of evidence as to whether this meeting took place. Mr. Aves had been travelling back to the UK from Qatar on this date (see pages 421; airplane receipt and diary entry page 506) and he did not attend the office that day. The claimant stated that Mr Aves said *"your role isn't needed anymore, there is a new business model and your role cannot be done in three days anyway". The company cannot continue to accommodate part timers and why would I pay for more members of staff when I already have to carry two-part timers.* Mr Aves denies that these

comments were made; the meeting did not even take place. On the balance of probabilities, the Tribunal preferred the evidence of Mr. Aves on the basis they were wholly inconsistent with the way that he had conducted himself in respect of the claimant. He had approved the claimant to work part time in the business in March 2022; if he had thought the claimant could not perform her role part-time, he would not have accepted the request. The role could be done part-time, and it was being done part time. Furthermore, the Tribunal rejected that a meeting took place as alleged taking account of the evidence of Mr. Aves that he had travelling long haul back from Qatar and did not attend the office.

30. Although the claimant suggested that she no longer had any involvement in business development activity, the Tribunal did not accept this evidence preferring the respondent's evidence namely all the regular social posts were composed and posted by the claimant. She also arranged client hospitality events; managed client competitions which were key to the client engagement and was given opportunities to be on site at client events. Client hospitality events that year were few and far between due to train strikes and COVID, but the claimant was arranging them. The claimant was also involved in two work projects namely ESPEN in around June 2022, a medical conference in Vienna. Initially, the claimant stated that she would attend but later then said she could not do it. Mr. Aves paid Jess Tansey to attend this event at a cost of £500. There was another event in September 2022 in the Lake District. She had the option to go to the event, but the claimant said she could not do it. The claimant's workflow document shows venue finding work she did from page 319 to 321 which is supported by the documents of page 129 to 143 and 145 to 154. The Tribunal accepted the evidence of Lauren Blythe that the claimant was conducting a mixture of large and small events/work.

31. On 15 October 2022 the claimant's husband updated the profile picture of her competing business Facebook page to say coming soon (see page 204). The domain for venuedo.co.uk was also registered. The claimant stated that it was her husband who did this, and she was unaware of this until January 2023. The Tribunal rejected this evidence as not credible. The Tribunal noted that the claimant did discuss matters about work with her husband as noted in the grievance hearing on 24 March 2023 at page 350 that in October 2022, when the claimant stated she *"was going to have a chat with her husband and seek some legal advice."* Furthermore, the claimant did not inform her employer about the new company.

32. On 20 October 2022 Mr Aves had a meeting with the claimant. The claimant alleges that Mr Aves said "*what I think you should do Katherine is go home and be a stay at home mum.. why don't you resign and come back when your daughter is at school why don't you become more flexible with your hours and instead of having coffee with your mum friends on a Monday you could work and your role cannot be done in three days".* Mr Aves disputes that he said any of these comments. On the balance of probabilities, the Tribunal accepted the respondent's version of events; and considered it improbable that a personal friend of the claimant who had welcomed her into the business and returning on a part time basis three days a week would

have conducted himself in this manner. It is also inconsistent with the friendly communications between the claimant and Mr. Aves when she sends a message and ends if “K x” (page 169 on 1 November 2024).

33. On 24 October 2022 the claimant changed the competing business Facebook page profile picture from “coming soon” to a graphic logo (see page 205). Later in October she uploaded an advert encouraging people to contact through her competing businesses website and offering free venue finding and event management services launching 2023 (page 206). She was also posting this on her business Instagram (page 208). Despite the claimant’s assertion that this was the work of her husband, and she was unaware of this; the Tribunal found that to be not credible and rejected her evidence.

34. The claimant told Mr Aves she felt her role had been made redundant and she wanted compensation. Mr Aves did not accept this, and he felt he needed her to support him and to rebuild the business following the pandemic. The claimant was his longest serving employee and he needed her experience and knowledge to get through the difficult situation.

35. By November 2022 the claimant was discussing her work situation with a solicitor and was advised to make records of matters which occurred at work, but the claimant informed the Tribunal she did not record anything. There was a further inconsistency in the claimant’s evidence; the claimant advised the Tribunal she made notes so to compile her witness statement, but she could not recall whether the notes still existed (she did not disclose these).

36. The claimant informed Mr. Aves she did not feel she was a director in the business anymore because she was not doing the work of a director as she was prior to COVID/maternity leave in the sense there was a loss of status. She did not inform him she wanted to resign her directorship. Mr. Aves obtained the correct form from the accountant to resign the directorship and without the claimant requesting the form, Mr Aves presented to her at a meeting on 1 November 2022 (see page 163). The claimant contended that she was intimidated by Mr Aves and pressured to sign this. The Tribunal did not accept the claimant was intimidated but do find she was encouraged to complete and sign it because she was presented with the form in a meeting by her superior; she had not requested the form and on the balance of probabilities the Tribunal finds that Mr. Aves said if you do not feel you are doing the director role she may as well resign it. The Tribunal notes that this was a loss of status for the claimant and reflected a reduction in responsibilities but did not incur any financial loss for the claimant or the business.

37. On 1 November 2022 (page 170) Mr Aves sent the claimant an e-mail asking her to send him the job description so that, but he could see what she was able to do. The claimant sent her job description (page 172) containing her comments about work she said she was no longer doing. She described that 80% of her current role was offering support with venue finding and event management as and when required. Although at the time Mr. Aves did not directly respond to this by email, he informed the Tribunal

that all of the tasks were required or would be once the market opened up save that her management of the team had been removed because of the reduction of staff. His evidence was that staff were far more autonomous since COVID so that the hierarchal structure with the claimant managing the team and reporting to him was no longer required and that team members were supervised by Lauren and Betsy, and they reported to him. The claimant had also lost her HR function such as authorising annual leave which was a task picked up by Mr. Aves. Although Mr. Aves refuted there was a reduction in the claimant's tasks; the Tribunal finds there was a reduction in the tasks performed by the claimant post COVID by reason that the business was in survival mode where all employees have to be operational, and he himself had taken on more management of the staff.

38. An e-mail dated 2 November 2022 (page 167 to 168) the claimant emailed Mr Aves about her job description. She stated she did not think that she should be rewriting her job description because the changes will effectively be making her job redundant which was a decision that he needed to make. She stated if her role was to change significantly, as you have suggested in our chats, then there is no alternative for you to decide to make this role redundant. The claimant stated that the respondent had said that her role was unable to be carried out as a part time role. The claimant said since her return to work most of her job description is either now with him, not happening, or has been shared with other members of the team. She said Mr Aves had told her that her role was redundant but that she was not (redundant). She referred that Mr Aves had mentioned a different business model and new ways of working. She stated that it was very hurtful that he had said it would be best for the claimant to be a stay-at-home mum. She stated she felt like she was a junior in the office and given basic inquiries so that her job satisfaction had taken a dive that the duties she was carrying out were not representative of her job title or job description and that she had felt excluded from business development activities that the rest of the team have been involved in. She described that she wasn't involved with the meeting with Xero because he needed somebody in the office and the celebration lunch for winning the pitch was on a non-working day. The claimant attached her job description (page 172) referring to responsibilities which no longer took place namely quarterly management meetings; assisting with agreeing the company turnover target; strategy plans and general yearly plans that she's no longer involved in. She referred to making decisions in the absence of a director as and when required. The claimant stated that she did make some decisions but feels all the relevant decisions that she used to be able to make are now Mr Aves. As for the full understanding of the day-to-day activities the claimant said she no longer had a full understanding, but she no longer worked closely with venues and events managers so to ensure a high level of service is always delivered. The claimant stated rather the team make their own decisions after speaking to Mr Aves. In respect of offering support with venue finding and event management as and when required the claimant does do this with 80% of her current role; She stated that she no longer offered support with training and staff development or offer support with difficult or delicate situation in terms of clients and suppliers; she said the team carried this out themselves

under Mr Aves supervision. The claimant said that she no longer offers account management to certain clients as and when required; she did provide industry knowledge and experience as and when required; but as for acknowledging and accepting productive and non-productive activities she no longer did this, and the team made the decisions under the supervision of Mr Aves. The management of appraisals no longer takes place and Mr. Aves manages the annual reviews. The claimant stated that she no longer arranged and coordinated sales trips or client trips which was Mr Aves sole responsibility. She continued to arrange and coordinate client competitions and assisting with the production of promotional materials no longer happens as far as the claimant was aware. In terms of business development, maintaining and expanding relationships with existing clients, assisting with preferred suppliers for new and existing clients and actively contacting prospective clients, the claimant was no longer doing this, and this solely rested with Mr Aves. In respect to the sole responsibility of the client CRM system this was now a shared responsibility with the rest of the team. As for the management of all staff holidays the claimant no longer did this, and Mr Aves conducted this. In respect of managing staff employment contracts and adjoining documentation and dealing with any HR related issues, the claimant no longer did this.

39. Mr Aves asked the claimant to confirm whether she was willing and able to perform the tasks included. The claimant confirmed that she was (see page 169). From Mr. Aves' perspective he said there was no reason why she shouldn't be doing most of the tasks. Some of the things have been stopped as a business such as quarterly management meetings or three, to six, month staff appraisals. Other things were much smaller including HR support since the pandemic as there were so few employees. Mr. Aves needed the claimant to be more involved and was happy for her to work at the same level as she previously did as necessary.

40. The claimant stated, *"I am conscious you are wanting to push forward and reach an agreement".* At this stage the parties had just begun discussions relating to a mutually agreeable settlement agreement and the Tribunal finds both parties were pursuing a mutual basis to terminate the employment of the claimant. The claimant had done the calculation on the redundancy figure and sent it to him (see page 167).

41. By email dated 17 November 2022 Mr Aves stated that the business development position is not an option and asked the claimant if she was still looking to leave the respondent (see page 164). The claimant confirmed to him orally that she was, and negotiations continued. The claimant was pursuing the respondent to finalise the settlement agreement (see page 164) dated 28 November 2022. The claimant states *"following on from our call on Friday 18 November I've taken some advice and been told that it's unusual to be waiting this long to get a draft compromise agreement and a settlement figure as most of these contains standard terms therefore I wondered when you might be in a position to share at least the settlement amount with me to consider whilst peninsula are finishing off the agreement it might be that the agreement is irrelevant if I find the offer unacceptable the delay reaching an agreement is one again causing me unnecessary anxiety*

and stress so I would appreciate you chasing this up with Peninsula this week."

42. There is a significant dispute of evidence as to whether Mr Aves told the claimant he did not think the team would like her doing the role she did before that she went on maternity leave on 1 November 2022. There is also a dispute of evidence as to whether Mr Aves told her there was no need for her to do site visits client activities or sales visits or that he was taking a new approach and there was a new business model. The claimant stated that she was upset after some meetings with Mr. Aves which is corroborated by Lauren Blythe's evidence, but Ms. Blythe was unaware why the claimant was upset and had not discussed it with the claimant. The Tribunal determined that the claimant could have been upset about anything. On the balance of probabilities, the Tribunal preferred the evidence of Mr. Aves, and he did not say these things to the claimant at any time. Further there was a dispute as to whether on the 2 of November 2022 Mr Aves said in response to the claimant's e-mail *"whoever wrote that for you this is now not going to be amicable between us"*. The Tribunal does not accept that Mr. Aves said this. There was also a dispute of evidence as to whether Mr Aves said if you are due to attend a meeting or appointment what would you do if your daughter is ill, you wouldn't be able to attend on 2 November 2022. The Tribunal accepted Mr Aves evidence that he didn't say this. In fact, on this day 2 November 2022 there are text messages exchanged between the claimant and Mr Aves of a very jovial nature (see page 160). The Tribunal found in the circumstances the claimant's contentions were not credible.

43. Prior to COVID and the claimant's maternity leave, Mr Aves as the managing director of the business would from time to time engage in business development and sales meetings alone see page 452-512. As an owner of the business, he determined the needs of the business, the workflow and the relationship he had with clients which he is entitled to do.

44. On 24 November 2022 the claimant uploaded an advert to Instagram (page 209) offering a Black Friday offer where she was providing a free venue search through her business. This is a service provided by the respondent.

45. On 30 November 2022 there was a staff meeting which both Mr Aves and the claimant attended. The respondent announced the claimant and Jessica Tansey would be leaving the business. Although the claimant disputed this, the Tribunal found the text message between Lauren and Jess referring to *"announcements"* (i.e plural) was likely to be both the claimant's and Jess's departure from the business. Mr. Aves asked the claimant if she would like to be involved in recruitment, but she declined. As for the suggestion appraisals were held on the 30 of November 2022 the outlook calendar at page 507 indicates no appraisals took place with staff members. These were always held at the end of March each year there were no pay reviews either. This evidence was supported by the testimony of Lauren Blythe.

46. Agreement between the claimant and Mr. Aves as to the terms of the settlement were eventually reached and signed on 15 December 2022 (see pages 174 to 200) including that *"the employee warrants and represents that they know of no circumstances that would amount to a repudiatory breach of*

any express or implied term of the contract of employment that would entitle or would have entitled the company to dismiss them without notice or payment in lieu of notice. The company enters into this agreement in reliance upon this warranty and the termination payment is conditional upon this being so see page 175. Further the employee hereby covenants and undertakes to be bound by the post termination restrictions and confidentiality undertaking set out in their restrictive covenant agreement dated 21 December 2018; see the restrictions see page 182 and the restrictive covenant at page 183 to 196.

47. On 26 January 2023 the claimant posted on her competing business Facebook page about company events in the Midlands (page 210). On 7 February 2023 Mr Aves was having a conversation with the claimant and asked her if she had any plans after leaving the respondent. She said that she was starting her own agency. Mr Aves was shocked by this because the claimant had never mentioned it before. Mr Aves could see that she followed many of the current suppliers for the respondent on Instagram and implied he believed that the claimant was or hoped to be working with them in the future (page 214-215). In his view this was a breach of the terms of the settlement agreement and a breach of her employment contract and fiduciary responsibilities as a board director.

48. On 8 February 2023 the claimant told clients over e-mail that she would be leaving the business in a couple of weeks (see page 247-263). Mr. Aves sought advice from Peninsula.

49. On 13 February 2023 the respondent determined to suspend the claimant from her employment (see page 267). The allegations included gross misconduct on the basis of setting up and marketing a competing company without the respondent's knowledge or consent, in breach of her employment contract and fiduciary duties as a director; gross misconduct on the basis of contacting employees and suppliers of the respondent informing them of your intentions to begin trading without the knowledge or consent in breach of her employment contract and fiduciary duties as a director and gross misconduct by way of entering into and concluding settlement agreement negotiations having given warranties within the agreement without addressing the above points.

50. The respondent’s solicitor wrote to the claimant and confirmed there had been a repudiatory breach of the settlement agreement which meant the figure would not be paid the claimant (page 269-270).

51. On 16 February 2023 Rebecca Sharman, Venue and Events coordinator for the respondent confirmed by e-mail that she had been told that the claimant had set up her own agency a couple of weeks before (see page 273).

52. At a meeting with the claimant on 21 February 2023 (see page 277-288) the claimant was accompanied by a trade union representative and met with Peninsula. The claimant said she was setting matters up with a view to starting trading after the end of a restrictive covenant period namely 3 months after the end of their notice. At page 281, the claimant accepted that the business would be in direct competition with the respondent when it started trading. The claimant said that the post offering free venue finding for

example the Black Friday post was fake news and was just marketing. There was no trading activity. She said the same of the post saying the first trip is booked and the first exhibition is booked (see page 282). She also confirmed that Lauren Blythe was following her company on Instagram page. Christine Storrer provides a statement that she knew that about the claimant's new business from about 19 January 2023 (see page 272). She was asked about the fact that she had chosen to follow many of the suppliers that the respondent uses on Instagram. The claimant said she followed them on her personal Instagram too, but they were just hundreds of different hotels and destination management companies she could follow (see page 284) Peninsula in their report dated 22 of February 2023 (page 293 to 300) recommended the claimant be invited to a disciplinary hearing.

53. By letter dated 23 February 2023 the claimant was invited to a disciplinary hearing on 28 February (301 to 304). The claimant was provided with relevant documentation on 28 February 2023. The claimant called in sick, and the hearing was rescheduled to 6 March 2023. On 2 March 2023 the claimant solicitor informed the respondent she was raising a grievance, appealing the disciplinary decision when it comes and will instigate ACAS proceedings procedures (page 305-306).

54. On 3 March 2023 (page 307) the claimant raised a formal grievance. She said that the settlement agreement had seemingly broken down, so she wanted to address the discrimination she felt she faced on 6 March 2023. The claimant confirmed she could not attend the rescheduled disciplinary hearing either. She provided written submissions on the 6 of March (page 309 to 314) and 7 of March 2023 (page 322 to 326). She said at this stage it was her husband who was writing the social media posts Peninsula provided a report dated 9 March 2023 (page 327 to 332). The claimant's notice as set out in the settlement agreement was due to expire in 8 of March 2023.

55. On 10 March 2023 Mr Aves wrote to the claimant to confirm the disciplinary process had ceased and that no decision could be made about the gross misconduct. The claimant did not detract her notice which was contained in the settlement agreement (only).

56. The google search for the claimant's business said it would be opening on 8 March 2023 (page 219). The claimant posted on her competing business Facebook page on 18 March 2023 confirming she had her first client booking (page 211). She had a full website with a contract form and e-mail address and phone number (page 223) the company was incorporated on 9 January 2023 (page 224). The claimant's evidence to the Tribunal is that she started work for her own business on 9 March 2023.

57. On 21 March 2023 the claimant was invited to a grievance hearing to be held on 24 March 2023 (page 337 to 338). The claimant's grievances included she had faced instances of discrimination based on maternity and sex by the respondent and specifically by Mr Aves since her return from maternity leave on 1 April 2022; she believed that she had been excluded from certain events and meetings and she believed that inappropriate comments had been made to her. On 22 of March 2023, she asked for

unfair dismissal to be added to a grievance (page 339). Peninsula heard the grievance on 24 March 2023 (see page 343 to 365). The claimant stated to the grievance chair at page 362 *"I don't understand how I can be held to the notice given as part of the settlement agreement if it has been breached but then on the other hand how can I have breached the agreement if there was no outcome of the accusations of gross misconduct for the disciplinary process. If Mike is adamant that the settlement agreement has been breached I considered that my notice has also been withdrawn and therefore I've been dismissed on 8 March. I have not been made aware of any reasons for the dismissal and therefore I class it as unfair"*. The grievance chair stated it looks as though you are still an employee because no dismissal has taken place. Mr Aves was sent questions on 3 April 2023 relating to the grievance and he provided his answers on 5 April 2023 the claimant (page 369-375). The grievance report was dated 27 April 2023 (page 379 to 388). The recommendations where that the claimant's grievances should be dismissed. Mr Aves wrote to the claimant on 28 April 2023 confirming the grievances had been dismissed (page 389 to 390). On 2 May 2023 the claimant appealed her grievance (page 580). The claimant's grievance appeal was held on 6 June 2023 (see page 405 to 416). The grievance appeal report dated 12 June 2023 recommended the grievance appeal be dismissed. Mr Aves confirmed this on 13 June (page 446 to 449).

Submissions

58. The respondent submitted that the claimant worked for 16 years at the respondent and overall had a good relationship with Mr. Aves. There was no history of any discriminatory treatment over this period of time by Mr. Aves. COVID impacted the way the respondent ran its business because the industry was in a fundamentally different situation; with a reduction in staff; and flatter management structure. In these circumstances it was not reasonable to have two layers of management over 3 employees. The respondent disputed that the claimant was doing menial work; the workflow supported by emails evidenced the claimant doing a good mix of small and larger events. The job the claimant returned to was different and the claimant agreed any roles removed was not for a discriminatory reason. The claimant wanted to be made redundant. The respondent did not pressure the claimant to resign but allowed the claimant to write her job description. This is inconsistent with the claimant being removed from the respondent's business. It was not credible that the claimant was unaware that her husband registered a company Venudeo or was referring to it on social media.

59. By reason of the claimant's concessions made under cross examination that acts did not relate to her sex; or she could not be sure a man would be treated any differently the claimant has failed to raise a prima facie case of sex discrimination or establish there was harassment related to sex.

60. The respondent submitted that the employment relationship ended because either the claimant resigned; was dismissed; or the contract came to an end

by mutual agreement. The respondent submitted the Tribunal could infer from the conduct of parties that both understood the relationship came to an end on 8 March 2023. The claimant's conduct was a repudiatory breach of contract; she committed gross misconduct by registering a competitive company on 9 January 2023. This was a breach of an express term of the employee handbook because the claimant failed to inform the respondent. The respondent acted in a procedurally fair manner by engaging lots of different processes and the dismissal was in the range of reasonable responses.

61. The claimant provided a written submission and did not wish to supplement them with oral submissions. In submissions, the claimant withdrew the indirect sex discrimination claim. Upon the respondent's application to dismiss the indirect sex discrimination, the Tribunal dismissed the indirect discrimination claim upon withdrawal.

62. The claimant also submitted that her claims were continuing acts of discrimination. The claimant stated she was unfairly dismissed on 8 March 2023 after the settlement agreement broke down due to the reaffirmation agreement not being signed by the respondent and the settlement amount being unpaid. Although the respondents said the claimant resigned there was no evidence to support this. The claimant had contacted the respondent to say she was fit for work and the respondent failed to provide any evidence of asking the claimant to return to work as set out in the letter of suspension. Further the claimant submitted that she was subject to direct sex discrimination including comments which the respondent accepted if said could be examples of direct sex discrimination. Alternatively, the claimant said she was harassed so to resign from her role and was required to sign the directorship form in an aggressive manner.

The Law

Direct discrimination.

63. *Section 13 (1) of the Equality Act 2010 provides that 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.*

64. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. It is for the Tribunal to decide as a matter of fact what is less favourable. In order to claim direct discrimination, under section 13 of the Act, the claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant whether the comparator is actual or hypothetical. The comparison must help to shed light on the reason for the treatment. Section 23 (1) of the Act stipulates that there must be no material difference between the circumstances relating to each case when determining whether the claimant has been treated less favourably than a comparator. In other

words, in order for the comparison to be valid, like must be compared with like; a comparator must not share the claimant's protected characteristic.

65. The Tribunal should explore the employer's mental processes, that is, conscious or subconscious to discover the ground or reason behind the act in deciding whether discriminatory treatment was because of a protected characteristic. The focus should be on the reason why in factual terms why the employer acted as it did. In the case of **Shamoon v the Chief Constable of the Royal Ulster Constabulary 203 ICR 337** the House of Lords held the issue essentially boils down to a single question : did the complainant because of a protected characteristic receive less favourable treatment than others.

66. Paragraph 3.14 of the EHRC employment code states that the motive or intention behind the treatment complained of is irrelevant. This means it will be no defence for an employer faced with a claim under section 13 (1) to show that it had a good reason for discriminating.

67. The protected characteristic need not even be the main reason for the treatment so long as it was an effective cause. The code confirms that the protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause see paragraph 3.11. An employer behaving unreasonably does not necessarily mean there has been discrimination but it may evidence, a supporting inference, if nothing else to explain behaviour see **Anya v the University of Oxford 2001 ICR 847.**

68. The EHRC code makes it clear that the circumstances of the claimant and the comparator need not be identical in every way but what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator (see paragraph 3.23). The fact that a different decision maker was involved in the comparator case does not necessarily amount to a material difference for the purpose of identifying that person as a comparator. However, there may be cases where the difference in decision maker amounts to a material difference. Where there is no actual comparator the treatment of a person who does not qualify as a statutory comparator because the circumstances are in some material respect different may nevertheless be evidence from which a Tribunal may draw a hypothetical statutory comparator would have been treated in the absence of an actual comparator (that is a real person who is in materially the same circumstances as the claimant but who was not suffered the same treatment the question of less favourable treatment needs to be determined by reference to a hypothetical comparator who resembles the claimant in all respects).

69. Section 212 (1) of the Act provides that detriment does not subject to subsection (5) include conduct which amounts to harassment. Section 212 (5) of the Act provides that where this Act disapplies a prohibition on harassment in relation to specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to detriment for the purposes of discrimination within section 13 because of that characteristic. In other words, harassment and direct

discrimination are mutually exclusive. Where the Act provides explicit harassment protection, it is not possible to bring a claim for direct discrimination by way of detriment on the same facts.

Pregnancy/Maternity discrimination

70. Pursuant to section 18 (2) of the Equality Act 2010, A person A discriminates against a woman if in the protective period in relation to a pregnancy of hers A treats her unlawfully (a) because of the pregnancy or (b) because of illness suffered by her as a result of it. For the purposes of subsection 2 if the treatment of a woman is an implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that. Even if the implementation is not until after the end of that period.

Burden of proof

71. The burden of proof pursuant to section 136 of the Equality Act 2010 provides "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. If a Tribunal cannot make a positive finding of fact as to whether discrimination has taken place it must apply the shifting burden of proof in **Laing v The Manchester City Council 2006 ICR 1519.** If the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter.

Harassment

72. Pursuant to section 26 of the Act, harassment is defined as "a person A harasses another B if A engages in unwanted conduct relevant to a protected characteristic and (b) the conduct has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating hostile degrading humiliating or offensive environment to B. In deciding whether conduct has the effect referred to in section 1(b) each of the following must be taken into account namely (a) the perception of B; (b) the other circumstances of the case (c) whether it is reasonable for the conduct to have that effect.

73. There are three essential elements of a harassment claim under section 26 (1) unwanted conduct;(2) that has the prescribed purpose or effect; and (3)which relates to a relevant protected characteristic.

74. The Equality and Human Rights Commission's Code of Practise on Employment notes that unwanted conduct can include a wide range of behaviour including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person surroundings or other physical behaviour see paragraph 7.6 of the Code.

75. The Tribunal must consider whether the conduct in question is related to the particular characteristic in question in **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam (2020) IRLR 495** the EAT held that the question of whether conduct is related to a protected characteristic is a matter for the

appreciation of the tribunal, making a finding of fact drawing on all the evidence before it. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative nor is a finding about the motivation of the alleged harasser.

76. The Code also provides at paragraph 7.9 that unwanted conduct "related to" a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. Whether a single act of unwanted conduct is sufficiently serious to establish a complaint of harassment is a question of fact and degree. The test relating to "effect" has both subjective and objective elements to it. The subjective part involves the Tribunal looking at the effect that the conduct of the alleged harasser A has on the complainant B. The objective part requires the Tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

Time

77. Pursuant to section 123 (1) of the Equality Act 2010 proceedings under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or be such other period as the employment thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

78. When exercising discretion to allow out of time claims to proceed Tribunals may have regard to the checklist contained in section 33 of the limitation act 1980 see **British Coal Corporation v Keeble 1997 IRLR 336**. Keeble states the section 33 factors are : considering the prejudice that each party would suffer if the claimant were allowed or not and have regard to all the circumstances of the case in particular (a) the length of and reasons for the delay (b) the extent to which the cogency of the evidence is likely to be affected by the delay (c)the extent to which the party sued has cooperated with any request for information (d)the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the claimant to obtain appropriate advice and once she knew of the possibility of taking action.

79. In the Court of Appeal decision **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23** stated that the Keeble factors should not be taken as a starting point for the tribunal's approach to the just and equitable extension. The best approach for a Tribunal when exercising the discretion is to assess all the factors in the particular case that it considers relevant including in particular the length of and the reasons for the delay.

80. In respect of continuing acts **Barclays Bank v Kapur 1991 I CR 208** it was established where an employer operates a discriminatory regime rule practice or principle then such a practice will amount to an act extending over a period. Where however there is no such regime rule practice or principle in operation and act that affects an employee will not be treated as continuing even though that act was continuing consequences which extend over a period. In the case of **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530** the Court of Appeal stated that a Tribunal should

not get caught up on discerning whether there is a policy regime practice rule or practice in determining whether there is a continuing act. The Tribunal should look at the substance of the allegations and where there are a series of connected acts that may suggest a continuing state of affairs that continuing state may amount to a continuing act. **Aziz V FDA 2010 EWCA Civ 304** stated that in deciding whether separate incidents constitute part of a continuous act one has regard to whether the same individuals or different individuals were involved; this is a relevant factor but not conclusive. In the EAT case of **Southwestern Ambulance Service NHS Foundation Trust v IRLR 168** establishes that where a claimant wishes to assert that there is a continuing act or an act extending over a period of time there must be findings made that there have been discriminatory acts committed by the respondent in order to form part of an act to extend over a period of time or a continuing state of affairs.

Dismissal

81. The burden of proof falls on the employee on the balance of probabilities to show that she was dismissed. Where language or circumstances are ambiguous the Tribunal must consider all surrounding circumstances and whether a reasonable employee would have considered they were dismissed. In the case of **Kirklees MBC v Radecki 2009 ICR 1244** the Court of Appeal held the removal of a claimant from the payroll whilst suspended and then negotiating a settlement agreement was a sufficiently unequivocal statement of intention to terminate the employment contract. The question for the Tribunal is what terminated the employment contract.

Unfair dismissal

82. Pursuant to Section 98 (1) of the Employment Rights Act 1996 an employer has the burden of showing the reason for the dismissal and that the reason falls within subsection (2) or some other substantial reason of a kind so as to justify dismissal.

83. In relation to the fairness of the dismissal section 98 (4) states 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 reasons shown by the employer (a) depends on whether the in the circumstances including the size of the administrative resources of the employees 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.

84. The Tribunal must not substitute its judgement for that of a reasonable employer in deciding whether or not the employer acted reasonably for the purpose of section 98 (4). The tribunal should ask itself whether or not the decision to dismiss fell within the range of reasonable responses of a reasonable employer.

85. The Tribunal must not substitute its judgement for that of a reasonable employer in deciding whether or not the employer acted reasonably for the

purpose of section 98 (4). The tribunal should ask itself whether or not the decision to dismiss fell within the range of reasonable responses of a reasonable employer. A harsh decision to dismiss can still be a fair one.

86. In respect of a conduct dismissal according to the case of **BHS v Burchell 1980 ICR 303** the tribunal must consider a threefold test; (a) whether the employer leave the employee was guilty of misconduct (b) whether the employer had in his mind regional grounds upon which to sustain that belief; and at the stage at which the employer form that belief on those grounds he had carried out as much investigation into the matter as was reasonable in the circumstances.

87. In **Sainsbury's Supermarkets v Hitt 2003 IRLR 23** the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted. In considering procedural fairness the tribunal can have regard to the HS code of practise of 2015 on disciplinary and grievance procedures which sets out the basic requirements of fairness applicable in most cases.

88. In the Court of Appeal case of **Taylor v OCS Group Limited 2006 IRLR 613** it was stressed that the task under section 98 (4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other when employees dismissed for serious misconduct a Tribunal might well decide that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as sufficient to dismiss the employee further whether misconduct is of a less serious nature so the decision to dismiss is near the borderline the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee defects in the original disciplinary hearing and pre dismissal procedures can be remedied on appeal it is not necessary for the appeal to be by way of a rehearing rather than review but the tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage the tribunal should examine the subsequent appeal hearing particularly its procedural fairness and thoroughness and open mindedness of the decision maker.

Polkey

89. A Polkey deduction is the phrase used in unfair dismissal cases to describe the reduction in any award for future loss to reflect the chance of the individual would have been dismissed fairly in any event see **Polkey v AE Dayton Services Limited 1987 IRLR 50**. The Tribunal should consider if a fair process had occurred would it have affected when the claimant would have been dismissed and by what percentage chance that a fair process would have still resulted in the claimant's dismissal. In making this consideration the Tribunal shall consider any potentially relevant evidence in accordance with **Software 2000 Limited v Andrews 2007 IRLR 568.** In the Court of Appeal case of **O'Donoghue v Redcar and Cleveland Borough Council 2001 EWCA Civ 701** the significance of the procedural or substantive distinction when hearing a case was downplayed. In the decision **Gove v Property Care**

Limited 2006 EWCA Civ 286 the Court of Appeal rejected the suggestion that the Polkey principle is narrowly confined only two instances procedural unfairness Buxton LJ said that instances of procedural unfairness such as occurred in the Polkey case are but one kind of case to engage the application of section 123 (1) of the Employment Rights Act 1996 Lord Justice Buxton held that section 123 (1) enjoined the Polkey principle to be of much wider application in cases of procedural unfairness.

Contributory Fault

90. The Tribunal has a discretion to reduce the basic and compensatory award pursuant to a finding of contributed conduct. The basic award may be reduced Pursuant to section 122 (2) of the Employment Rights Act 1996 when the Tribunal considers that any conduct of the complainant before the dismissal with such as it would be just and equitable to reduce or reduce further the amount of the award to any extent. In respect to the compensatory award pursuant to 123 (6) of the ERA 1996 where the tribunal finds that the act was to any extent caused or contributed to by any action of the complainant the tribunal shall reduce the amount of the compensation award by such proportion as it considers just and equitable. In consideration of the reduction of the compensation award the tribunal must find that the conduct of the claimant was culpable and blameworthy and must have caused or contributed to the claimant's dismissal. Such conduct need not amount to gross misconduct **Jagex Limited v McCambridge UKEAT/0041/19.**

91. Where there are significant overlaps between the factors taken into account when making a Polkey deduction And when making a deduction for contributory conduct the tribunal should consider expressly whether in the light of that overlap it is just and equitable to make a finding of contributory conduct and if So what its amount should be to avoid the risk of a claimant being penalised twice for the same conduct; see **Lenlyn UK Limited v Kular UKEAT/0108/16**. In assessing contribution, the tribunal should consider whether the relevant conduct is objectively culpable or blameworthy and consider whether that caused or contributed to the claimant's dismissal, and if so determined, to what extent it is just and equitable to reduce any award.

Credibility

92. The Tribunal found the claimant’s evidence to be evasive. She was asked about being present at redundancy meetings as members of her staff she managed including Emily Jane Connelly and Jan Webber were made redundant, but the claimant could not recall ever being at such meetings. The Tribunal found this to be not credible bearing in mind that the claimant managed these individuals. The claimant stated that she could not recall being involved in any of the meetings that took place online. The claimant made very serious allegations with no evidence to support it. For example, the claimant stated that she believed there was some client meetings referring to pages 507 to 509 but they had been removed from the diary. She was unable to say what client meetings had actually taken place. The claimant contended that her mental health was detrimentally affected by her

treatment and that she had attended her General Practitioner on three occasions, but she was unable to provide any dates at all even within a range of dates. She provided a repeat prescription dated 4 May 2023 for antidepressants at page 537; the document had no name on it. The claimant said she did not know whether notes she prepared her witness statement from still existed; the Tribunal found this evidence to be unsatisfactory. The claimant also stated that on 15 October 2022 the update to her profile on Facebook to say "coming soon" in respect of a competing business with the respondent she was unaware of, and it was her husband who did this without discussing with her. The Tribunal found this assertion as not credible particularly as indicated in her grievance meeting, that she discussed matters with her husband (see page 350).

93. Following the claimant's expression of dissatisfaction with her role in October 2022, the respondent was offering the claimant a potential business development manager or sales and marketing/events role and inviting her to draft a job description of a role she wished to perform. The Tribunal found this action inconsistent with the claimant's case that Mr. Aves wished to remove her from the respondent's business. Mr. Aves employed an all female team with some part time workers with child care responsibilities. There were no previous complaints accepted by the claimant that he had acted in a discriminatory fashion. Overall, the Tribunal found Mr. Aves to be more credible than the claimant.

Conclusions

94. It is important to consider the context of the respondent's business returning post-COVID. The respondent's business was in a completely different commercial environment and landscape with a 50% reduction in staff headcount. The business was in financial distress and in "survival mode"; barely covering monthly costs and requiring financial support via a bounce back loan. The claimant had been out of the business since March 2020 when she was furloughed and commenced maternity leave in March 2021. When the business opened again in 2022 there was a far less hierarchal structure with a smaller team and an increased team effort amongst all employees to drive the business to success with "all hands on deck". Staff members were expected to be far more autonomous and be fully operational (as opposed to conducting management or administration) which was largely performed by the Managing Director, Mr. Aves, as owner of the business. On her return to work the claimant was working three days per week (on her request). She did not enjoy the way the business was now run and was dissatisfied with the reduction in need for her management of a smaller team and perceived herself to be less important and senior in the organisation. The Tribunal determined that the claimant decided to take preparatory steps to set up her own business by mid-October 2022 and intended to leave the respondent's organisation by early 2023.

95. There was a significant dispute of evidence between what the claimant stated Mr. Aves had said and Mr. Aves strongly refuted it. In determining who the Tribunal believed it applied the standard of the balance of

probabilities, namely what was more likely than not. In respect of some of the comments the claimant had included them in email correspondence with Mr. Aves at the time. Under cross examination the claimant accepted that in the main she did not believe that the comments had anything to do with her sex or she said she was unsure as to whether Mr. Aves would speak to a man in the same way. Mr. Aves told the Tribunal that he did not challenge them at the time because he was seeking advice from Peninsula and was not advised to do so. He stated he was not familiar with employment law and frankly did not see at the time that the situation would result in an employment tribunal claim. He maintained that he did not say the things alleged by the claimant. The Tribunal found his explanation as to why he did not challenge the comments in correspondence at the material time as credible.

Pregnancy & Maternity Discrimination: section 18 of the Equality Act 2010

96. The protected period for the purposes of section 18 (6) of the Equality Act 2010 is March 2021 to 5 April 2022. The claimant did not suggest to Mr. Aves in cross examination that any of her complaints took place in the protected period pursuant to section 18 (6) of the Act or that the implementation of any decision took place in the protected period. The claimant did not address the Tribunal in her written submission about this complaint.

97. The acts complained of took place on the claimant's return to work from maternity leave between 5 April 2022 to 8 March 2023 (the dismissal). The Tribunal determined that none of the acts which the claimant complains of took place or were implemented in the protected period. In the circumstances the Tribunal finds all of these complaints fail and are dismissed.

Direct sex discrimination

98. The respondent making fundamental changes to her job duties from her return to work on 8 March 2022 so that her role primarily involved administration, venue saucing and small events and no longer gave her opportunities for human resources management, business development or significant sales or projects

99. The Tribunal has already set out above the challenges faced by the respondent's business post COVID and the significant reduction in staff. The Tribunal determined that there was a reduction in need for administration, venue sourcing, human resource management, business development and significant sales or projects by reason of COVID and the consequent reduction in staff. However, the claimant was still involved in venue sourcing for both small and large events and had contact with significant clients such as Nano and the Pullman function. Under cross examination, the claimant conceded by reason of these challenges, the respondent's business was in a different position in 2022 than before her furlough in March 2020 and

agreed that these changes had nothing to do with her sex. Other than Mr. Aves, the team at the respondent consisted of all female staff. Changes to the claimant's duties were a consequence of COVID and the survival mode of the respondent seeking to sustain its business. The claimant's treatment had nothing to do with her sex. This allegation fails.

100. Comments alleged to be made by Michael Aves

Mr. Aves and the claimant had a long-standing friendship and business relationship. The claimant conceded under cross examination, that Mr. Aves had never behaved in a discriminatory way towards herself or any other member of staff during her long employment with the respondent save as she alleged on her return to work in 2022. Three members of Mr Ave's team had childcare responsibilities and two of the women worked part time.

(1)5 October 2022 why would I pay for more members of staff when I already have to carry two part-timers

In the context of the longstanding and strong relationship between the claimant and Mr Aves and his historical behaviour toward the claimant and his all female team, on the balance of probabilities, the Tribunal did not find that Mr Aves said this to the claimant. In any event under cross examination the claimant conceded that she did not consider this comment had anything to do with her sex. This allegation fails.

(2)5 October 2022 "your role isn't needed anymore, there is a new business model and your role cannot be done in three days anyway. The company cannot continue to accommodate part- timers"

Mr. Aves stated the words "new business model" was simply not words he had ever used. Further he alleged had he thought the claimant could not continue to do her role in 3 days he would never have agreed to the claimant reducing her working time to 3 days on 8 March 2022 (see page 85). Taking the conduct of Mr. Aves into account; his support for the claimant in agreeing to her working three days per week and his support of other females who worked part time for the business, on the balance of probabilities the Tribunal did not find that Mr. Aves said these things to the claimant. Furthermore, the claimant also conceded in cross examination that she did not consider the comments had anything to do with her sex. This allegation fails.

(3)20 October 2022 what I think you should do Katherine is go home and be a stay-at-home mum

The Tribunal rejected the claimant's evidence and found on the balance of probabilities that Mr. Aves did not say this to the claimant as alleged. The Tribunal took into account that Mr. Aves supported the claimant's return to part time working in the business and his support in the workplace of other female part time workers. Under cross examination the claimant said she did not know if Mr. Aves would say this to a hypothetical male comparator. This allegation fails.

(4)20 October 2022 why don't you resign and come back to work when your daughter is at school

On the balance of probabilities, the Tribunal did not find that Mr. Aves said this. The business was starting to open up in 2022 and it was in survival mode post COVID. Mr. Aves needed the claimant to stay with the business and assist its survival; he did not wish her to leave. The claimant stated under cross examination that she was unsure if Mr. Aves would treat a hypothetical comparator like this. This allegation fails.

(5)20 October 2022 your role cannot be done part time in three days; this comment was also repeated on numerous other occasions

On the balance of probabilities, taking the above context into account the Tribunal did not find that Mr. Aves said this. Further the claimant accepted in cross examination that she did not believe this had anything to do with her sex. This allegation fails.

(6)20 October 2022 why don't you become more flexible with your hours and instead of having coffee with your mum friends on a Monday you could work

On the balance of probabilities, taking the above context into account the Tribunal did not find that Mr. Aves said this. Further the claimant stated in cross examination that she was unsure whether the respondent would treat a man like this. This allegation fails.

(7)1 November 2022 there is no need for you to do site visits and client activities or sales visits I'm taking a new approach and there is a new business model

On the balance of probabilities, the Tribunal did not find that Mr. Aves said this to the claimant. The Tribunal accepted Mr. Aves evidence that “new business model” is not a phrase he used. Further the Tribunal found in the context that he was seeking to rebuild the business, Mr. Aves would not discourage employees from conducting any type of work which would generate business and income for the respondent. Under cross examination the claimant stated that she did not believe that Mr. Aves saying this had anything to do with the fact that she was a woman. This allegation fails.

(8)1 November 2022 I don't think that the team will like you doing your role as you did before you went on maternity leave

On the balance of probabilities, the Tribunal did not find that Mr. Aves said this to the claimant. The business was running differently from its pre-COVID state because it was struggling to survive. There was a change in management structure because Mr. Aves was conducting all the management because the team was so much smaller; it simply did not make sense that there was a two-stage management structure. However, the claimant stated in cross examination that she did not believe that these comments were related to her sex. This allegation fails.

(9)2 November 2022 nice e-mail whoever wrote that for you, this is now not going to be amicable between us

The Tribunal did not find that Mr. Aves said this this to the claimant on the balance of probabilities. Under cross examination the claimant conceded that she did not believe that these comments had anything to do with her sex. This allegation fails.

(10)2 November 2022 you are due to attend a meeting or appointment what would you do if your daughter is ill? You wouldn't be able to attend.

Taking into account the support Mr. Aves had given to the claimant returning part time to the business and his support of other women working part time at the respondent, on the balance of probabilities the Tribunal did not find that Mr. Aves said this to the claimant. This allegation fails.

101. Excluding the claimant from the following work events meeting or appointments;

(1)16 August 2022 the entire team apart from accounts manager along with Mike attended a large client sales/business development meeting to discuss opportunities for upcoming events. The claimant was not invited to attend

The Tribunal found on 16 August 2022 there was a meeting with Xero, a significant client, with the purpose of introducing the client's wider team to the respondent's junior staff. The whole team did not attend; the meeting was attended by Mr Aves, Lauren Blythe and Betsy Margaret Williams. The claimant was not in attendance because she had a call with another client on this date (page 504) namely Nano. The claimant conceded Nano was a significant client of the respondent. Furthermore, Mr Aves wanted someone senior such as the claimant with experience to cover the office so that if there were any problems with an event, a client or venue or last-minute issues these could be dealt with by someone as senior and experienced as the claimant. The Tribunal accepted that the real reason for the treatment was that the claimant was conducting a call with a significant client and the respondent needed someone senior back at the office to deal with any problems. The treatment had nothing whatsoever to do with the claimant's sex. This allegation fails.

(2)16 September 2022 the entire team had a celebratory lunch to reward new business this was arranged on one of the claimants non-working days and she was not invited to attend by Michael Aves. The claimant did receive a last minute invite at 11:54 from another member of the team

This was an impromptu lunch following the successful receipt of an award by the respondent; it consisted of some take away sandwiches and crisps from M & S in the office. It took place on the day that the respondent was made aware of the respondent's success which was one of the claimant's non-working days. The claimant stated that this should have been put off until she

returned to the office on Tuesday. The claimant was invited to attend by Betsey at page 156 via text. The claimant replied, “thanks for including me guys but I'll leave it xx.” The claimant explained that she lived 30 minutes away from the office; she had childcare responsibilities that day. Under cross examination the claimant agreed that this had nothing to do with her sex. This allegation fails.

(3)22 November 2022 the claimant noticed that Michael Aves had a number of business development and sales meetings planned in his diary none of which she had been invited to. These meetings were arranged on the claimant’s working days

This was disputed by the respondent. The claimant was unable to say what meetings took place. She contended they had been deleted from Mr Ave's outlook calendar. Mr Aves shared his outlook calendar page 452 to 512. His evidence is that none of the meetings had been deleted. On the balance of probabilities, the Tribunal accepted his evidence; the claimant was unable to establish what business development and sales meetings had been planned which we she had not been invited to. Furthermore, as a managing director, Mr. Aves would from time to time engage in business development and sales meetings alone. This is a practise which took place before claimant was furloughed in March 2020. He sometimes acted alone by reason of the needs of the business and the relationship that he had with the client and sensitive topics that may come up. This allegation fails.

(4)30 November 2022 the claimant was excluded from the interview and recruitment process for a new member of the team. Two other current members of the team that she had previously managed were invited to meet the candidates for a lunch to help in the selection process

The Tribunal rejected the claimant's evidence. By this point of time, the claimant’s departure from the business had been announced. The Tribunal found this to be the case based on the text message introduced by the respondent on day 3 between Lauren and Jess which referred to “announcements” plural. On the balance of probabilities, the Tribunal deemed that this was likely to be the announcements of the departures of both Jess and the claimant from the respondent’s business. The claimant was asked if she wished to be involved in recruitment, but she declined. This allegation fails.

(5)30 November 2022 Michael Aves held individual appraisal meetings with all other team members except the claimant. In these meetings the team members received a pay review the claimant had no pay review.

The Tribunal did not find this allegation established on the evidence. Mr. Aves gave evidence to the Tribunal that appraisals

took place who is the end of the financial year along with the pay review. This was corroborated by the evidence of Lauren Blythe. The claimant had indicated that she was leaving the respondent and had signed the settlement agreement in December 2022 for a departure date on 8 March 2023. The real reason for the treatment is there was little purpose in holding an appraisal meeting and pay review in 2023 when the claimant was about to depart the respondent's employment. This allegation fails.

102. On or around 1 or 2 November 2022 Michael Aves pressured her to resign as the director;

The Tribunal does not accept that Mr Aves pressured the claimant to resign as a director of the business. The Tribunal found that from about October 2022 the claimant had articulated to Mr Aves that she no longer felt that she was a director. He obtained the correct form to resign as director from his accountant. He presented this to the claimant at a meeting on one November 2022 and the claimant filled out the form that removed her as a director and Mr Aves wanted her to work on a new job description with the attention of agreeing this would be the claimant's future role (see page 166). The claimant made no specific complaint about pressure to be removed as a director in her e-mail correspondence with the respondent dated 3 November 2022 (page 166). The Tribunal found the claimant was not pressured but encouraged to resign as she felt she was no longer acting as a director. The claimant did not raise any complaint because the claimant understood by reason of the legal advice that she was receiving (on her own case by November 2022) she owed fiduciary duties to the respondent company as a director. The claimant had already started to make preparatory steps in mid-October 2022 to set up a competitive business. The Tribunal found the real reason for the treatment was that the claimant continued to suggest to the respondent that she felt she was no longer a director. She was provided with the form on 1 November 2022 by Mr Aves and she chose to fill it in and resign her directorship. This had nothing whatsoever to do with the claimant's sex. This allegation fails

103. On or around 1 or 2 November 2022 Michael Aves pressured her to resign her employment

The Tribunal rejected this allegation. As set out above the respondent's business was in survival mode. Mr. Aves required all his team to grow the business. The claimant was unsatisfied with her position on her return to work and suggested to Mr Aves she did not feel that she was a director any longer. He wished to keep the claimant in the business and suggested that she should draft a job description which she could call sales or marketing director whatever role she wished to perform. This allegation fails.

104. In November or December 2022 in response to complaints that she raised with Michael Eaves she was offered a settlement agreement to terminate her employment

There is no dispute that the respondent offered a settlement agreement to terminate the claimant's employment in the context that the claimant was

unsatisfied with her role on her return to work and she did not believe that she was a director. The claimant accepted under cross examination the reason why a settlement agreement was offered was because she fell out with Mr Aves. The Tribunal determined that this was the real reason for the offer of the settlement agreement, and this had nothing whatsoever to do with the claimant's sex. This allegation fails.

105. Dismissing her

The Tribunal deals more extensively with the dismissal of the claimant set out below. However, the Tribunal does not find that the reason for the treatment was anything to do with the claimant's sex. At the time of the claimant's dismissal on or about 8 March 2023, the parties had negotiated a settlement agreement for the claimant's employment to end on 8 March 2023. The termination date was agreed as 8 March 2023 and the respondent determined that as the claimant had not withdrawn that date as the end of her intended date of departure, (despite the settlement agreement not being enforceable) her employment consequently ended on that date. The Tribunal finds that was legally incorrect for the reasons it sets out below. The Tribunal determined that the respondent considered in any event that the claimant was likely to be in breach of her terms and conditions of employment as contained in the employee handbook by taking steps to set up a competitive business and that the claimant had failed to mention this to Mr. Aves at the material time. Further the claimant had taken preparatory steps to set up a business in competition with the respondent from 15 October 2022 when she was still a director; this was a potential breach of her director duties and in breach of the employee's handbook clause b other employment namely "you are expected to devote the whole of your time and attention during working hours to our business. If you propose taking up employment with an employer or pursuing separate business interests or any similar venture you must disclose the proposal with the director in order to establish the likely impact of these activities on both yourself, and the company" (page 105). This dismissal had nothing whatsoever to do with the claimant's sex.

106. Harassment related to sex

The claimant relies upon the same factual allegations for the harassment claim as the direct sex discrimination complaints. The Tribunal refers to its findings of fact on the direct claim of sex discrimination; the Tribunal having not found any of the allegations established on the facts, rejects the claimant's contention that was she was subject to harassment related to sex.

Time

107. In the circumstances, that all of the complaints of direct discrimination and harassment related to sex have failed the Tribunal does not deem it necessary to consider the issue of time.

Dismissal

108. The Tribunal finds that the claimant was dismissed by the respondent. The parties agree that the claimant's employment ended on 8 March 2023. The Tribunal finds that the claimant did not resign at any time. The parties entered into a settlement agreement with the intention of the claimant leaving the business on 8 March 2023. However, the settlement agreement was never concluded and is not enforceable (as agreed by both parties) because the respondent did not pay the settlement sum to the claimant, suspended the claimant and sought to investigate a potential breach of gross misconduct by reason of the claimant's activities of setting up a competitive business and failing to inform the respondent about it. The respondent informed the claimant it would not be paying the settlement sum. Instead, the respondent chose to wait until 8 of March 2023 relying upon the intended date of departure in a non-enforceable settlement agreement and sought to argue before the Tribunal that this was a mutually agreed termination and/or resignation because the claimant did not withdraw her intended date of leaving the company set out in the settlement agreement.

109. The Tribunal rejects the respondent's assertion that there was a mutually agreed termination of the employment relationship; or that there was a resignation; that was an error of law. The claimant did not resign. With the settlement agreement which contained the end date of the claimant's employment (there was no separate resignation of the claimant) not being put into effect, it meant that consequently the claimant remained an employee. The grievance chair in the course of the grievance hearing was somewhat perplexed as to the claimant's situation stating at page 362 "it looks as though you're still an employee because no dismissal has taken place". On 6 March 2023 (page 308), the claimant communicated to the respondent that she was now fit stating *"I'm now feeling fit better and fit for work so you should no longer consider me off sick"*. The respondent ignored this and failed to conclude the disciplinary process. The claimant had been suspended on 13 February 2023 by letter dated page 267 to 268. It stated in the letter during *"the suspension you must refrain from attending the workplace whether during or outside of normal working hours unless it has been specifically requested by the company or otherwise authorised in advance."* The claimant waited to hear from the respondent.

110. The Tribunal determined in all of the circumstances including there was no express resignation by the claimant; the intended date of departure from employment of 8 March 2023 contained in a settlement agreement which was now ineffective could not be relied upon as a mutually agreed termination or a resignation, the claimant was dismissed by the respondent. In effect the claimant's employment was terminated by the respondent on or about 8 March 2023 and it failed to provide the claimant with an admissible reason for her dismissal at the material time, relying instead incorrectly on a view that there was a mutually agreed termination.

111. The respondent says that the claimant did not withdraw the notice set out in the settlement agreement, so her employment ended. The Tribunal finds

that is a deficient analysis and an error of law. The termination date contained in a non-enforceable settlement agreement is not an agreed termination date if the agreement is not concluded. The claimant was dismissed and at the material time the respondent did not have an admissible reason to dismiss the claimant. Consequently, the dismissal on 8 March 2023 is unfair. The respondent seeks to argue that there was some other substantial reason for the dismissal. The Tribunal notes that this is a wide category but nevertheless it simply was not in the mind of the respondent at the time; it relied upon the fact the end date was contained in the settlement agreement and the claimant did not withdraw it.

Polkey

112. However, the Tribunal finds that had a fair process been adopted in the circumstances this respondent could have summarily dismissed the claimant fairly by reason of gross misconduct. In breach of the claimant's employment contract from mid-October 2022 she did take steps to set up a competitive business and failed in accordance with her contractual terms and conditions to discuss this with Mr. Aves. This was also at a time when she was a director of the business and there was a potential breach of her fiduciary duties owed to the respondent. If the disciplinary process had been finalised the Tribunal determines that the respondent would have dismissed the claimant summarily for the reason of gross misconduct and done so fairly within 4 weeks of 8 March 2023.

113. These findings lead the Tribunal to the conclusion that the claimant is entitled to a basic award by reason of an unfair dismissal and a compensatory award limited to four weeks only.

Contributory Fault

114. However, the Tribunal determines that the claimant contributed to her dismissal pursuant to section 123 of the Employment Rights Act 1996 because the claimant took preparatory steps to set up a competitive business from 15 October 2022 and registered a competitive company on 9 January 2023. This was a breach of an express term of the employee handbook and the claimant's terms and conditions because the claimant failed to inform the respondent. The claimant was required to disclose that to her employer. The Tribunal determines the claimant was guilty of blameworthy conduct which contributed to the termination of her employment. The Tribunal determined it was just and equitable to make a deduction from the compensatory award of 50% and considers it is just and equitable in these circumstances that the claimants basic award also be reduced by 50% to £3,692.32.

ACAS uplift

115. On the basis that there was a failure to hold a proper disciplinary procedure once the claimant had informed the respondent that she was fit and well on 6 March 2023 the Tribunal determines it is just and equitable that there should be an ACAS uplift of 20%. A failure to hold a disciplinary hearing is a significant breach of the ACAS code concerning disciplinary processes.

Remedy

116. The Tribunal notes that four weeks net pay and four weeks pensions contributions totals £1540.24. The claimant also was working on her business during that 4 week period but received no income in that period. The Tribunal increased that total by 20% to take account of the ACAS uplift and then reduces it by 50% for contributory fault.

Calculation

117. The claimant is awarded a basic award of £3,692.32 (including deductions). The claimant is awarded a compensatory award of £924.15 (four weeks net wage and pension loss and including ACAS uplift and deduction for contributory fault). The total monetary award payable to the claimant for unfair dismissal is £4,616.47.

118. The claimant was in receipt of benefits. The prescribed element is £924.15. The period of the prescribed element is from 9 March 2023 to 2 August 2024.The difference between the total award and prescribed element is £3,692.32.

Employment Judge Wedderspoon

12 August 2024

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