EMPLOYMENT TRIBUNALS

Claimant: **Mrs. H Selkin**

Respondent: **Opico Limited**

Heard at: **Nottingham (and hybrid by way of CVP)**

On: **29th November 2024 (Reading time)**
2nd, 3rd, 4th, 5th & 6th December 2024
9th December 2024 (In Chambers)

Before: **Employment Judge Heap**

Members: **Ms. D Newton**
Mr. Z Sher

Representatives

Claimant: **Mr. R Wayman – Counsel**
Respondent: **Mr. J Munro - Solicitor**

RESERVED JUDGMENT

1. The Claimant's complaints of harassment contrary to Section 26(1) Equality Act 2010 succeed in part to the extent set out below. The remainder of the complaints fail and are dismissed.

2. The Claimant's complaints of direct sex discrimination fail and are dismissed.

3. The complaints victimisation fail and are dismissed.

4. The complaint of unfair dismissal is well founded and succeeds.

5. The complaint of wrongful dismissal is well founded and succeeds.

6. A provisional Remedy hearing having been listed for 7th March 2025 that hearing will remain in the list.

REASONS

BACKGROUND AND THE ISSUES

1. This is a claim brought by Mrs. Helen Selkin (hereinafter "The Claimant") against her now former employer, Opico Limited (hereinafter "The Respondent").

2. The claim was presented by way of a Claim Form received by the Tribunal on 12th May 2023 following a period of early conciliation via ACAS which took place between 4th and 13th April 2023. The claim is one of harassment contrary to Section 26(1) Equality Act 2010 related to the protected characteristic of sex, direct sex discrimination and victimisation contrary to Sections 13 and 27 Equality Act 2010 and for unfair and wrongful dismissal.

3. The Respondent denies the claims in their entirety, either on the basis that the facts as set out were said not to have occurred and/or not to have occurred in the way that the Claimant contends that they did or, otherwise, that the Claimant was not harassed, discriminated against or victimised in respect of any of the matters of which she complains. The Respondent further contends that the Claimant was fairly dismissed by reason of her conduct and/or as a result of a breakdown in trust and confidence which they say amounts to some other substantial reason justifying the termination of her employment. Whilst it is accepted that the Claimant's employment was terminated without notice, it is contended that the Respondent was entitled to do so on the basis that the Claimant had committed acts of gross misconduct.

4. The claim came before Employment Judge Adkinson for a Preliminary hearing which took place on 4th August 2023. At that hearing the issues were identified albeit with the caveat that the Claimant was to provide additional information by way of further and better particulars of some aspects of the claim. That information was subsequently provided by the Claimant. There was no final list of issues created by either party but we have taken what was recorded in the Orders of Employment Judge Adkinson and that further information provided by the Claimant as being the issues that we were required to determine.

5. However, we did raise with Mr. Wayman at the outset of the hearing that one of the protected acts relied on by the Claimant for the purposes of the victimisation claim was so vague that it would not appear to be possible for us to make findings of fact about it. That was on the basis that the Claimant could not identify the date or even vague date when she said that she had raised issues with Mr. Woolway of the Respondent and no detail was provided either in the further and better particulars or the Claimant's witness statement of what she was supposed to have said. Mr. Wayman candidly accepted that this would be an issue and the conversations alleged to have taken place by the Claimant essentially became a matter of background.

THE HEARING

6. The hearing of this matter was listed for a period of eight days between 29th November 2024 and 10th December 2024. The evidence concluded late morning on 5th December 2024. The parties had the remainder of that day as we had previously agreed to prepare outline written submissions. Those were supplemented by oral submissions which took place the following day. Thereafter, we began our deliberations in private.

7. At the close of submissions we indicated to the parties that we intended to reserve our decision because there were a number of findings of fact that we needed to make and a number of complaints that we thereafter needed to determine. We were not certain that we would be able to conclude our deliberations in good time to deliver an ex tempore decision on 10th December 2024 which was to be the final day of hearing time and we did not wish to put the parties to the time and cost of attendance, even remotely, if it transpired that we would have been unable to do so. Delivering our decision orally would also not have concluded the hearing within the time allocated as there would have been insufficient time allowed to go on and determine remedy if appropriate. We had in that regard determined that we would not hear any evidence in relation to the matter of remedy until such time as we had determined liability on the basis that remedy would invariably turn upon which complaints, if any, succeeded at this hearing. In order to save delay in the event that the claim did succeed in whole or in part with the agreement of the parties we provisionally listed a further day of hearing time for a Remedy hearing which would be vacated if the claim failed.

8. We concluded our deliberations on 9th December 2024 and the final day whilst not used as a hearing day was used for the Judge to begin preparation of this Judgment. Unfortunately, the Judgment took longer than the Judge had anticipated to be finalised as a result of other cases, other judicial business, periods of leave and some unexpected personal circumstances which could not have been foreseen. The Judge apologises to the parties for the delay and appreciate their patience in having awaited the Judgment.

Witnesses

9. Upon commencement of the evidence we heard from the Claimant in person and on her own behalf and on behalf of the Respondent we heard from the following:-

    (i) James Woolway - the Managing Director of the Respondent to these proceedings against whom a number of complaints of harassment were made and who took the ultimate decision to dismiss the Claimant;

    (ii) Charles Bedforth – the Respondent's former Sales Director against whom the Claimant makes a number of complaints of harassment;

    (iii) Mikey Vernall – the Respondent's Full Stack Developer who raised a grievance about the Claimant which eventually resulted in the termination of her employment;

    (iv) Emily Mason – an Accounts Manager for the Respondent; and

    (v) Taryn Cochran – the personal assistant and Human Resources ("HR") Executive to Mr. Woolway.

10. We say a word about our assessment of the credibility of each of those witnesses below.

11. We should observe that although the hearing proceeded as an attended hearing at the Nottingham hearing centre, the Respondent applied for Ms. Mason to give her evidence remotely via CVP. The Claimant did not object. For our part we were content to agree to that application as Ms. Mason would have had to have

travelled some distance to attend in person and her evidence was it was agreed at the outset likely to be very brief.

12. During the course of the hearing Mr. Munroe made reference to a number of videos which he wished to play during the course of the Claimant's evidence. Those videos had been sent by the Claimant to Mr. Bedforth. Those had not previously been disclosed as they should have been. We considered that they would need to be seen by the Claimant before she gave her evidence and they were viewed accordingly. It was raised by the Claimant that there were a number of other messages from Mr. Bedforth to her that had also not been disclosed at any stage. After taking instructions from Mr. Woolway and Ms. Cochran we were told by Mr. Munroe that Mr. Bedforth had deleted all the messages after he left the Respondent and so there was nothing else that could have been disclosed.

13. Mr. Bedforth was asked about that by the Tribunal during his evidence and that transpired to be incorrect. He had not deleted the messages and it appears that in all likelihood he has never been asked for them as should have been the case under the Respondent's disclosure obligations. As we shall come to below, it appears to us that the Respondent has not taken those obligations seriously.

CREDIBILITY

14. We turn now to our assessment of the credibility of the witnesses from whom we have heard, given that this has invariably informed our findings of fact in a case where there are a number of disputes as to events and, in some instances, where we are not assisted by way of the existence of any documentary evidence to support one side or the other.

15. We begin with our assessment of the Claimant. We considered her to be a credible witness and one whose account was rooted in truth. The Claimant has throughout been entirely consistent in the account that she has given in respect of the issues of which she complains. That has been the case throughout the disciplinary process, appeal process, in her witness statement and in her account before us.

16. We turn then to the evidence called on behalf of the Respondent. We considered Mr. Woolway to be generally a credible witness who was giving a truthful account but we did not consider him to be giving the full or correct picture in relation to certain matters which caused a difficulty for the Respondent. Particularly, we did not consider him to be giving an accurate account about having considered alternative options to dismissing the Claimant. That was not reflected anywhere other than in Mr. Woolway's oral evidence. It was not in his witness statement, in the letter dismissing the Claimant nor in any other document which was before us. We say more about that below.

17. We were also concerned about what we were told – which we understood to be on instruction from Mr. Woolway – by Mr. Munroe about disclosure. We were told when the Tribunal enquired about the above referenced messages between the Claimant and Mr. Bedforth that the instructions that had been given were that those messages had been deleted. When Mr. Bedforth gave evidence it transpired that that was wholly inaccurate. It simply appeared that he had never been asked for them. The position of the Respondent was that they had not realised that they would be required but they have at all times been legally represented. It appears to us that it would be inherently unlikely that the Respondent would rely entirely on the guidance of Peninsula in respect of the disciplinary and appeal hearings for the Claimant but not for the Employment

Tribunal proceedings. As a result of this and other issues which we come to below we were far from satisfied that the Respondent took their disclosure obligations seriously.

18. We considered Mr. Bedforth to be a credible witness who was giving us an honest account. Whilst he lacked insight in relation to a number of his actions which he saw no issue with that is in our view in keeping with his "old school" mindset rather than any attempt to give a misleading account.

19. We considered Mr. Vernall to be overall a credible witness but one whose stance in relation to the Claimant and what he understood that he had seen and heard to be skewered by an antipathy towards her arising largely from an earlier incident in which she had called him a misogynist and at which he had clearly taken offence. Whilst we believed that he was seeking to give us an honest account, ultimately that has to be considered against that background and that he was unable to provide impartial and objective evidence.

20. We considered Ms. Cochrane to on the whole be a truthful witness although there were some elements of her evidence which concerned us. We did not consider her to be candid in respect of the amount of involvement that she had in the early stages of an investigation into the Claimant and it was clear that she was not simply there as was suggested in the role of a note taker. We come to the reasons for that later. We also found her evasive in relation to questions that she was asked about instructions that she had given to Peninsula and like Mr. Vernall, it was clear that there was antipathy towards the Claimant from Ms. Cochrane which again caused issue as to the objectivity of her evidence. Therefore, whilst we accepted her evidence generally, we were left with doubts in relation to some aspects.

21. There was also a further issue in relation to disclosure which arose in respect of Ms. Cochrane and which cast doubt on the credibility of parts of her evidence in respect of notes that she said that she had made on her mobile telephone on 6th March 2023 about a conversation with the Claimant in the kitchen. Those had not been disclosed and clearly they should have. Ms. Cochrane's position was that the notes did not need to be disclosed because they were on her personal mobile phone. That was either a fundamental misunderstanding about disclosure obligations or the fact that the notes did not exist. Similarly, no handwritten notes of interviews that had been undertaken prior to the Claimant's suspension had been disclosed with only typed versions being available. As we shall come to there were inaccuracies in the typed notes regarding a meeting with the Claimant such that we were unable to be sure that the others were accurate.

22. We deal finally with the evidence of Emily Mason. There was ultimately very little that she was able to add and it was not entirely clear why she was called as a witness when other more relevant individuals such as the people dealing with the disciplinary and appeal hearings were not. We should observe, however, that Ms. Mason did fail to make what would have been a sensible concession that certain messages to which she was taken could be seen as being sexist in nature. We were unable to ascertain whether that was her genuine view feeding in from the culture of the Respondent (to which we come further below) or in essence towing the party line being in a difficult position giving evidence on behalf of the Respondent in the presence of Mr. Woolway. However, that does not particularly matter for the purposes of the findings that we have to make.

THE LAW

23. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be below.

24. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 26, 27 and 39.

25. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

> *(1) An employer (A) must not discriminate against a person (B)—*
>
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
>
> *(b)as to the terms on which A offers B employment;*
>
> *(c)by not offering B employment.*
>
> *(2)An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a)as to B's terms of employment;*
>
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c)by dismissing B;*
>
> *(d)by subjecting B to any other detriment.*
>
> *(3)An employer (A) must not victimise a person (B)—*
>
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
>
> *(b)as to the terms on which A offers B employment;*
>
> *(c)by not offering B employment.*
>
> *(4)An employer (A) must not victimise an employee of A's (B)—*
>
> *(a)as to B's terms of employment;*
>
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*
>
> *(c)by dismissing B;*
>
> *(d)by subjecting B to any other detriment.*
>
> *(5)A duty to make reasonable adjustments applies to an employer.*
>
> *(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—*
>
> *(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or*

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Direct Discrimination

26. Section 13 EqA 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".

27. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

28. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

29. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

30. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246:**

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to

whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

31. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious, but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**).

Harassment

32. Harassment is dealt with by way of the provisions of Section 26 EqA 2010, which provide as follows:

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a)the perception of B;

(b)the other circumstances of the case;

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

33. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant. However, in respect of a complaint of harassment, the word "relate" has a broad meaning (see for example paragraph 7.10 of the EHRC Code).

34. As restated by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:

a) What was the conduct in question?

b) Was it unwanted?

c) Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?

d) Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?

e) Was the conduct related to the protected characteristic relied upon?

Victimisation

35. Section 27 EqA 2010 provides that:

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

(a)B does a protected act, or

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

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

(a)bringing proceedings under this Act;

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

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

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

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

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

67. In dealing with a complaint of victimisation under Section 27 EqA 2010, Tribunal will need to consider whether:

(i) The alleged victimisation arose in any of the prohibited circumstances covered by Section 39(3) and/or Section 39(4) EqA 2010 (which are set out above);
(ii) If so, was the Claimant subjected to a detriment;
(iii) If so, was the Claimant subjected to that detriment because he or she had done a protected act.

68. In respect of the question of whether an individual has been subjected to a detriment, the Tribunal will need to consider the guidance provided by the EHRC Code (as referred to further below) and the question of whether the treatment complained of might be reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment (paragraphs 9.8 and 9.9 of the EHRC Code).

69. If detriment is established, then in order for a complaint to succeed, that detriment must also have been "because of" the protected act relied upon. The question for the Tribunal will be what motivated the employer to subject the employee to any detriment found. That motivation need not be explicit, nor even conscious, and subconscious motivation will be sufficient to satisfy the "because of" test.

70. A complainant need not show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a "significant influence" on the employer's decision making (**Nagarajan v London Regional Transport 1999 ICR 877**). If in relation to any particular decision, the protected act is not a material influence of factor – and thus is only a trivial influence - it will not satisfy the "significant influence" test (**Villalba v Merrill Lynch & Co Inc & Ors 2007 ICR 469**).

71. In any claim of victimisation, the Tribunal must be satisfied that the persons whom the complainant contends discriminated against him or her contrary to Section 27 EqA 2010 knew that he or she had performed a protected act (**Nagarajan v London Regional Transport [1999] ICR 877**). As per **South London Healthcare NHS Trust v Al-Rubeyi (2010) UKEAT/0269/09** and **Deer v Walford & Anor EAT 0283/10**, there will be no victimisation made out where there was no knowledge by the alleged discriminators that the complaint relied upon as a protected act was a complaint of discrimination.

Section 212(1) Equality Act 2010

72. Section 212 Equality Act deals with the general interpretation of relevant parts of the Act and includes the fact that detriment (in the sense of direct discrimination and victimisation) does not include conduct which amounts to harassment.

The EHRC Code

73. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Time limits in discrimination claims

74. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a)the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b)such other period as the employment tribunal thinks just and equitable.*
>
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a)the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b)such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> *(a)conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b)failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a)when P does an act inconsistent with doing it, or*
>
> *(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

75. Therefore, Section 123 provides that proceedings must be brought *"within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".*

76. For the purpose of those provisions, conduct which extends over a period is to be treated as done at the end of that period and the failure to do something is to be treated as occurring when the person in question decided upon it. Therefore, in the event of conduct which extends over a period, time will not begin to run until the last act done in that period. The appropriate test for a "continuing" act" is whether the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (**Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**).

77. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is "just and equitable" to allow time to be extended and the complaint to proceed out of time.

78. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and should have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).

79. In considering whether to exercise their discretion, a Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

80. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. However, the burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

Unfair Dismissal

81. Section 94 Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

82. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's conduct. If it is disputed then the burden is upon the employer to satisfy the Tribunal on that question and they must be satisfied that the reason advanced by the employer for dismissal is the reason asserted by them; that it is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the dismissal of the employee. A reason for dismissal should be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

83. It is therefore for the employer to satisfy the Tribunal as to the reason for dismissal. If they are not able to do so, then a finding of unfair dismissal will follow.

84. If an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

85. The all-important question of fairness is contained with Section 98(4) ERA 1996 which provides as follows:

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was redundancy) *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

86. The burden is no longer upon the employer alone to establish that the requirements of Section 98(4) are fulfilled in respect of the dismissal. That is now a neutral burden.

87. In conduct cases, a Tribunal is required to look at whether the employer carried out a reasonable investigation from which they were able to form a reasonable belief, on reasonable grounds, as to the employee's guilt in the misconduct complained of (**British Home Stores v Burchell [1980] ICR, 303 EAT**).

88. An Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges the employer's processes and decision making by the yardstick of the reasonable employer and can only say that a dismissal was unfair if either falls outside the range of reasonable responses open to the reasonable employer.

89. Many employees will be able to point to something the employer could have done differently, or indeed better, but that is not the test. The question for the Tribunal is whether the employer acted within the range of reasonable responses open to it or, turning that question around, could it be said that no reasonable employer would have done as this employer did?

90. Relevant to the fairness of a dismissal is also whether the employer followed the ACAS Code of Practice on Grievance and Disciplinary Procedures ("The ACAS Code").

Wrongful dismissal

91. An employer is obliged to give to an employee the requisite notice that they are entitled to in order to bring the employment relationship to an end. That is either the minimum statutory notice to which they are entitled under Section 86 Employment Rights Act 1996 or, if it is greater, the notice of termination of employment to which they are entitled under a contract of employment or statement of initial employment particulars.

92. If the employer fails to give the employee such notice then they are in breach of contract and the Tribunal is seized with jurisdiction to consider such a complaint

under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

93. The obligation to give notice does not arise where the employer is entitled to terminate the contract of employment summarily on account of the conduct of the employee where that conduct amounts to gross misconduct.

FINDINGS OF FACT

94. The parties should note that we have limited our findings of fact to those which are strictly necessary for the determination of the remaining complaints before us. We have not therefore made a finding of fact in relation to each and every event where there is dispute between the parties where that is neither necessary nor relevant to the matters which we are tasked with determining.

95. The parties should be assured, however, that we have considered all of the documentation and witness evidence before us; all that each of the witnesses have had to say and all that both representatives have represented to us during the course of the hearing and by way of their oral and written submissions. Whilst we may not have commented on all that we have seen and heard the parties can be assured that we have nevertheless taken it into account.

96. Where we have referred to the "bundle" below that is a reference to the main hearing bundle. We also had a supplemental bundle which we have referred to where necessary, as we did at the hearing, as the "further bundle".

The Respondent

97. The Respondent is a distributor of agricultural machinery based in the Lincolnshire area.

98. At the material time with which we are concerned the Respondent had three directors. James Woolway was and is the owner and managing director, Charles Bedforth was the Sales Director and Angus Steven was also a director. Mr. Bedforth has since left employment with the Respondent for personal reasons which are entirely unconnected to this claim.

99. The industry in which the Respondent operates is by and large a male dominated one and we accept the Claimant's evidence that most of the female members of staff employed by the Respondent are engaged in largely administrative functions.

100. The Claimant contends that there is a sexist culture at the Respondent which begins with Mr. Woolway and extends downwards. We do not accept that the entire culture was one of sexism, but it was certainly not one of progression.

101. Both Mr. Woolway and Mr. Bedforth – who have respectively described each other as "traditional" and "old school" – demonstrated little insight in respect of both their actions which we shall come to below and during their evidence as to how "traditional views" may not be acceptable in the world which we now live in. Tradition is on occasion to be applauded but not at the expense of progression and inclusion and unfortunately some conduct which was not only tolerated at the Respondent fell into the latter category.

Disciplinary policy

102. The Respondent had a disciplinary policy although no one appeared to be particularly familiar with it and instead reliance was placed on Peninsula who the Respondent engaged to provide human resources ("HR") and employment law advice. Although Ms. Cochrane had a title which included HR activities in reality she had no particular experience in that regard and relied on Peninsula and followed what they said to the letter and without question.

103. However, the disciplinary procedure provided that dismissal would only occur after either a second episode of serious misconduct or a first offence of gross misconduct (see page 84 of the hearing bundle). The procedure set out that dismissal for gross misconduct would be rare and provided for a non-exhaustive list of what might constitute gross misconduct. That included theft, physical violence, deliberate acts of unlawful discrimination or harassment, breach of health and safety rules and being under the influence of drugs or alcohol. We do not accept that Mr. Woolway at any point referred to that policy during the disciplinary process that led to the Claimant's dismissal and rejection of a subsequent appeal.

Commencement of the Claimant's employment

104. The Claimant was employed by the Respondent as a Marketing Manager. She commenced employment on 25th April 2017 following a successful interview with Mr. Woolway. There is no question that the Claimant was very good at her job and was respected in that regard by Mr. Woolway. The position was a management one and the Claimant was one of the only female managers with the Respondent.

105. There had been some issues that had arisen for the Respondent in respect of what might best be described as the Claimant's interpersonal skills with colleagues. One of those issues resulted in the Claimant being issued with what was referred to as a letter of concern on 1st September 2021 (see page 97 of the bundle).

106. A second issue arose in November 2022 with a member of staff who reported to the Claimant. There came to be conflicting reports over what had happened and whether the Claimant had caused that employee to be in tears. Although part of Ms. Cochrane's role involves HR, she candidly accepted that her experience is such that in all but the most straightforward of matters advice is sought from Peninsula, a legal consultancy with whom the Respondent has a monthly retainer.

107. Ms. Cochrane spoke to Peninsula about the issue that had arisen and sent a note of the advice received to Mr. Woolway afterwards at his request. The note does not portray much of a neutral view of the Claimant from Ms. Cochrane which may well be indicative of the fact that, as Ms. Cochrane candidly admitted in her evidence, they did not enjoy a good working relationship. The note is a lengthy one and we do not set it out in full but it is worth setting out the main opening paragraph upon which the Claimant places reliance as evidencing an intention to exit her from the Respondent. That paragraph said this:

> *"With regard to my conversation with Peninsula earlier, Peninsula suggest that with all the information we have we can definitely go down the verbal warning route and build on that if nothing changes. The other option they suggested was a settlement but I told them that you wanted to give Helen a chance to change her ways rather than parting company at this stage".*

108. We accept that the idea of settlement did not come from Mr. Woolway as Mr. Wayman contends. It is clear from the note that that was something suggested by Peninsula and it was equally clear that that was not what Mr. Woolway wanted and so there was no reason for him to have raised it for consideration.

109. The remainder of the note set out the options that Mr. Woolway had on the basis of the advice from Peninsula. That ranged from commencing disciplinary proceedings to issuing a further letter of concern to taking no further action.

110. Ultimately, Mr. Woolway determined that he would not take any further action in respect of this issue because he had conflicting accounts. That was the most favourable option insofar as the Claimant's position was concerned.

111. We do not accept as is alleged on behalf of the Claimant that by November 2022 at the latest Mr. Woolway had any intention to seek to exit her from the Respondent business. Whilst Mr. Wayman submits that it would be strange for Peninsula to begin talking about a settlement agreement as that was a leap from a potential verbal warning, as we have already touched upon above the email is clear that that suggestion did come from Peninsula and that Mr. Woolway's position was that he did not wish to part company with the Claimant. The fact that Mr. Woolway did not want to take that step is evidenced by his position that she was a very good Marketing Manager that he did not want to lose and the fact that he chose to take no further action at all on this occasion. If he had been seeking an exit strategy for the Claimant, then it appears to us that he would have commenced disciplinary proceedings with a view to giving a verbal warning to "build on that" in the future.

112. Although we make no findings about what had occurred on those occasions and whether the letter of concern or ponderances as to a verbal warning were justified, we have observed for ourselves during the hearing and particularly cross examination that the Claimant has a strong and forceful personality and such matters can, we know from our own experiences, cause clashes within the workplace. That is particularly the case with less confident or self assured members of staff. That is not intended as a criticism of the Claimant and there was nothing before us to suggest any wider problem than the two isolated instances referred to by the Respondent before the events that led to her dismissal.

113. There had also been some earlier what might be described as niggles in respect of the Claimant's employment. That had included issues that the Claimant had raised about someone vaping in the office which led to something of an email show down between herself and Mr. Woolway (see page 107 of the hearing bundle), working from home and personal mobile phone use (see pages 114 and 115 of the hearing bundle). Those matters were noted to Ms. Cochrane but we do not see them as being indicative of an intention to exit the Claimant from the business.

Witches comment

114. In or around December 2020 a comment was made by Mr. Woolway which we accept was directed towards the Claimant and another member of staff, Jess. At that time Jess worked with the Claimant in the marketing department.

115. There is a dispute as to whether the reference to witches arose orally or by email. We prefer the Claimant's evidence that it was made by email. That email has not been disclosed and whilst we were told by the Respondent that it did not exist, we are far from confident that that was correct given the other issues as to

disclosure where we were told one thing when it turned out that that was not correct at all. The Claimant's evidence has been consistent throughout that this was an email and we accept that position.

116. The comment arose in the context of some involvement that the marketing department had had about either creative or marketing issues. The comment was directed by Mr. Woolway to Glenn Bootman and was clearly about what he perceived as the Claimant and Jess meddling. His email, which was copied to the Claimant and Jess, said this:

"Glenn – just leave the Witches to stirring the cauldron and given them the ingredients they need."

117. We are entirely unsurprised that the Claimant found the comment offensive. It was wholly inappropriate.

118. We did not accept the evidence of Mr. Woolway that this had somehow arisen as he set out at page 260 of the hearing bundle that this arose following a discussion about technical matters and Mr. Bootman making a reference to it all being "smoke and mirrors" and "black magic" to him. We prefer the Claimant's consistent evidence that he called her a Witch.

119. We also accept the Claimant's evidence that she raised this with Mr. Woolway during her appraisal and that she told him that she did not appreciate his comment referring to herself as a witch and neither did Jess. Mr. Woolway apologised and said that he did not mean anything by it. We find it more likely than not that there was no intention to cause offence because of a lack of awareness on Mr. Woolway's part that what does not offend him could not offend anyone else. That is also indicative of the way in which he dealt with a WhatsApp message that offended the Claimant which we come to further below.

120. We should observe that the Respondent refutes that the Claimant raised this issue during her appraisal and relies on the fact that this did not appear in the outcome letter from that meeting. However, it would not in our experience be usual to raise such an issue in an appraisal outcome which is all about goals, targets and previous performance and it is again notable that the actual notes of the appraisal taken during the course of it have not been disclosed.

<u>Shopping for a dress comment</u>

121. We accept the evidence of the Claimant over that of Mr. Woolway about this incident. In that regard in Spring 2021 there was a discussion between the Claimant and Mr. Woolway about a new exhibition show trailer. The discussion occurred in front of two other male colleagues. We accept the Claimant's evidence that when discussing costs Mr. Woolway said to her *"As long as you don't spend too much, you're not shopping for a dress."*

122. Whilst Mr. Woolway may well have thought that he was being amusing to his wider audience, the comment was again highly inappropriate and we can see why the Claimant was offended by it. It was another example of Mr. Woolway's "traditional" views. We accept the Claimant's evidence that she told Mr. Woolway that she found the comment offensive. Her evidence before us was that the words that she used when raising this with Mr. Woolway was that it "was a bit much to talk about shopping for a dress and I'm not sure that that's really appropriate". The Claimant said that she may have said that she was offended by it but she could not recall. We accept however that even if the Claimant did not expressly say that that she was nevertheless offended.

123. Mr. Woolway again apologised but did not appear to gain insight from these incidents that the sort of comments that he was making were inappropriate and could cause offence. We are surprised that the Claimant found this type of comment concerning with it coming only months after the "Witches" comment and apology.

124. Mr. Woolway did not deny that he made a comment about shopping for dresses (see page 260 of the hearing bundle) albeit his position was that it arose in the context of discussions about advertising costs. His position was that the position in relation to the advertising was not like going out to buy dresses and because an expensive one had not been bought there could be justification for buying two cheaper ones. Whilst we have accepted the Claimant's evidence on this point even had we preferred the account of Mr. Woolway it is still inappropriate and offensive providing a stereotypical view that all that women are interested in is shopping and clothes. Again, it is demonstrative of a lack of a progressive views on Mr. Woolway's part which is particularly concerning given his position as Managing Director. That type of comment to a female subordinate in a management position in front of male colleagues was demeaning.

Complaint about the WhatsApp message

125. During the Covid-19 pandemic staff at the Respondent had set up a WhatsApp group. That was a not uncommon occurrence during the pandemic in order to keep in touch given that many people were working from home. The group was open to all employees of the Respondent who were referred to as the "Opico family".

126. On 12th January 2022 one of the Respondent's employees, Mr. Sherwin, posted a video on the Opico family group WhatsApp. The WhatsApp message was of a homemade disc which had two options of how to spend the day. One was spending time with family and the other was "going shooting". The only way in which the disc could land was on "going shooting".

127. Mr. Woolway had replied to the message with a winking face emoji. It was obvious from that that he was effectively endorsing it.

128. The Claimant emailed Mr. Woolway the following day with a copy of the video and Mr. Woolway's response. As she relies in that message as a protected act it is worth setting it out in full. The message said this:

> *"Morning James*
>
> *I'm sorry but I really don't think this is for the Opico family. I find it sexist and to be honest it makes me really cross that this is acceptable on a group whatsapp* (sic). *It is very much a boys club joke. I could go on. I was tempted to comment on the Whatsapp* (sic) *but decided against it. We were talking about anxiety and this certainly triggered mine*".

129. Mr. Woolway did not reply to the Claimant. Instead, he forwarded the message to Ms. Cochran with the following comment:

> *"Been pondering this.*
>
> *I really don't see an issue with it. Jen[1] was sent it before Christmas by a friend who knew she was a shooting wife and she showed it to me and laughed.*
>
> *I am not sexist and would laugh just as much if it was a joke about a girls Spa day's (and spending time with husbands). It is obviously tongue in cheek and not reality but I don't want to stir things up so I felt it better to just not answer.*
>
> *If I bow to this sort of thing I will not be me!"*

130. We find the sort of words used such as referring to "shooting wife" and "girls" to be reflective of Mr. Woolway's "traditional" views and it is concerning that he could not consider from the Claimant's perspective how she might have been offended or to at least acknowledge that.

131. We accept that it is likely that at other times the Claimant probably raised issues with Mr. Woolway about things that concerned her culturally within the Respondent. Ms. Cochrane accepted in her evidence that the Claimant had made comments to her and we find it more likely than not that if she had done so she would also have raised the matters with Mr. Woolway. However, we can make no specific findings about that or about what was said because the Claimant was not able to give details about such matters. We accept Mr. Woolway's evidence that the only times that he could recall any issues being raised were the ones which we have referred to above.

<u>WhatsApp messages between the Claimant and Mr. Bedforth</u>

132. Mr. Bedforth was at the time of the Claimant's employment the Respondent's Sales Director. He and the Claimant had a good working relationship and were on friendly terms. During the course of the Claimant's employment they sent a number of WhatsApp messages to one another. Those were sent to and from the Claimant's personal mobile phone.

133. Mr. Bedforth has similar "traditional" views to Mr. Woolway and did not give thought to whether the sorts of messages that he was sending to a work colleague were appropriate but we accept that he intended no malice by them and did not have reason to believe that the Claimant was offended by what he was sending.

134. The messages included the following:

(a) On a date sometime prior to 15th October 2020 picture of an overweight woman alongside a scantily clad slimmer woman with the following narrative:

> *"This is Katie, her boyfriend Tom left her when her weight ballooned to 19 stone. Heartbroken and distraught, she embarked on a strict, vegan, nettle based diet and started an intense 12 month, 7 days a week work-out programme which did precisely fuck all.*

[1] Jen is Mr. Woolway's wife.

On the right is Tom's new bird".

The Claimant did not as far as we can see reply to that message.

(b) On a date that we cannot ascertain from the extracts that we have a long message about a fictitious motor merger between Renault Clio and Ford Taurus to create a "Clitaurus". The message went on to refer to the vehicle being a "real bitch" to start in the mornings, that new models were fun to own but costly to maintain and horribly expensive to get rid of, used models having an increased appetite for fuel and curb weight increasing with age and that it is best to lease one and replace it when it becomes "troublesome".

As far as we can see the Claimant did not reply to that message.

(c) On 30th October 2020 a message with the narrative "*If at the end of this second lock down you could choose between a foreign holiday with your wife or pints & steaks with the lads what would be your choice*". There then followed a poll with the only options being for how steak can be cooked.

The Claimant replied to that to say that she could hear Mr. Bedforth "laughing from here". Had the Claimant found the message offensive then we are satisfied that she would have said so rather than commenting as she did.

(d) On 8th January 2021 photograph of a woman stood on some scales with the narrative *"Are you aware that you have posted your vagina on the internet"*. Apparently, it would appear that there was a reflection in that regard onto the scales.

As far as we can see the Claimant did not reply to that message.

(e) On 23rd October 2021 a video of a man apparently asking what was for dinner whilst in the foreground was a woman with a bottle of wine.

We have not seen that video. As far as we can tell the Claimant did not reply to that message.

135. As we have already observed, the entirety of the messages between the Claimant and Mr. Bedforth were not disclosed. Some of the messages were videos and having obtained those during the course of the hearing we viewed them, including ones sent by the Claimant. Those included the following:

(a) A video sent on a date that we cannot ascertain of a fictional character, Sir Les Patterson, being interviewed on a talk show during which he recounted a "joke" which clearly paid reference to a misunderstanding between his wife and a chemist regarding her vagina and a small dog about some hair removal cream;

(b) An audio clip sent on a date that we cannot ascertain concerning two women on what is referred to as a girl's night out urinating on the way home. One is said to have used a wreath as rudimentary toilet paper and their husbands speaking the next day indicating that one wife had returned home with "a card in her crack saying from all of us at the fire station we'll never forget you";

(c) A video clip sent on a date which we cannot ascertain of two men discussing women's golf and that they were "desperate at driving but good with an iron";

(d) A video clip on 2nd February 2021 with a man referring to people becoming In Laws upon marriage with the final part when revealed that his wife upon marriage becomes "The Law". Mr. Bedforth had replied to that with the comment "clearly he is a wimp" and a laughing face emoji.

136. There were a number of other messages within the bundle that were sent by the Claimant to Mr. Bedforth which included the following:

(a) On 13th November 2020 a picture of a naked man and woman with reversed genitalia with the caption "*The first Covid-19 vaccine seems to be working well*";

(b) On 1st December 2020 a message suggesting that a woman could not understand the temperature sign on a car dashboard;

(c) On 12th January 2021 a message about "Women's Arse Size"; and

(d) On 14th January 2021 a message about "Why men shouldn't write advice columns".

137. We do not accept the Claimant's position that those messages were not sexist in nature and were humorous. In reality there was little to no distinction between what was being sent between the pair of them.

138. The Claimant made no complaint about the messages sent by Mr. Bedforth to himself or anyone else at the Respondent until the later disciplinary process came about when we are satisfied that by that stage they had taken on a new significance because she was being accused of harassment.

139. We do not accept that she was offended by the messages because if she had been she would have raised that given her nature and the fact that she had raised other matters previously including the "Opico Family WhatsApp" and she would not have replied to Mr. Bedforth, including sending her own "jokes" in return. The Claimant's position in the further and better particulars produced for this claim was that she was in effect constantly complaining to Mr. Woolway about sexism but with no detail as to dates and occasions. If she was offended in any way by Mr. Bedforth's messages then in view of that position we find that she would clearly have complained or at the very least asked Mr. Bedforth to stop but she did neither. As we shall come to below, on occasions when she did taken offence to something that Mr. Bedforth had said or done then she was quick to call him out about that and we find that she would have done the same with any messages that she considered to be offensive.

<u>Comments at the Pre-LAMMA show dinner on 16th January 2023</u>

140. As we understand it, LAMMA is a trade show which the Respondent was to attend. On the night prior to the show beginning the Claimant and others including Mr. Bedforth attended a dinner. Two incidents occurred during this event. The first was an issue which was not covered at all in Mr. Bedforth's witness statement. We accept the Claimant's evidence that in respect of this first incident Mr. Bedforth made a reference to a Tweet which had been put on social media regarding the Duchess of Sussex and which referenced a scene in Game of Thrones. Mr. Bedforth had opined that the Tweet was not in his view

offensive. We accept that the Claimant had replied that she considered the Tweet to be both sexist and racist and that it was a dreadful thing to say. We accept that Mr. Bedforth had replied along the lines that the Claimant just did not understand the Game of Thrones reference. We find it more likely than not that Mr. Bedforth did make such comments on the basis of his lack of awareness of what might well be considered by others in the current day and age to be offensive. We do not consider that he meant anything offensive by it but this was again a lack of understanding and being of a clumsy and "old school" mindset. We accept that the Claimant was offended by the comment and of course she made that plain to Mr. Bedforth.

141. The second thing that happened at the dinner was that Mr. Bedforth made what he considered to be a joke to the Claimant about an employee of a client of the Respondent. It is not disputed that Mr. Bedforth said to the Claimant about this employee when he came into dinner *"look Helen your boyfriend's arrived aren't you going to go over and say hello*." We accept that this was not the first time that Mr. Bedforth had made such references about the individual in question.

142. Mr. Bedforth's evidence was that the Claimant had previously made a comment about that individual being "dishy" and that this something of a joke between them. It was not put to the Claimant in cross examination that she had said that and we do not accept that she did nor that this was part of a "playful" exchange of which the Claimant was part. It was an unwanted comment which we accept offended the Claimant.

143. We accept the Claimant's evidence that she did not consider bringing a claim about these things or the other acts that are said to be harassment at the time because that was not conducive to a good working relationship and she was enjoying her job and did not want to put it in jeopardy. However, her dismissal for alleged harassment effectively put matters in a new light.

Comments about the death of parents

144. In February 2023 Mr. Woolway's mother sadly passed away and her funeral took place on 1st March 2023. There was a discussion between the Claimant and Mr. Bedforth as to how the funeral had gone. As part of that conversation Mr. Bedforth made an unsolicited comment to the Claimant about the death of her father by reference that her parents had "died in the right order". The meaning behind that was that the Claimant's mother would be able to look after herself whereas Mr. Woolway's father would not because his late wife had done all the cooking and looking after him. The comment is not disputed. We consider it a feature of Mr. Bedforth's "old school" views and whilst we accept that he did not intend to cause any offence, we accept that the Claimant did find it upsetting and sexist.

145. It was suggested on behalf of the Respondent that the Claimant had agreed with the comment made or that it was part of a wider conversation about the death of parents. We do not accept that and it was not put to the Claimant in cross examination. We accept that she was offended.

The events of 6th and 7th March 2023

146. On 6th March 2023 the Claimant was in the kitchen alongside a Mr. Bell and Ms. Cochrane. We accept the Claimant's evidence that a conversation had begun regarding some assistance that she had offered in respect of her daughter's school project on philosophy and ethics.

147. The topics of conversation at that time had been as follows:

(a) A way to reduce overpopulation was for men to have compulsory vasectomies that could only be reversed when they were emotionally and financially ready to have a child because that would prevent unplanned pregnancies;

(b) That men needed a woman to have a baby but the reverse was not the case;

(c) That men should pay more tax to compensate women who have taken career breaks to have children; and

(d) That some men and women work harder than others.

148. From the evidence before us, conversations or debates of this nature were not uncommon at the Respondent and were not limited to interactions involving the Claimant. We accept – and it does not appear to be disputed – that the conversation arose from the school project and we do not find that the Claimant was seeking to force her own views on others at any point.

149. Ms. Cochrane's evidence was that she had made notes of the conversation with the Claimant in the kitchen on her mobile telephone in the event that they were needed for any follow up discussions. Those notes were not disclosed. It was clear that Ms. Cochrane did not understand, nor does it appear to have been explained to her, what the Respondent's disclosure obligations were because even though she told us that those notes were made on her personal phone they were clearly disclosable via a screenshot. It appeared to us for reasons relating to those notes, handwritten notes of meetings to which we have already referred and the failure to disclose all relevant communications between the Claimant and Mr. Bedforth that disclosure obligations were taken less than seriously by the Respondent.

150. On 7th March 2023 a further conversation took place along the above lines. That was in Mr. Bell's office. We accept the Claimant's evidence that that was not instigated by her and that it simply followed on from what had been said in the kitchen the day before when she entered the office. Mr. Vernall's evidence was that he had walked past Mr. Bell's office and heard the conversation and had then continued to pass by to hear what was being said. It is clear that Mr. Vernall could not have known on that basis who started the conversation or what the context was and we prefer the Claimant's evidence about what happened.

151. Mr. Vernall had had a previous issue with the Claimant during which he said that she had called him a misogynist. It was clear from Mr. Vernall's evidence before us that he did not think highly of the Claimant and we are satisfied that he would have been inclined to think the worst of her and that and the limited observation that he was able to have as to the interaction in the office on 7th March 2023 led him to draw the negative views that he did.

Notice board

152. The Claimant had a notice board within her office. She had a number of things pinned on that board many of which were work related and some which were personal. One was a print out of a "Tweet" which had been posted (not by the Claimant) in response to the decision of the United States Supreme Court in Roe v Wade. The Tweet said this:

"Stop abortion at the source.

Vasectomies are reversible.

Make every young man have one.

When he is deemed financially & emotionally fit to be a father it will be reversed. What's that? Did the idea of regulating a man's body make you uncomfortable?"

153. We accept the Claimant's evidence that she had had the print out on her notice board for some time but discussions about her daughter's project had reminded her about it so she brought it to prominence as a reminder for her as she considered it interesting. When Mr. Woolway later instructed her to take it down she did so.

154. We accept that the print out was not advocating forced male vasectomies as the Respondent – and Mr. Vernall particularly – appeared to think. It was an opinion of someone else posted on social media about the Roe v Wade decision and the implications that that had for women being able to regulate their bodies in respect of abortion.

The complaint from Mikey Vernall

155. On 7th March 2023 Mr. Vernall contacted Ms. Cochrane by telephone to make a complaint against the Claimant arising from what he believed that he had overheard on that day. Ms. Cochrane was travelling back from a work event with Mr. Woolway and notified him of what Mr. Vernall had said.

156. They determined between them that Ms. Cochrane would speak with Mr. Vernall when they arrived back at the office. Mr. Woolway did not sit in on that meeting because he was busy with other matters but it was reported to him by Ms. Cochrane afterwards. The notes prepared by Ms. Cochrane are at page 135 of the hearing bundle. As we have already referred to above we did not have the handwritten notes and cannot be sure that the typed version is accurate. Mr. Vernall reported Ms. Cochrane that the Claimant had opined that men should have forced vasectomies that could only be reversed with the approval of a woman; that only superior men could have a gene pool and that they would go to a sperm bank and choose from that superior pool and that women should pay less taxes because they have harder lives. He complained of the Claimant being loud and defensive and of one of the attendees, Gwyn Evans, being uncomfortable. Ms. Cochrane was told that those present alongside the Claimant were Gwyn Evans, Alex Bell and Glenn Bootman.

157. Ms. Cochrane's evidence was that she believed following receipt of the report that what Mr. Vernall had reported was correct because of her own experiences in the kitchen the day before. It was clear that as Ms. Cochrane was a potential witness she should not have been investigating the complaint and that was all the more so given that we accept that she had a fixed mind from the outset that the Claimant was guilty of what Mr. Vernall had complained of. That view was

also likely reinforced by the fact that by her own admission she did not have a positive view of or good working relationship with the Claimant.

158. The way in which the interviews were conducted was indicative of that closed mind and an intention to gather accounts which supported what Mr. Vernall had complained about. Mr. Ball was interviewed on the same day. This interview was with Mr. Woolway taking the lead and Ms. Cochrane having the role as note taker although as we shall come to she strayed from that and became involved in comments or questions and seeking to impose her own views.

159. Mr. Bell reported – or at least the typed notes record that he did - substantially the same issues as Mr. Vernall had and that the Claimant had instigated a conversation about forced male vasectomies that could only be reversed on approval by a woman and that men should pay more tax than women. Mr. Woolway asked Mr. Ball if he thought the Claimant had been joking and after receipt of Mr. Ball's answer indicated that "It's obviously not a joking scenario then". That conclusion was reached before any further investigation had taken place and before the Claimant had even been spoken to about the matter. Ms. Cochrane became involved more than once about the situation and asked leading questions such as whether the Claimant had snapped at Mr. Bell and raised her own experiences in respect of what had occurred the day before in the kitchen.

160. Glenn Bootman was also interviewed by Mr. Woolway and Ms. Cochrane, again on the same date. This meeting was also not dealt with in an impartial way. Mr Bootman was asked about the conversation and had replied that it "goes over your head, all of it". That was thought not to be sufficient for Mr. Woolway who pressed Mr. Bootman that it was a proper conversation, that there had been a formal complaint, that two people were upset by it and that he was required to say what had been said. Mr. Bootman gave an account of the conversation which is consistent with what the Claimant says was said in that if men had a vasectomy there would not be unwanted pregnancies and that they could be reversed later. He referred to it as being "banter"; that it had not been aimed at anyone and that it was a two way conversation (see page 131 of the hearing bundle).

161. Despite that being his view, Mr. Woolway pressed that it was "obviously aimed at males wasn't it". Similarly, when Mr. Bootman opined that it was not intended with any malice he was effectively challenged by Ms. Cochrane if he felt that it was 100% fine and a joke. She similarly challenged Mr. Bootman whether he thought forcing males to have vasectomies was normal office banter and appropriate. It was clear that Mr. Woolway and Ms. Cochrane had accepted the version of events of Mr. Vernall – indeed the Claimant was not even asked for her account – and were pressing Mr. Bootman to agree.

162. Mr. Bootman also denied that what the Claimant had done was inappropriate and sexist or that voices had been raised when there was a contrary point of view. He was also pressed on that view by Mr. Woolway.

163. Mr. Woolway had also reached a conclusion before even speaking with the Claimant that voices had been raised. When Mr. Bootman indicated that he did not think that that was true he was pressed as to whether the Claimant was defensive and loud. He confirmed that she was not and that it had all been banter. Ms. Cochrane then reinforced her view of matters seemingly in a way to get Mr. Bootman to agree with her by replying "You think forcing men to have vasectomies is normal office banter. You think it's appropriate". It was clear that

the interviews were not conducted from a neutral point of view but on the basis that Mr. Vernall's complaint was already made out.

164. Mr. Bootman agreed that a comment had been made about sperm banks and a woman selecting sperm but said that he had not heard any comment being made about taxes.

165. Gwyn Evans was not interviewed and as we shall come to later that was on the basis that Ms. Cochrane thought that he was scared of the Claimant and might influence his account. It is clear that no evidence was sought which might therefore be supportive of the Claimant.

166. As we have already observed, it was clear to us that Mr. Vernall did not hold positive views of the Claimant and took issue with a matter that she had previously raised about him. It was not considered by the Respondent whether that history may have impacted on what Mr. Vernall thought that he had heard and be pre-disposed to think ill of the Claimant.

167. The Claimant was also spoken to on 7th March 2023. The Respondent's notes of the meeting appear at page 133 of the hearing bundle. They are disputed by the Claimant and her own version appears at page 147. Again, the original handwritten notes have not been disclosed. The main point of contention is a paragraph where the Claimant says that she though forced male vasectomies were a "very good idea". We accept her evidence that she did not say that and that chimes with her evidence that she did not believe that everyone should have autonomy over their bodies. The Respondent's notes were not written in a partisan way. They referred to opinion that the Claimant was smiling and laughing but if she was then we accept her evidence that that was because she was blindsided and was not told properly what she was actually being accused of. The notes also contain further interactions with the Claimant after the meeting which are written in equally skewed terms referring to matters such as unspecified people saying that the Claimant was making "snide comments".

168. We observe again that the original handwritten notes of Ms. Cochrane had not been disclosed. They clearly should have and again this is a further example of the Respondent not properly complying with their disclosure obligations.

169. Despite having sufficient detail to set out precisely what the allegations made by Mr. Vernall were because he had told Ms. Cochrane that and they had been able to be shared with Mr. Bootman, they were not shared with the Claimant. That made it extremely difficult for the Claimant to properly respond because she did not know exactly what the allegations against her were. Matters appeared to be left that the Claimant would take down the poster in her office and she would have been entitled to think that things were not going to be taken any further.

170. Ms. Cochrane emailed Mr. Vernall later that day to tell him that she had opened a case with Peninsula. In response he replied with the further details of his complaint which were along the lines of the verbal account that he had given to Ms. Cochrane. That was also followed up with a further email the following day giving his views about the Claimant and what a "good outcome" would be for him. He also referenced that the Claimant had torn down the poster from her board and said that it was pathetic.

The grievance against the Claimant

171. On 8th March 2023 Mr. Vernall emailed Ms. Cochrane raising a formal grievance about the events of 7th March 2023. We accept that that was a turning point insofar as how the matter would proceed was concerned. That was because the previous day matters had been left that the Claimant would take down the poster and nothing more was said about the matter until the grievance was raised. That is also supported by the fact that at a later suspension meeting which we shall come to below, Mr. Woolway specifically referred to matters having moved on. That could only be a reference to the grievance because nothing else had happened.

172. Mr. Vernall's grievance, which was sent to Ms. Cochrane and his line manager, said as follows:

"I would like to submit a Grievance against Helen (I have cc'ed Hugh, my manager, into this email)

I overheard this conversation from my office which I just down the corridor. I also walked passed (sic) the office a few times.

Helen quite publicly in Alex and Gwyn's office was talking about how in her view all Men should be forced to have a sterilisation (Vasectomy) and only a woman is allowed to have a man's vasectomy reversed with her permission and only selected men can add sperm to a sperm bank where all women can pick from and how women should pass less Tax than men. She said making men have a vasectomy would stop abortion from the source.

When a counter view was given by Alex, Helen started getting very defensive and aggressive saying "that's different" and "men need women, women don't need men". It was also very clear when I walked past, Gwyn was very uncomfortable. Alex also asked for the conversation to end on multiple occasions.

Helen also has a poster on her wall with these views. When Helen was asked to remove the poster from her office, she physically ripped the poster off the board and was mumbling. I did not hear all the words except for "Pathetic".

Helen talked about these views on 07/03/2023 and 06/03/2023 with different office staff.

I am deeply offended and feel uncomfortable someone can say such things so publicly for an extended period. Helen has said she thinks her comments are a good idea and she believes them. I feel Helen's Misandrist behaviour is grossly unacceptable I don't feel comfortable working in the same environment with a person with such extreme views".

173. The grievance went on to list a number of people who it was said had heard the comments. Despite the fact that the complaint raised by Mr. Vernall was termed as a grievance it was not investigated as such and as we shall come to below the Respondent instead moved to deal with it under their disciplinary process.

Process after the grievance and suspension of the Claimant

174. On 13th March 2023 Mr. Woolway and Ms. Cochrane held a meeting with the Claimant at which she was suspended. As we have already observed, reference was made to things having moved on and we are satisfied that that reference was to Mr. Vernall having raised a grievance. Indeed, that was the next thing referred to by Mr. Woolway when he told the Claimant that the Respondent had received a grievance about her having used discriminatory language.

175. The Claimant understandably asked to see the complaint that had been made. That was refused with the Claimant being told that she would be sent a letter with full details of the complaint. She was not provided with any details at that stage and was not told who had made the complaint. She understandably would not have known that that was Mr. Vernall because she had no idea that he had been standing outside listening to the conversation on 7th March 2023. The Claimant made plain that she had apologised to Mr. Bell but had been told that he had not made the complaint and had also spoken to both Mr. Bootman and Gwyn Evanswho had no issues. Mr. Woolway refused to tell the Claimant anything further about the complaint other than it was about the use of discriminatory language. That was despite the fact that they had sufficient information from what had been said by Mr. Vernall to give the Claimant specifics of what she was being suspended for.

176. The Claimant was told that Peninsula would be involved and that the Respondent would be in touch with her by letter.

177. At the meeting the Claimant was given a letter which had been drafted by Peninsula confirming her suspension. That letter set out no more details than had been given at the meeting and left the Claimant no wiser as to what the basis of the allegations against her actually were (see page 140 and 141 of the haring bundle).

Disciplinary process

178. Despite the fact that the Claimant had been told that the decision to suspend her had been taken so as to investigate the allegations against her, the very next day she received a letter inviting her to a disciplinary hearing. No further investigation had been undertaken between the suspension and the Claimant being sent that letter. That was despite the fact that Mr. Vernall's own grievance listed that one other witness to his complaint other that those already interviewed was a member of staff called Kate who shared an office with the Claimant. She was not interviewed on the decision of Ms. Cochrane on the basis that she thought that Kate had not been present.

179. Again, Peninsula had drafted the letter. Surprisingly, the disciplinary hearing was set for only two days after the date of the letter.

180. The following allegations against the Claimant were set out:

"It is alleged that you have caused the company to lose faith in your integrity namely, it is alleged you have displayed a form of discrimination or harassment, as defined by the Equality Act 2010. Further particulars being but not limited to:

(a) It is alleged that during a conversation with other members of staff you stated that when men should be born, they should have a forced vasectomy. The only way they can have the vasectomy reversed is if a woman approves it.

(b) It is alleged that during this conversation you stated only superior men are allowed to have a gene pool. They can go to a sperm bank and women can pick from these selected people.

(c) It is further alleged that you stated Women should pay less taxes because they have harder lives.

(d) It is alleged that you had a poster of an inappropriate nature relating to human reproduction and the male sex displayed in your office."

181. Enclosed were the notes that Ms. Cochrane had made in meetings with the Claimant, Mr. Ball, Mr. Bootman, and Mr. Vernall along with what was termed as a picture of an "inappropriate poster", the suspension letter and the employee handbook. Mr. Vernall's grievance was not included.

182. The letter set out that the disciplinary hearing would be conducted by a member of the Peninsula Face2Face team and it made plain that an outcome of the hearing may be dismissal for gross misconduct.

183. The Claimant asked for a postponement of the hearing to enable her to arrange for someone to attend with her which was understandable given the short notice that she had been given of the meeting. Mr. Woolway agreed to postpone the hearing for one day but made plain that no further postponements would be granted (see page 144 of the hearing bundle). We would observe that that gave the Claimant very little time to prepare and that was particularly the case given that before receipt of the letter inviting her to the disciplinary hearing the Claimant had not even known properly what the allegations against her actually were.

The disciplinary hearing

184. The disciplinary hearing went ahead on 17th March 2023. It was chaired by Anna-Lisa DeVoil of Peninsula. Neither Mr. Woolway nor Ms. Cochrane were present. We should observe that surprisingly the Respondent did not call Ms. DeVoil as a witness in these proceedings. Whilst reliance was placed on her report which we shall come to in due course, we were not able to address with her the decision making which led to her recommendations or the steps that she took in the process.

185. The Claimant wrote a long letter following the disciplinary hearing taking place in which she made the following points:

(i) That she had not known that her initial meeting was anything other than information nor that it was being recorded and taken as a formal statement and that she did not agree it was an accurate record;

(ii) That Ms. Cochrane had not been impartial in her role as a note taker and had involved herself in conversations;

(iii) That Tom Brookes and Gwyn Evans who had also been part of the conversation had not been interviewed;

(iv) That she had been told that the suspension was to investigate the allegations but all of the interviews had taken place before that point;

(v) That she had not been listened to or questioned properly at the meeting with Mr. Woolway;

(vi) That there had been no attempt to investigate Mr. Vernall's account and that it appeared that it had been accepted;

(vii) That leading questions had been asked during the interviews; and

(viii) That the investigation and process had not been dealt with in accordance with ACAS guidelines.

186. Despite the fact that the meeting with Ms. DeVoil had been termed as a disciplinary hearing she did in fact conduct further investigation meetings with all of the original people who had been interviewed along with Tom Brookes who had also been present on 7th March 2023 and Gwyn Evans. Despite Kate having been mentioned by both the Claimant and Mr. Vernall as a potential witness she was still not interviewed. We have not heard from Ms. DeVoil to determine why she conducted additional interviews and determined not to interview Kate.

187. During the meeting with Mr. Bell he gave an opinion that the Claimant had been expressing her own beliefs during the conversations on 6th and 7th March 2023. He accepted that the poster on the Claimant's notice board might have been there for some time and that he had not previously noticed it until the discussions took place. Mr. Bell indicated that could not recall how the conversation on 7th March had started but that it may have been an off the cuff remark from the Claimant and that it had come up a few times over the day. He described the Claimant as being a bit "riled" and that he might have asked her to stop or said "that's enough" a few times.

188. Relevant to the allegations that led to the Claimant's dismissal, Mr. Bell said that the comments were about males having vasectomies at birth and them being reversed later. He said that he could not recall what was stated about how they would be reversed and made no comment that this was only with a woman's permission as was the position in Mr. Vernall's grievance. That was contrary to what the typed notes of the meeting that he had with Mr. Woolway and Ms. Cochrane had said.

189. He also stated that there was a discussion about sperm being frozen and that superior sperm could be selected and that men were not needed in society anymore. Mr. Bell raised that the issue about tax was mentioned but only briefly and that the context of him having asked the Claimant to stop or that was "enough" was in respect of the fact that there was a lot of work to be done and he was trying to utilise the skills of Mr. Bootman while he had him in the office. He made it plain that the context was not that the Claimant had come into the office saying that they were her beliefs (although he later opined that they were her beliefs), he could not recall how the conversation had started and that it might have been because of a discussion about homework. He also accepted that the conversation might have already been in train when the Claimant entered the office and that may have been from a comment that he had made to Mr. Bootman.

190. Mr. Bell stated that a comment had been made back to the Claimant about a woman having her tubes tied and that being reversed which he said that she had responded to by saying that that was not the same.

191. Mr. Bell did not express that he felt harassed or offended by the conversation. The most that he got to that was saying that he felt that it was a "bit much" (see page 156 of the hearing bundle) and that he had had enough of what was going on. He also did not dispute the Claimant's position that this what had been said was all part of a debate and the throwing around of ideas (see page 158 of the

haring bundle) and that a number of people had been involved. He referred to the conversation being quite loud and that people would have been able to overhear it.

192. Ms. DeVoil also had a meeting with Glenn Bootman on 20th March 2023. Mr. Bootman could not recall how the conversation on 7th March had started or who started it but that there had been a discussion about vasectomies and reversible vasectomies. He referred to it as an open discussion and a debate with various things having been discussed such as the rights and wrongs and alternatives. He also referred to it having likely occurred from a conversation that had been had previously about homework.

193. When asked about the demeanour of those involved Mr. Bootman referred to it as being a "casual debate", that no one was standing out as it being their true thoughts and that there were no raised voices (see page 163 of the hearing bundle). He referred to himself, the Claimant and Mr. Brookes as being the most involved with involvement from Mr. Bell as well and the Claimant being the most vocal.

194. Mr. Bootman was asked if anyone appeared to be uncomfortable and he replied in the negative, that it was a "low key debate" and no one had appeared upset, concerned or bothered. He did not recall Mr. Bell seeking to take any steps to close the conversation down. He was also asked if the Claimant had presented matters as her own beliefs and he replied not and again referred to matters as being a debate. When asked he did not recall anything being said about women paying less tax than men and he denied that the Claimant had a "problem" with the male gender.

195. When asked about the circumstances of reversal of a vasectomy Mr. Bootman referred to that being when the man was financially stable and in a position to settle down. He did not recall anything about that only being if a woman approves it. He also did no recall the poster being displayed on the Claimant's wall.

196. Gwyn Evans was also interviewed on the same day. Mr. Evans was a direct report to the Claimant. He did not give any indication that he was in any way afraid of the Claimant and was in fact complementary as to her line management style. He recalled a conversation about male vasectomies but indicated that he was very busy and did not recall much because he was working hard. He could not be sure when asked but thought that it was the Claimant who had started the conversation.

197. Mr. Evans was asked if he felt uncomfortable with the conversation. He replied that he did not give it a second thought because he was busy working. He referred to it being not a normal conversation to have in the workplace but that it was a "conversation, nonetheless". He did not recall the length of time that the "poster" had been on display but did not consider that it was likely to be very long. He did not recall any conversation about sperm banks or increased taxes. He was clear that he did not hear anything about a woman only being able to authorise a reversed vasectomy (see page 174 of the hearing bundle).

198. Ms DeVoil also interviewed Mr. Vernall. He described the Claimant as having from the start of her employment made comments of the nature that he complained about. He made reference to the Claimant being a "man hater" and that she aggressively defended her beliefs when someone attempted to put forward a contrary argument. It was clear that he did not know how the conversation had started but that there had been reference to the Claimant's

daughters school presentation. He referred to the conversation as being 45 minutes long or more and that he had spent time in between taking calls and dealing with IT issues but had walked past Mr. Bell's office three or four times. As to what he recalled about forced vasectomies he read that account straight from his grievance.

199. Contrary to Mr. Evans' account he referred to him and others looking uncomfortable. Mr. Vernall also gave an opposing account to Mr. Evans and Mr. Bootman that it was not a conversation or debate, it was the Claimant saying what should happen or that it was a good idea.

200. He referred to having made notes when he overheard Mr. Bell telling the Claimant to stop multiple times. Those notes have not been disclosed either.

201. Mr. Vernall also referenced the poster and that he had reported it. It was clear to us both from his comments and also from his evidence before us in response to questions from Mrs. Newton that he did not understand the extract from the social media post and that it was in the context of the Roe v Wade case.

202. Again, contrary to the accounts that anyone else had given Mr. Vernall maintained that he was certain that the Claimant had said that only a woman could decide when the vasectomy was reversible. Mr. Vernall was the only one that gave that account other than what it was said that Mr. Bell had said in the typed notes of his initial interview with Mr. Woolway and Ms. Cochrane. As we have already observed we cannot say that those notes were accurate ones and we have not heard evidence from Mr. Bell.

203. Mr. Vernall confirmed that he had heard comment about sperm banks and taxes and that he was certain that all such matters were the Claimant's beliefs. He referred on a number of occasions to the Claimant being "anti-men".

204. He also referred to Mr. Evans as being scared of the Claimant. That was of course a view of Ms. Cochrane. It was not a view shared by Mr. Evans as we have already touched upon above.

205. Mr. Vernall also indicated that if the Claimant returned to work then he could no longer work at the Respondent and that he would take them to a Tribunal. He referenced a previous incident where the Claimant had called him a misogynist regarding a comment that he had made about a dishwasher and that he had made complaints about her in the past. Insofar as the dishwasher comment was concerned Ms. DeVoil confirmed that she was aware of that but because it was some time ago it was not something that she would necessarily look into. Clearly, it did not cross her mind that Mr. Vernall did not hold the Claimant in high regards, clearly took issue that she had called him a misogynist and was now calling her the exact same in terms of being a misandrist and anti-man.

206. Curiously, Ms. DeVoil also made a comment that she would take into account what he had said about how he was feeling about the situation and his future plans after he made a second comment about taking the Respondent to a Tribunal if the Claimant returned to work. That was not relevant to whether the Claimant was "guilty" on the balance of probabilities of the allegations that had been levelled against her.

207. Ms. DeVoil also met with Ms. Cochrane. She could not of course assist with what had actually happened on 7th March 2023 because she had been out of the office at a conference with Mr. Woolway at the time. She did, however, recount comments that it was said were made by the Claimant in the kitchen the day

previously about her daughter's project about overpopulation where she had used an idea that she had had about vasectomies being performed at birth and only reversed if approved by a woman and that men should pay more tax because women have harder lives. She referred to Mr. Bell having looked unhappy about the conversation and having similarly being unhappy the following day after she had received the initial complaint from Mr. Vernall and returned to the office. Like Mr. Vernall, Ms. Cochrane also referred to the Claimant as having a reputation as a "man hater". She also referred to not having interviewed Gywn Evans because it would be a "waste of time" because he was "shit scared" of the Claimant. Much of the account of Ms. Cochrane was consistent with that of Mr. Vernall when others were not.

208. The final interview conducted by Ms. DeVoil was with Tom Brookes. He described having only been in Mr. Bell's office on 7th March 2023 for a maximum of two minutes during which he had mostly been on his phone. He did not recall any conversation of the type that had been complained about and that everyone's mood had been "fine".

The disciplinary outcome report

209. Ms. DeVoil produced a report with her findings and recommendations to the Respondent on 28th March 2023. The report is a long one and we do not set it out in full. In relation to each of the allegations against the Claimant Ms. DeVoil reached the following conclusions:

> *"ALD finds that on the balance of probabilities, there is evidence to substantiate that on three occasions over the course of 6th and 7th March 2023, HS has imposed the idea of forced male vasectomies on her colleagues, and two of her male colleagues have taken offence, thereby meeting the criteria of unlawful harassment under the Equality Act 2010. As such, this is found to be Gross Misconduct".*
>
> *"ALD finds that on the balance of probabilities, there is evidence to substantiate that HS has imposed the idea of eugenics, or supreme gene pool and two of her male colleagues have taken offence, thereby meeting the criteria of unlawful harassment under the Equality Act 2010. As such, this is found to be Gross Misconduct."*
>
> *"ALD finds that on the balance of probabilities, there is evidence to substantiate that HS has imposed the idea of men paying more tax than women who have "harder lives" and two of her male colleagues have taken offence, thereby meeting the criteria of unlawful harassment under the Equality Act 2010. As such this is found to be Gross Misconduct".*
>
> *"ALD finds that on the balance of probabilities, there is evidence to substantiate that HS has imposed the idea of forced male vasectomies on her colleagues in the form of a poster, and two of her male colleagues have taken offence, thereby meeting the criteria of unlawful harassment under the Equality Act 2010. As such, this is found to be Gross Misconduct".*

210. We find those conclusions surprising. Firstly, only Mr. Vernall had actually complained about the Claimant. At most, Mr. Bell had indicated that he was frustrated because he was busy working. He at no time indicated to Ms. DeVoil that he had taken offence.

211. Other than Mr. Vernall who was only eavesdropping and not privy to the whole of the conversation, the context or how it started, there was no evidence that the Claimant had "imposed" any views. Mr. Bootman and Mr. Evans were clear that it was simply a conversation or debate and Mr. Bell could not be certain that he had not himself started it from a comment to Mr. Bootman. There was simply no evidence other than the assertion of Mr. Vernall who was not partisan that the Claimant had imposed any views or beliefs and we find it difficult to see how that conclusion was reached. We were not able to ask Ms. DeVoil about that because she was not of course called to give evidence.

212. The recommendations made by Ms. DeVoil said this:

> *"Having given full and thorough consideration to the information presented ALD recommends that HS is dismissed from their employment without notice.*
>
> *Occurrences of gross are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct.*
>
> *A copy of this report in its entirety should be made available to HS with the appropriate cover letter and report appendices.*
>
> *ALD is satisfied that the minutes produced are an accurate summary of he hearing and refers to these whilst making their findings and recommendations.*
>
> *It is a matter for the Employer to decide whether they wish to accept all or any of ALD recommendations.*
>
> *HS will have the right to appeal the decision that is made and this should be done in line with the existing Appeal policy".*

213. The recommendations of Ms. DeVoil did not engage with how she had concluded that the Claimant's alleged actions amounted to gross misconduct nor reference the relevant parts of the Respondent's disciplinary procedure. We find that surprising. It did also not engage with any other potential sanction other than dismissal for gross misconduct.

The termination of the Claimant's employment

214. Ms. Cochrane received the report from Peninsula and forwarded that to Mr. Woolway. Thereafter, he took the decision to dismiss the Claimant. We did not accept his evidence that he thoroughly reviewed the report and came to his own conclusions about whether or not the Claimant should be dismissed. We consider it more likely than not that he simply blithely accepted the recommendations of Ms. DeVoil without question as indeed the Respondent had done throughout the process.

215. We also did not accept the evidence of Mr. Woolway that he gave any consideration to any other sanction other than that proposed by Ms. DeVoil. There is certainly no evidence of that anywhere, no reference was made in the report suggesting that that could be and should be done and it did not chime with

the way in which the other matters were dealt with where the advice of Peninsula was simply followed without question. We accept in this regard the submission of Mr. Wayman that it is unusual that the issue about alternative sanctions was not referenced at all in Mr. Woolway's witness statement when it was clearly an important issue. We do not accept his evidence that he was not given any guidance about what should be contained in a witness statement or given any advice about that. It does not chime with the Respondent following entirely the advice from Peninsula in the disciplinary and appeal context but not for the final hearing.

216. No outcome meeting was held with the Claimant with Peninsula having advised Ms. Cochrane that the Claimant could be told of the decision to terminate her employment over the telephone.

217. Whilst we accept the evidence of Mr. Woolway and Ms. Cochrane that that was the advice given by Peninsula, it was curious advice. The Claimant had not by the point of her dismissal even seen the report produced by Ms. Devoil let alone had the opportunity to comment upon it. As she set out in her witness statement there were a number of inconsistencies and issues with the accounts given during the investigation which she should have been able to comment upon before any decision was taken.

218. Moreover, it was a cold way to treat an employee of almost six years to have merely had a telephone conversation with her rather than a face to face meeting to deliver what was clearly going to be bad news to the Claimant. Whilst Mr. Woolway told us that the Claimant was pushing to know the outcome of the hearing – something which would be natural given the circumstances – there was no reason why she could not have been sent the report for her consideration and a proper face to face meeting arranged to discuss it before any decision was taken.

219. We are not satisfied that Mr. Woolway did anything other than blindly accept the recommendations of Peninsula. Firstly, that was what was done throughout. Secondly, there is no evidence that Mr. Woolway gave any independent thought to the matter.

220. Mr. Woolway confirmed the Claimant's dismissal by letter dated 29th March 2023 (see page 248 of the hearing bundle). The dismissal letter said this:

> *"As you know we engaged a third-party consultant to conduct the disciplinary hearing on 17th March 2023. Please [find] their report attached.*
>
> *Having carefully considered the report of their findings and recommendations, it is my decision to follow the recommendations for the outcome to be a dismissal for Gross Misconduct. After reading through the report and the evidence submitted I feel that this is the only outcome that can be considered due to it being clear that your actions have caused harassment to other employees. Your actions have resulted in a fundamental breach of contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship.*
>
> *This will take effect immediately and you will not be entitled to any notice.*
>
> *You have the right to appeal against my decision, and should you wish to do so, you should write to me within 5 days of receiving this letter giving*

the full reasons why you believe the disciplinary action taken against you is too severe or inappropriate".

221. That letter was also drafted by Peninsula. We do not accept that it was reflective of what actually happened in terms of Mr. Woolway having considered the content of the report or given any independent thought to the sanction to be imposed.

Appeal against dismissal

222. As indicated above the Claimant was offered the right of appeal against her dismissal which she decided to exercise. The letter was again a long one and so we do not set it out in full here but it made the following points:

(a) She had not been asked for her account on either 7th or 13th March 2023;

(b) Her account had not been put to any witnesses because she had not been asked for it;

(c) Witnesses were only interviewed after they had had an opportunity to discuss their evidence;

(d) Mr. Vernall had not been privy to the whole conversation or the context and had only relied on selected snippets and in view of that it was not reasonable to consider her actions as harassment;

(e) She perceived that she had been victimised because of previous comments about sexist behaviour and Mr. Vernall's perception of her as a "man hater";

(f) A reasonable investigation had not been undertaken;

(g) That there was a conflict of evidence which had been resolved in favour of Mr. Vernall and Mr. Ball;

(h) The conclusion that what had been said amounted to harassment was an error of law;

(i) That the topic had only arisen because of conversation about a school project and on 7th March 2023 it had been ongoing before she had entered the office;

(j) That the poster had been on her noticeboard since June 2022 and was about the decision in Roe v Wade;

(k) That the was a culture of sexism at the Respondent for which she produced an annex relating to, amongst other things, the comments by Mr. Woolway and the WhatsApp messages; and

(l) No action had been taken about those matters and so it was outside the band of reasonable responses to have dismissed her.

223. The Claimant also made a subject access request within the same letter and attached as annexes evidence of the WhatsApp messages and the like that she relied upon.

224. The Respondent acknowledged receipt of the Claimant's appeal and again indicated that it would be dealt with by Peninsula Face2Face by way of a review of the original decision. An appeal hearing was scheduled for 14th April 2023 although it was rescheduled at the Claimant's request to 3rd May 2023 (see page 266 of the hearing bundle). That meeting took place and the Claimant carefully explained her grounds of appeal.

225. The Peninsula consultant who dealt with the Claimant's appeal was William Barry. As part of his dealing with the appeal he interviewed Mr. Woolway and Ms. Cochrane and also Emily Mason. He did not speak to Kate either despite her having been mentioned by both the Claimant and Mr. Vernall.

226. For reasons which we cannot understand Mr. Barry held a joint interview with Mr. Woolway and Ms. Cochrane. That was not helpful as it was clear that rather than them simply giving their own – as far as possible objective – account they were sparking off each other and the notes reflect that.

Appeal outcome

227. Mr. Barry produced an outcome report dated 11th May 2023 which was again sent to Ms. Cochrane who forwarded it to Mr. Woolway. Mr. Barry indicated that his view was that all points of the Claimant's appeal should be dismissed. Like Ms. DeVoil he made recommendations which were as follows:

> *"Having given full and thorough consideration to the information presented WBA recommends that HS's Disciplinary Appeal be dismissed in its entirety and that the original sanction of dismissal without notice be upheld.*
>
> *A copy of this report in its entirety should be made available to HS with the appropriate cover letter and report appendices.*
>
> *It is a matter for the Employer to decide whether they wish to accept all or any of WBA's recommendations.*
>
> *……*
>
> *HS has exercised their right of appeal and there is no further right of appeal on this matter".*

228. Like Ms. DeVoil the Respondent has not called Mr. Barry to give evidence at this hearing.

229. Mr. Woolway wrote to the Claimant with the appeal outcome on 18th May 2023 (see page 358 of the hearing bundle). The relevant parts of the outcome letter said this:

> *"Having carefully considered the report of their* (Peninsula Face2Face) *findings and recommendations, it is my decision that the Disciplinary Appeal is dismissed in its entirety.*
>
> *As outlined in the report, there was not enough evidence presented to overturn the original decision and the points that you outlined in your appeal could not be upheld given the lack of substance that was provided".*

230. We were not satisfied that Mr. Woolway did anything other than accept the recommendations of Mr. Barry as he did with Ms. DeVoil without any further independent consideration. We would also observe that Mr. Woolway had taken the decision to dismiss and also took the decision on appeal. There was another director of the Respondent who could have dealt with either of those stages to ensure some degree of independence and we also consider it inappropriate that part of the Claimant's appeal contained criticism of Mr. Woolway in connection with which he had given his own account disputing much of what the Claimant had said (see pages 260 to 263 of the hearing bundle) yet was still the final arbiter despite it being clear that he lacked independence and impartiality.

231. The Claimant subsequently issued the proceedings which are now before us for determination. She did that on 12th May 2023 following a period of early conciliation between 4th April and 13th April 2023.

CONCLUSIONS

232. Insofar as we have not already done so above, we now set out our conclusions in respect of the remaining complaints before us.

Unfair dismissal

233. We begin with consideration of the complaint of unfair dismissal. We are satisfied that the reason operating in the mind of the Respondent when dismissing was conduct.

234. However, that is not the end of the matter and we need to consider whether the Respondent conducted a reasonable investigation from which they were able to reasonably conclude that the Claimant had committed the misconduct which was alleged. We are not satisfied that they had.

235. In this regard, the information that the Respondent had was a conflicting account between the Claimant and Mr. Vernall. Having not heard from Ms. DeVoil we are unable to ascertain why she accepted the account of Mr. Vernall over that of the Claimant other than that is what had happened from the outset when the matter was reported to Ms. Cochrane. The Claimant was consistent in her account that this had been part of a debate following on from discussion about her daughter's school project. The Respondent through Ms. Cochrane knew that the school project was the context that the matter had been raised initially on 6th March 2023.

236. The Claimant had been present throughout, Mr. Vernall was not and he could not have known the context of the discussion or how it had arisen. He was essentially eavesdropping on a conversation that he was not a part of nor had it been intended that he should be part of. Whilst his account was to some degree supported by Alex Bell, Mr. Bell himself had raised no complaint about the conversation or the Claimant and importantly he gave no account that a woman needed to approve the reversal of a vasectomy. Whilst he had initially expressed irritation when asked about the discussion, that was a far cry from an allegation of harassment. He could also not say how the conversation had come about but that it may have already been in train when the Claimant entered the office. That accorded with the Claimant's account.

237. There was also evidence from other members of staff who were present that nothing of any consequence had occurred and which tended to support the account given by the Claimant and contradict the account given by Mr. Vernall.

Particularly, there was no supporting evidence that the Claimant had said that a vasectomy could only be reversed if a woman approved it nor that Mr. Evans had been uncomfortable as Mr. Vernall had claimed.

238. Nevertheless, those matters were not given any apparent weight by the Respondent and the position of Mr. Vernall was again simply accepted without question which was a dangerous step in view of his prior antipathy towards the Claimant.

239. We are satisfied that on the basis of the conflicting information which was to hand and which we have referred to here and in our findings of fact above, the Respondent did not have sufficient information to form a reasonable belief on reasonable grounds that the Claimant was guilty of the allegations against her. Aside from the account of Mr. Vernall, the evidence pointed squarely to there having been a debate – something which was not uncommon at the Respondent – in which the Claimant had been involved but had not necessarily started – and in which no one displayed any upset.

240. Given the information which was to hand we are also satisfied that the decision to dismiss also fell outside the band of reasonable responses.

241. Given that background we do not find that any reasonable employer would have dismissed the Claimant and her dismissal was accordingly unfair.

242. Moreover, there were also a number of procedural matters which fell firmly outside the band of reasonable responses which also rendered the dismissal unfair.

243. Firstly, it is clear that up until Mr. Vernall raised his grievance the intention was that the matter would be dealt with informally with the Claimant being spoken to and being asked to take down the poster, which she did. That was certainly the impression that the Claimant was given and we are not surprised that that is what she took away from the meeting with Mr. Woolway and Ms. Cochrane.

244. It was only Mr. Vernall's grievance that changed the landscape but that grievance said nothing more than Mr. Woolway already knew when he met with the Claimant and told her to take down the poster. Mr. Vernall's grievance was not investigated under the grievance process and instead the Respondent escalated that to a disciplinary process.

245. Secondly, the way in which Mr. Woolway and Ms. Cochrane dealt with their part of the inestigation was in now way impartial. It was clear that Ms. Cochrane was a potential witness having been party to the events of the discussion in the kitchen on 6th March 2023 and she should not have taken any part in the investigation. Moreover, she did not get on with the Claimant and it was clear that she accepted the account that Mr. Vernall gave without question. She was not in a position to conduct any neutral investigation nor did she do so. Notes that she took of meetings with the Claimant were also not indicative of any neutral stance.

246. Thirdly, neither Mr. Woolway nor Ms. Cochrane attempted to investigate independently. The questions that they asked in meetings were leading and clearly demonstrated an acceptance that what Mr. Vernall had reported was accurate. The Claimant was also left in the dark about what it was that she was supposed to have done and was not given specifics about that either on 7th or 13th March 2023 despite that being well within the Respondent's gift and they had

in fact been able to supply the very allegations that they refused to give to the Claimant to other people that were interviewed such as Mr. Bootman.

247. Fourthly, in the initial stages of the investigation by Ms. Cochrane and Mr. Woolway not all relevant witnesses were spoken to. Both Mr. Vernall and the Claimant identified Kate as being a relevant witness but Ms. Cochrane determined that her view was that Kate had not been in the office and so she was not spoken to. That was despite the fact that Ms. Cochrane was not in the office either and Mr. Vernall and the Claimant who were would have been better placed to know who should be spoken to.

248. In respect of witnesses, Ms. Cochrane also made a deliberate decision not to interview Glenn Bootman. Her rationale for that was that she felt that Mr. Bootman was "scared" of the Claimant. That can only be in the context that he may have given an account that was favourable to her which again was not seeking to independently investigate and find evidence that was not only damning but also exculpatory.

249. Fifthly, the Claimant was told that the purpose of her suspension was to allow an investigation to take place yet all investigations had in fact already taken place by that stage and the decision was taken simply to more to a disciplinary hearing on a charge of gross misconduct without anything more. Given that that was the advice from Peninsula and we have not heard any evidence from them in that regard it is difficult to understand how the account of Mr. Vernall and Mr. Ball were preferred over the accounts of the Claimant and others who had indicated that it was just a conversation and nothing more.

250. Sixthly, the report by Ms. De Vois took no account of the fact that Mr. Vernall had not been present for the whole of the conversation and was just passing by and eavesdropping in the corridor. It also took no account of the fact that Mr. Vernall was predisposed to think badly of the Claimant given their previous history when he believed that she had called him a misogynist.

251. We were also not at all convinced that Mr. Woolway made any review of the report of the evidence before electing to take the decision to terminate the Claimant's employment for gross misconduct. Our view is that he simply accepted the course proposed by Peninsula without question. Equally, we were not at all satisfied that Mr. Woolway engaged with any other possible sanction other than dismissal without notice which was what Ms. DeVoil had recommended. Other than his say so in evidence before us there was simply nothing to support that.

252. The Claimant was also given no opportunity to see the report of Ms. DeVoil and the additional interview notes before a decision was taken to dismiss her. The Claimant should clearly have had that report and had a meeting to properly discuss it before any decision was taken to terminate her employment. Whether the Claimant was pushing for an outcome or not, the way in which her dismissal was communicated by Mr. Woolway was cold and inappropriate.

253. Finally, in terms of the appeal against the Claimant's dismissal that also went directly to Peninsula. Again, we have not heard from the appeal officer and so we have not been able to get to the bottom of the independence of the appeal process. We can well see that upholding an appeal in circumstances where a colleague had given the advice to dismiss and for which a charge was being made would be somewhat professionally embarrassing. Without having heard from Mr. Barry we cannot be sure that the appeal process was approached in an

independent manner.

254. Moreover, in respect of the appeal Mr. Woolway was the final arbiter in relation to both the final disciplinary and appeal decisions. Whilst he relied entirely on Peninsula for both, there was nevertheless no independence or impartiality.

255. There were therefore a number of procedural irregularities which fell outside the band of reasonable responses open to a reasonable employer.

256. We do not consider that had the Respondent operated a fair procedure that the Claimant would have been dismissed and that there should be any Polkey reduction to compensation. On the basis of the clear information to hand that we have set out above the Claimant had engaged in a debate with other staff members. She had not committed acts of harassment as alleged. Had the Respondent looked properly at the evidence and operated a fair procedure it cannot be reasonably be said that the Claimant would have still been dismissed in all events nor that there would have been a risk of that happening.

257. Similarly, there was nothing by way of culpable or blameworthy conduct on the part of the Claimant that should see any reduction in either the basic or compensatory awards.

Wrongful dismissal

258. It is for the Respondent to satisfy us on the balance of probabilities that the Claimant had committed acts of gross misconduct. We can take into account in that regard not only what information was before the Respondent but also the evidence that we have heard during the course of this hearing.

259. The only direct evidence at this hearing that we have regarding what occurred on 7th March 2023 was from the Claimant and Mr. Vernall. We prefer the evidence of the Claimant to that of Mr. Vernall. Her evidence has been consistent throughout the process. It is also supported by the accounts given by Mr. Bootman and Mr. Edwards during the investigation and the fact that there had been a discussion the previous day about the Claimant's daughter's school project rather than the Claimant seeking to impose her own views on anyone.

260. Moreover, Mr. Vernall was not present for the entire conversation. He did not know the context or how it began and he was not present throughout. He was also pre-disposed to think badly of the Claimant given his previous history with her.

261. We also remind ourselves that debates of the nature which had taken place on 7th March 2023 were not uncommon within the Respondent. We are entirely satisfied that what occurred on 7th March 2023 was a debate between colleagues which had been started before the Claimant even entered the room. It was in no way conduct which entitled the Respondent to terminate the Claimant's contract of employment, let alone without notice. It follows that the complaint of wrongful dismissal is well founded and succeeds.

Harassment related to sex/direct sex discrimination

262. We turn then to the complaints of harassment related to the protected characteristic of sex.

263. We begin with the WhatsApp messages from Mr. Bedforth to the Claimant. We

can group all of those together. We do not accept that that was unwanted conduct to the Claimant. Whilst we accept that she did not invite Mr. Bedforth to send her the messages she reciprocated in kind by sending similar "jokes" back to him over a period of time. We do not accept her position that the messages that she sent and which we saw during the course of the hearing were different in nature to that which Mr. Bedforth had sent.

264. We are also not satisfied that those messages created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We are not satisfied that the Claimant was at any time offended by those messages. She is of the character to say so when she is and if she had been offended we are satisfied that she would have told Mr. Bedforth so or at the very least tell him to stop. She did neither. She also replied to some of the messages and more tellingly than that sent similar messages herself.

265. It follows that in relation to the part of the claim concerning harassment in regard to the messages from Mr. Bedforth, those complaints fail and are dismissed.

266. Having dismissed the harassment complaint we have gone on to consider if the sending of the messages nevertheless amounted to direct sex discrimination. We do not find that it did. Mr. Bedforth did not send the messages to the Claimant because she was a woman and we are entirely satisfied that he would have sent the same messages to a man which was because he found them amusing and saw no issue with them. They were simply part of an exchange that he had – which was reciprocated – with a colleague and the Claimant's sex was of no relevance to that. This part of the claim therefore also fails and is dismissed.

267. We turn next to the "Witches" comment by Mr. Woolway. We have found that that happened in exactly the way described by the Claimant and that it referred to her as a Witch stirring the cauldron. It was plainly unwanted conduct. The Claimant did not invite such comment and it was entirely out of the blue. We do not find that the purpose of making the comment was for Mr. Woolway to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant because it is part of his "traditional" mindset to not give much if any apparent thought to what might be considered offensive by others. However, we are satisfied that it did create a humiliating and offensive environment in the reasonable perspective of the Claimant. Being called a "Witch" stirring a cauldron clearly inferred that she was a trouble causer. The email was not sent to the Claimant alone but also other work colleagues. It was demeaning and offensive and the Claimant rightly told Mr. Woolway of her displeasure about being referred to in such terms.

268. That leaves the question of whether the conduct related to sex. We find that plainly it did. The nature of the analogy was of a woman causing trouble or mischief. The comment was not made in a way that was neutral of gender but one where the Claimant as a female was painted as a witch. We are satisfied that that was conduct that related to her sex.

269. The next complaint of harassment that we need to consider if the events of Spring 2021 which again involved Mr. Woolway. We have accepted the Claimant's evidence that Mr. Woolway made a comment to the Claimant "as long as you don't spend too much, you're not shopping for a dress". We again accept that this was unwanted conduct on the Claimant's part. It was entirely uninvited and unexpected. We again are satisfied for the same reasons as given above that it was not Mr. Woolway's intention or purpose to cause offence. However,

we are satisfied that in the Claimant's reasonable perception it was offensive and it was humiliating. We remind ourselves that the Claimant raised this with Mr. Woolway and objectively we can see how it could have been embarrassing and caused offense. It was said in a work context when discussing something that the Claimant was to do as part of her management role in front of two male colleagues and was belittling. The final question if whether that related to the protected characteristic of sex. We have little hesitation in finding that it did. The comment relied upon a stereotypical view that women are only interested in shopping for clothes and spend too much money when doing so. The comment was therefore plainly related to the Claimant being female.

270. The next complaint is the video sent by Mr. Sherwin on WhatsApp to the Opico Family group. That was unwanted conduct on the Claimant's part. Whilst she was a member of the group, she plainly by reason of her complaint to Mr. Woolway did not expect to receive that sort of video on that platform. We have not heard from Mr. Sherwin so we cannot say whether or not his purpose was to cause an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. However, given that it was sent to a WhatsApp group and not simply to the Claimant directly it would appear unlikely that that was his purpose.

271. However, we accept the Claimant's evidence that she found the video to be offensive and that it had no place on a WhatsApp group. We are satisfied that to an objective standard it was reasonable for the Claimant to find that it created an offensive environment, particularly as it was endorsed by Mr. Woolway by his emoji reply. We are also satisfied that the conduct related to sex. It was demeaning to women as it suggested that men would prioritise time away from their wives and families. As such, we are satisfied that this amounted to harassment.

272. The next complaint is the comment of Mr. Bedforth about the Jeremy Clarkson Tweet regarding the Duchess of Sussex. We accept that Mr. Bedforth bringing up the topic of the Tweet and saying that he did not see anything wrong with it was unwanted conduct. Although it was crass and there was no reason to bring it up – on the basis of the evidence before us there did not appear to be any context to it – we accept for the same reasons as already given above that he did not say it with the purpose or intention of causing offence. However, we accept that it did create an offensive environment for the Claimant and that was obvious from her reaction to what had been said and her evidence before us. We consider it reasonable to an objective standard for the comment that there was nothing wrong in the Tweet to have done so. We are also satisfied that the comment was related to the protected characteristic of sex. The Tweet referred to a woman being paraded naked through the streets in a clearly offensive way related to the Duchess of Sussex and Mr. Bedforth was endorsing that there was nothing wrong with that. We are therefore satisfied that this was an act that amounted to harassment relating to the protected characteristic of sex.

273. The next complaint is the comment of Mr. Bedforth on 16th January 2023 saying that the Claimant's "boyfriend" had arrived and whether she was going to go over and say hello. We are satisfied that this was unwanted conduct. We do not accept that it was part of a wider "playful" conversation nor that the Claimant had previously referred to the person in question as being "dishy". Again and for the same reasons as given above we do not find that Mr. Bedforth intended to cause offense of that that was his purpose in making the comment. Again, that was a matter of failing to appreciate the appropriateness or otherwise of such comments but we do accept the Claimant's evidence that she found this offensive. We also find that to an objective standard it was reasonable for her to

do so as the comment was belittling and was directed about someone who was married with a family. The final question was whether the comment was related to sex. We are satisfied that given the reference to the person in question being the Claimant's "boyfriend" that it was. It therefore amounted to harassment related to the protected characteristic of sex.

274. The final complaint of harassment is the comment made about the order of the death of the Claimant's parents. We accept that this amounted to unwanted conduct and we have not found that this was part of any wider or previous conversation about the death of the Claimant's father. Again, and for the same reasons as given above, we do not find that Mr. Bedforth made the comment with the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. However, we accept that the Claimant to a reasonable and objective standard found that comment to have created an offensive environment. It was a comment about the death of her father and her mother – who Mr. Bedforth did not know – being able to cope in the aftermath. We are also satisfied that the comment related to the protected characteristic of sex. It was in the context of a widower not being able to look after themselves because their wife had done all the cooking and cleaning. It again took a stereotypical view that that was a woman's role. It therefore amounted to harassment relating to the protected characteristic of sex.

275. As a result of the fact that we have found the above complaints to be harassment we do not need to go on to consider if they would also have amounted to direct discrimination.

276. However, we do need to deal with the question of jurisdiction in respect of those complaints which we have found to have amounted to harassment. This is because, as Mr. Wayman candidly accepts, all complaints other than the final act on 1st March 2023 have been presented outside the time limit provided for by Section 120(3) Equality Act 2010. Our first consideration is whether the acts can be said to be part of a course of conduct. The acts themselves took place over a long period of time with significant gaps in between in December 2020, Spring 2021, January 2022, January 2023 and March 2023. However, most of those acts were perpetrated by the same two senior people within the Respondent. All of them also arose in the context of an environment which is "traditional" but as we have already referenced not in the right sense of the word. Whilst we do not go so far as to label the Respondent as an "Old Boys Club" as the Claimant contends, it is not a progressive organisation. The mindset of both Mr. Woolway and Mr. Bedforth is that "jokes" which demean women are not something to be considered offensive and that mindset has clearly dissipated over others within the workforce including Mr. Sherwin and in her evidence before us Ms. Mason.

277. We are therefore satisfied that the acts amounted to a course of conduct culminating in the last act on 1st March 2023 which was presented to the Tribunal in time. It follows that all acts of harassment were presented in time.

278. Even if we had reached a contrary conclusion we would nevertheless have found that it was just and equitable to extend time to hear the complaints. The Claimant had a reasonable explanation why she did not present a claim before. She had addressed matters at the time and understandably did not want to rock the boat by issuing a claim. Matters took on a new significance when she found herself having been dismissed for allegedly committing acts of harassment herself. There can be no reasonable suggestion that the Respondent is in any way prejudiced by the delay. There has been contemporaneous documentation to assist and witness evidence has able to be deployed in respect of each of the

allegations. The balance of prejudice would fall firmly on the Claimant in the event that she was prevented from advancing what are after all meritorious complaints.

279. For those reasons, the complaints which we have found to amount to harassment are well founded and succeed.

Direct sex discrimination – suspension and dismissal

280. The Claimant relies on two acts of less favourable treatment and we deal with each of them separately.

281. The first of those is suspending the Claimant before obtaining her account of events. She compares her treatment to that of Mr. Bedforth, Mr. Woolway and Mr. Sherwin or alternatively a hypothetical comparator. None of the actual comparators named can be said to be appropriate comparators as their circumstances were not materially the same as that of the Claimant. None had had a grievance raised about them. The nearest that came anywhere remotely close was Mr. Sherwin who was the subject of an email concern from the Claimant but that was very different to Mr. Vernall's grievance about her.

282. We have then gone on to consider whether a hypothetical comparator would not have been suspended before their account was taken. We have considered the "traditional" culture of the Respondent and Mr. Woolway particularly but we do not find that that cultural insensitivity had anything to do with the decision to suspend or the role of women in the workplace. Mr. Woolway had of course employed the Claimant and it was clear from his evidence and the outcome of her appraisal (see page 100 of the hearing bundle) that she was valued by him.

283. However, it is clear that even if we have found that there were facts from which we could infer that the suspension was influenced by the Claimant's sex, the "reason why" the Claimant was suspended was on the advice of Pensinsula. They were aware of what steps had been taken by Ms. Cochrane and Mr. Woolway to "investigate" and gave that advice to suspend. We find that that was the reason why the Respondent acted as it did in that regard.

284. The second allegation of direct sex discrimination is the Claimant's dismissal. She again relies on the same actual comparators in respect of this allegation or in the alternative a hypothetical comparator. For the same reasons as in respect of the first allegation none of the actual comparators are appropriate comparators as their circumstances were not materially the same as that of the Claimant.

285. We have however considered carefully whether the catalogue of issues with regard to the Claimant's dismissal were such that the burden of proof reverses in respect of a hypothetical comparator along with the "traditional" culture of the Respondent.

286. Ultimately, we are not satisfied that it did. Whilst Mr. Woolway's "traditional" values are reminiscent of a fortunately bygone era and are suggestive of a demeaning attitude towards women, we are not satisfied that the Claimant's sex played a part in his decision to dismiss. He had of course employed the Claimant, he clearly respected and valued her work and had previously given her the benefit of the doubt in November 2022. The defects in the process in the initial stages were due to inexperience of Ms. Cochrane and Mr. Woolway and the antipathy of the former towards the Claimant for reasons entirely unrelated to her sex. In respect of the latter stages that was a matter for Peninsula and

despite some slightly evasive answers as to what instructions were given by Ms. Cochrane there was no specific evidence that either Ms. Cochrane or Mr. Woolway provided any instructions that a specific outcome must be reached. Indeed, if they had it would have been unethical for Peninsula to have accepted those instructions.

287. We have taken into account the Claimant's position that male members of staff were not disciplined for the sending of WhatsApp messages but the circumstances of those matters were not the same as that of the Claimant. In respect of Mr. Bedforth and Mr. Sherwin no grievance or formal complaint was ever made about those matters and the circumstances are therefore not comparable with that of the Claimant.

288. Against that background, we do not consider that there are facts which allow us to draw an inference that the Claimant's sex played a part in the decision to dismiss her and that a male member of staff who had had a grievance raised in respect of similar allegations and had a recommendation of dismissal for gross misconduct by Peninsula would have been treated in the same way.

289. In all events, we are satisfied from the evidence that the clear "reason why" the Claimant was dismissed was because that was the recommendation of Peninsula and Mr. Woolway was content to follow that without question.

Victimisation

290. We begin with whether the Claimant had done a protected act. The Claimant relies on four alleged protected acts in that regard. The first is her telling Mr. Woolway that she did not appreciate being compared to a witch and neither did Jess. We do not conclude that that alone and without more was sufficient to constitute a protected act. It could logically only fall within Section 27(2)(d) EQA 2010 but we do not consider that even impliedly this could amount to making an allegation that Mr. Woolway's comments had contravened the Act. It was simply the Claimant commenting that she had not appreciated that reference being made and not something that could amount to an allegation that there had been unlawful discrimination.

291. The second thing that is said to be a protected act is the Claimant's comment in relation to the shopping for a dress exchange. We remind ourselves that the Claimant told Mr. Woolway in this regard that it was "a bit much to talk about shopping for a dress when it's about work and I'm not sure that's really appropriate". Again, this could only fit logically within Section 27(2)(d) EQA 2010. For similar reasons to those given above we do not consider that this could amount even impliedly to an allegation that the comment had contravened the Act. It was again simply a similar reference to the Claimant commenting that she had not appreciated the comment being made in a workplace environment and that it was not appropriate rather than something which could suggest that there had been an act of unlawful discrimination.

292. The next act relied on is the complaint that the Claimant made about the WhatsApp message from Mr. Sherwin on 12th January 2022. Again, that can only fit logically within Section 27(2)(d) EQA 2010. We do conclude that the Claimant's email did amount to a protected act.

293. Whilst she did not expressly state that the video contravened the EQA 2010 that is not necessary. She referred to the video as being sexist and as a boys club joke. We consider that that was sufficient by implication to suggest that the video was discriminatory by reference to the word sexist and therefore a contravention of the EQA 2010. The email therefore amounted to a protected act.

294. The final protected act relied on are in effect numerous complaints that the Claimant is said to have made to Mr. Woolway. We do not know what those are or when they took place and in what circumstances. Accordingly, we can make no findings of fact about that nor reach any conclusion that any other complaints that might have been made amounted to the doing of a protected act.

295. We have gone on to consider then the issue of detriment. The first act of victimisation relied on by the Claimant is her suspension on 13th March 2023. We have approached this question not only from the point of view of the protected act that we have found to be made out but also, in the even that we were wrong about the other two, as to whether all or any of them resulted in the detriment complained of. We should say in respect of the issue of detriment that we are entirely satisfied that the suspension of the Claimant and her dismissal were such as to amount to detriment.

296. We remind ourselves that the only alleged protected acts relied on by the Claimant that we have been able to make findings of fact about are the events of December 2020, Spring 2021 and 12th January 2022. The Claimant's suspension did not come until 14 months after the last of those acts.

297. If, as is suggested on behalf of the Claimant, Mr. Woolway had formed a view that he wanted to remove her from the Respondent company because of the complaints that she had raised then we find it more likely than not that he would have commenced a disciplinary process in November 2022 and "built on it from there". He did not. He gave the Claimant the benefit of the doubt and took the most favourable option to her that was open to him.

298. There is no evidence that Mr. Woolway was in any way materially influenced when suspending the Claimant by any of the complaints upon which she relies as being protected acts. Although he did not agree with the Claimant about Mr. Sherwin's WhatsApp message being offensive and did not reply, there is no evidence that he took against the Claimant in respect of such matters and in regards to the earlier complaints he did in fact apologise to her. In our view the only reason that the Claimant was suspended was because that was the advice received from Peninsula which Ms. Cochrane and Mr. Woolway followed without question.

299. We reach the same conclusion in respect of the Claimant's dismissal which was the second act of victimisation complained of. We do not find that Mr. Woolway was in any way materially influenced by any of the matters that the Claimant relied on as being protected acts and instead the real reason for the treatment complained of was following the advice from Peninsula.

300. It follows that both complaints of victimisation fail and are dismissed.

REMEDY

301. As indicated above, we have not heard evidence in respect of the matter of remedy and the date provisionally listed for a Remedy hearing in the event that it was needed is confirmed.

302. The parties do of course have the continued use of the services of ACAS to assist them in seeking to resolve the matter of remedy without the need for a further hearing and we encourage them to make use of those services.

Approved by:

Employment Judge Heap
Date: 26th February 2025

JUDGMENT SENT TO THE PARTIES ON

....26 February 2025.....

.....

FOR THE TRIBUNAL OFFICE

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