Claimant: **Miss. Joanne Attridge**

Respondent: **DB Engineering & Consulting GMBH**

Heard at: **Nottingham**

On: **18th, 19th, 20th, 21st, 22nd, 25th & 28th November 2024**
11th December and 16th December 2024

Before: **Employment Judge Heap**

Members: **Mr. C Tansley**
Mr. G Edmondson

Representatives

Claimant: **Mr. J Horan - Counsel**
Respondent: **Ms. S Brewis - Counsel**

RESERVED JUDGMENT

1. The complaints of harassment succeed to the extent set out below. The remainder of the complaints fail and are dismissed.

2. The complaints of victimisation succeed to the extent set out below. The remainder of the complaints fail and are dismissed.

3. The complaints of direct discrimination succeed to the extent set out below. Th remaining complaints fail and are dismissed.

4. The Claimant was dismissed by the Respondent and that dismissal was unfair. The complaint of unfair dismissal is therefore well founded and succeeds.

5. The complaint of constructive unfair dismissal fails and is dismissed.

6. The claim remains listed for a Preliminary hearing on 18th March 2025 as previously notified to the parties.

REASONS

BACKGROUND AND THE ISSUES

1. This is a claim brought by Miss. Joanne Attridge (hereinafter "The Claimant") against her now former employer, DB Engineering & Consulting GMBH (hereinafter "The Respondent"). There are two claims which have been consolidated to be heard together. The first claim was presented on 18th May 2022 and comprised complaints of discrimination relying on the protected characteristic of sex. That claim was brought against the Respondent and also an individual Respondent, Gerrard Skelton, who it was said had sexually harassed the Claimant. The claim against Mr. Skelton was withdrawn by the Claimant in June 2023 on the basis that a settlement had been reached between the parties. He has played no part in this hearing and did not give evidence before us.

2. The second claim form was presented on 26th May 2023 and comprised complaints of victimisation, constructive dismissal, direct sex discrimination and harassment relying on the protected characteristic of sex.

3. The claim has been the subject of a number of Preliminary hearings. The first of those took place on 5th October 2022 before Employment Judge Hutchinson. At that stage the Claimant was acting as a litigant in person and the second claim had not yet been presented. The claim had been listed for a hearing on 10th to 13th July 2023 but that hearing was postponed because the Claimant made an application to amend the first claim. A further Preliminary hearing was listed to deal with that matter.

4. That Preliminary hearing came before Employment Judge Welch on 10th July 2023. By that time the second claim had been presented. Employment Judge Welch granted the Claimant's amendment application to include allegations of victimisation regarding an investigation into a grievance that the Claimant had issued which was dealt with by Simon McNenemy, a solicitor instructed by the Respondent. We deal further with that amendment issue below.

5. The claim was relisted at that Preliminary hearing to be heard on 8th to 19th July 2024 but it could not proceed on those dates because Mr. Horan who represented the Claimant was taken ill. That hearing was accordingly postponed and instead Employment Judge Heap converted time on the first day of the hearing to a further Preliminary hearing. She postponed the remaining dates of hearing time and the full hearing was accordingly relisted on the dates set out above and proceeded with all parties, representatives and witnesses in attendance with the exception of a late witness called by the Respondent, Simon McNenemy, who attended remotely by CVP. There was no objection to that remote attendance and we were satisfied that Mr. McNenemy's evidence was not affected by him not having been physically present at the hearing centre.

6. Adjustments had been agreed at the Preliminary hearing before Employment Judge Welch for both the Claimant and Mr. Horan which were in effect to have non-sequential sitting days so that there were gaps in the hearing. So as to enable the re-listing of the hearing on the first available dates Mr. Horan indicated that those adjustments were no longer required. Instead, we made adjustments where necessary by way of breaks when requested and on

occasions shorter hearing days.

7. Before that time there had been a further Preliminary hearing before Employment Judge Butler on 24th January 2024. At that hearing Orders were made for the parties to agree a final list of issues which included those which arose in the second claim.

THE HEARING

8. The full hearing proceeded on the dates above. A further day of hearing time to that which had been listed at the Preliminary hearing on 8th July 2024 was added on 16th December 2024 for the Tribunal's deliberations because there was insufficient time to deal with that within the original listing.

9. Prior to the hearing the parties had as directed by Employment Judge Butler agreed a joint list of issues that the Tribunal was to determine. Mr. Horan on behalf of the Claimant had approved the first draft of that list following a hearing before Employment Judge Welch and after some tweaks between the parties it was agreed by him and by the Claimant's solicitor. As it transpired part way through the Claimant's evidence during cross examination by Ms. Brewis some additional allegations of discrimination had been permitted by Employment Judge Welch as an amendment but those had not found their way on either side into the agreed list of issues. We lost a significant part of a day of hearing time dealing with those matters.

10. We should observe that Mr. Horan was somewhat critical of the Respondent's legal representatives with what appeared to be suggestion that the allegations permitted by Employment Judge Welch as amendments had in some way been deliberately omitted or that it was their responsibility alone to include them. That had been predicated on the basis that it was said that there had not been a revision to the list of issues after the Preliminary hearing before Employment Judge Welch. Ms. Brewis contended that that was not correct and that the Claimant's representatives had in fact specifically agreed a further draft. At our request she produced a number of the emails demonstrating that that was correct and that Mr. Horan had produced the first draft after the hearing before Employment Judge Welch and had subsequently expressly agreed the content as had his instructing solicitor. The criticism of Ms. Brewis and her instructing solicitor was therefore not justified.

11. Nevertheless, we accepted that we should determine the allegations which formed part of the amended case. We gave oral reasons for that decision at the time. No one has requested that those are embodied within this Judgment and so we need say no more about them. It did lead, however, to an application from Ms. Brewis to call Mr. Simon McMenemy to give evidence. Mr. Horan did not object and we considered it both appropriate and necessary to accede to that application given the circumstances. A witness statement was prepared promptly for Mr. McNenemy and provided to Mr. Horan. The statement was relatively short and Mr. Horan indicated that he would be able to deal with Mr. McNenemy's evidence on the seventh day of hearing time when he was scheduled to attend.

12. We also had a further matter to deal with which arose on the third day of hearing time when Mr. Horan made an application to amend the claim to refer to an allegation against Mr. McNenemy only concerning his acceptance of Mr. Skelton's resignation as being now either by him or some other unspecified person at the Respondent who may have been responsible for that. Mr. Horan's position was that the Respondent had never identified who it was who was said to be the person who accepted the resignation and so the amendment was necessary. Ms. Brewis objected to the application. She pointed out that it was not accurate to say that the Respondent had never provided that information because it was contained in an Amended ET3 Response filed after the amendment application was permitted by Employment Judge Welch.

13. We refused the amendment application with reasons given orally at the time. Again, no one has asked for those reasons to be embodied within this Judgment and so we need say no more about them.

14. During the course of discussions about the list of issues regarding the inclusion of the allegations permitted by Employment Judge Welch, a number of concessions were made by Ms. Brewer on behalf of the Respondent. Particularly, she accepted that the actions of Mr. Skelton on 27th January 2022 amounted to sexual harassment and also that the Respondent no longer relied on the statutory defence that had previously been advanced in respect of that complaint. In reality that concession should have been made by the Respondent much sooner. We had already viewed CCTV footage of that incident which made it plain that the Claimant's account of those events was accurate.

15. On the morning of the third day of hearing time Mr. Horan made an application to amend what was said to be the list of issues but was in fact an application to amend the claim. That was to extend an allegation previously only levelled against Mr. McNenemy relating to the acceptance of Mr. Skeltons resignation with immediate effect. That was said to extend to persons unknown on the basis that Mr. Horan asserted that the Respondent had never identified who that was said to be. Ms. Brewis pointed out that that was not correct and that the Respondent's Amended ET3 Response filed on in response to amendments to the claim made plain that it was not Mr. McNenemy who made the decision to accept Mr. Skeltons resignation and had identified who had and so it had been in the Claimants gift for some time to make the application.

16. We refused the application with oral reasons given at the time. Whilst neither party has asked that those be embodied within this decision, in short form we refused the application on the basis that it was made too late in the day, there was no good reason why the application could not have been made on receipt of the Amended ET3 Response, the Claimant had at all material times had or had access to legal advice and representation at various hearings and it would likely necessitate the calling of a further witness who no longer worked for the Respondent and who was based in Germany and would need to travel to the UK to give evidence.

17. During the entire course of the hearing a German speaking interpreter was present save as for 11th December 2024 when we heard submissions and it was agreed that no interpreter was required and 16th December 2024 when the Tribunal undertook our deliberations. An interpreter was booked on the application of the Respondent and witnesses for both the Claimant and the Respondent had German as their first language. All witnesses were agreed that

the interpreter would only need to be utilised if they experienced difficulties in relation to questions being asked of them and no in respect of everything said during the hearing. In reality, the interpreter was not needed for the vast majority of the hearing. Unfortunately, when she was the quality of interpretation when required was not of a high standard but witnesses were able to manage adequately with their own knowledge of the English language and we did not receive any application to appoint a new interpreter.

18. We also had a number of documents within the hearing bundle the originals of which were in German. We had copies of the same documents in translated form.

19. Whilst we were able to conclude evidence, submissions and deliberations within the hearing time set out above there was insufficient time to give Judgment which was therefore reserved. 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.

20. With the agreement of the parties we listed a Preliminary hearing for case management given that the concession of the Respondent as to the actions of Mr. Skelton on 27th January 2022 were such to amount to harassment meaning that a Remedy hearing would be necessary. We did not list a Remedy hearing at that stage as the parties took the view that medical evidence was likely to be required.

21. We have considered all of the evidence and submissions that we have seen and heard whether we have expressly referenced them within these reasons or not. The parties can therefore be assured that we have taken all matters into account and considered matters in the round.

WITNESSES

22. During the course of the hearing we heard evidence from the Claimant on her own account. We also heard on her behalf from Christian Hunefeld who is an employee of the Respondent and the Claimant's former line manager and Kristina Ruoff who was the Respondent's former Head of International Human Resources ("HR") Management. We also had a witness statement from Bradley Chalmers who is the Claimant's partner. Ms. Brewis did not have questions in cross examination for Mr. Chalmers and it was not necessary in our view to hear from him. It was left that we would attach the appropriate weight to the statement of Mr. Chalmers although it was not in the end necessary for us to do that because his evidence could not assist us in relation to the key issues that we had to determine.

23. On behalf of the Respondent we heard from Christine Harbich, Giada Feroce-Vernikovsky and Athina-Isabelle Durre. We also heard from Simon McNenemy who as we have observed above was a solicitor instructed by the Respondent to investigate a grievance brought by the Claimant.

24. We say a word about the credibility of the witnesses from whom we have heard below.

CREDIBILITY

25. We start with our assessment of the Claimant. It was clear that the Claimant was and remained vulnerable and that was evident from her presentation before us. We found her to be a credible witness whose account has remained consistent throughout. It was clear that she stridently believes that all of the acts that she relies on as being discriminatory were even where she was unable to articulate the reasons why. That in our experience is not unusual, particularly where a case has been articulated for a Claimant in a certain way based on legal advice. Whilst we did consider some aspects of the Claimant's evidence to be somewhat exaggerated, she was consistent and credible on the key issues and some degree of exaggeration is not unusual when considering matters through the prism of someone who vehemently believes that they have been treated very badly.

26. We found Ms. Ruoff to be a credible witness. There was one aspect of her evidence which did not accord with the Claimant's account over who it was that removed her from the Toronto Project. However, a difference in account of that nature was not in our view such as to doubt either the credibility or reliability of the account which Ms. Ruoff gave. It might have been more telling if their accounts were identical. Ms. Ruoff was giving evidence about matters that she dealt with some considerable time ago and as such we do not hold that one error in recollection against her in terms of the remainder of her evidence.

27. We also found Mr. Hunefeld to be a credible and reliable witness. Whilst there has been suggestion that he is very close to the Claimant it has to be born in mind that Mr. Hunefeld remains a senior employee of the Respondent. It would not be in his interests to give us a misleading account and we accepted his evidence.

28. We also found the Respondent's witnesses to be largely credible. We did have some doubts over the evidence of Ms. Harbich on occasion as she was sometimes evasive and did not answer questions asked in an entirely straightforward manner. However, we must temper that against the fact that Mr. Horan's questions were often lengthy and not always easy to follow and that was not assisted by the fact that English is not Ms. Harbich's first language and the quality of interpretation was not particularly good when utilised.

29. Where we have preferred the account of one witness over that of another we have given reasons for that below.

THE LAW

30. 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.

31. 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.

32. 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

33. 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".

34. 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**).

35. 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.

36. 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.

37. 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."

38. 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

39. 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.

40. 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).

41. 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

42. 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.

43. 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.

44. 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).

45. 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.

46. 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**).

47. 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.

The EHRC Code

48. 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.

Unfair dismissal

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

50. Section 98 deals with the general provisions with regard to fairness and provides that two of the potentially fair reasons for dismissing an employee are either that the employee was redundant, or, otherwise, that there was "some other substantial reason" of a kind such s to justify the dismissal of an employee holding the position which the employee held. The burden rests upon the employer to satisfy the Tribunal on that question.

51. Assuming that the employer is able to do so, the all important test of reasonableness is then set out at section 98(4) ERA 1996 and provides as follows:

"Where the employer has fulfilled the requirements of subsection (1), (that is that 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."

52. Insofar as redundancy dismissals are concerned there is statutory definition provided for by Section 139 Employment Rights Act 1996. This provides as follows:

> *"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-*
>
> *(a) the fact that his employer has ceased or intends to cease:-*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business:-*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."*

53. Key to the consideration of fairness in the context of a redundancy dismissal (once it has either been established that there was a potentially fair reason to dismiss on that basis) is the process adopted for selecting employees for redundancy. The relevant considerations are whether the employer:

    a. Identified the correct pool for selection for redundancy;

    b. Applied fairly and reasonably to that pool fair and objective selection criteria;

    c. Undertook appropriate consultation with the employee on the method for selection and the process adopted (including consideration and consultation on the question of suitable alternative employment).

54. With regard to the selection criteria, Employment Tribunals must avoid subjecting them to undue scrutiny provided that those selection criteria are objective (see **British Aerospace plc v Green and Ors 1995 ICR 1006, CA**). The question for the Tribunal will be whether the selection criteria were or were not inherently unfair and whether they were applied in the particular case in a reasonable fashion.

55. The burden is no longer upon the Respondent alone to establish that the requirements of Section 98(4) ERA 1996 were fulfilled in respect of the dismissal. This is now a neutral burden.

56. However, we remind ourselves that an Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer (see **Sainsbury's Supermarkets Limited v Hitt [2002] EWCA Civ 1588** and **Williams v Compare Maxam Ltd 1982 ICR 156, EAT**). It judges both the employer's processes and decision making by the yardstick of the reasonable employer and can only say that the dismissal was unfair if either falls outside the range of responses open to the reasonable employer. Put another way, could it be said that no reasonable employer would have done as the Respondent did?

Constructive unfair dismissal

57. Section 95 provides for a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

58. Tribunals take guidance in relation to complaints of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make*

up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

59. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.

60. The question of whether or not there has been a repudiatory breach of the term of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee is only relevant insofar as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

61. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

62. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including continuing to accept pay or a lengthy delay before resigning. In those circumstances, an employee may affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

63. Tribunals are also assisted by the guidance in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] I.R.L.R. 833** which requires consideration of the following matters when determining a complaint of constructive dismissal:

    (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (ii) Has he or she affirmed the contract since that act?
    (iii) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? and
    (iv) Did the employee resign in response (or partly in response) to that breach?

FINDINGS OF FACT

64. We ask the parties to note that we have only made findings of fact where that is relevant to the issues to be determined in the claim. We have not therefore made findings on all areas where the parties are in dispute with each other where that is not necessary for the proper determination of the claim before us.

The Respondent

65. The Respondent operates in the rail industry dealing with engineering projects including design, safety and project management. It, along with a number of other subsidiaries, is part of the Deutsche Bahn group. The Respondent has a head office in Berlin but operates in the United Kingdom and Ireland and had at the time with which we are concerned offices in Derby and Birmingham. The Derby office was not owned by the Respondent but was leased from a private landlord. We are satisfied from the evidence of Mr. Hunefeld that the keys to the Derby office were not surrendered until shortly before the hearing commenced before us in November 2024 around 19 months after the termination of the Claimant's employment.

Commencement of the Claimant's employment

66. The Claimant commenced employment with the Respondent on 15th May 2018. At the time with which we are concerned the Claimant was engaged in the role of Director of Business Development. She was based between the Respondent's Derby and Birmingham offices and her line manager at the time with which we are concerned was Christian Hunefeld. Mr. Hunefled has been employed by the Respondent since 2003 in senior roles and remains employed by them.

67. Mr. Hunefeld was at the time engaged in the role of Director of the United Kingdom and Ireland which involved overseeing and directing the Respondent's business in those territories.

68. We accept the Claimant's evidence that she had never received any complaint or criticism of her work during her time with the Respondent and it is clear that her work was highly regarded by Mr. Hunefeld.

The Toronto Project

69. During the course of her employment with the Respondent the Claimant developed an interest in HR and a move into a position in that regard. She had also begun a CIPD qualification in anticipation of that. In September 2021 she applied for a senior role in HR based in Berlin. That was following a recommendation from Mr. Hunefeld to Jens Roder who would be interviewing for the position.

70. The Claimant was interviewed for that position but was unsuccessful. We accept her evidence, however, that she had during the interview expressed an interest in working in the United States and was later spoken to by Christina Harbich (Senior Vice President Corporate Ramp Up and Jens Roder (the Chief Financial Office and Chief HR Officer). Both are employed by DB International Operations GmbH ("DBIO"). DBIO and the Respondent are part of the same group of companies.

71. Whilst the Claimant was unsuccessful in her application for the HR position in Berlin we accept her evidence that she was told that Mr, Roder and Ms. Harbich had been impressed with how she had performed at interview and that they wanted to discuss with her the potential for working on a project in Canada which DBIO was bidding for. That evidence accords with an email exchange between Mr. Roder and Mr. Hunefeld in October 2021 with Mr. Roder describing the project being a good match for what the Claimant brought to the table and her

desired work location (see page 79 of the hearing bundle).

72. That project was in respect of the infrastructure and operations work for the railway network in the Toronto area and it was to be run under the project management of Christine Pluberg of DBIO. It is common ground that the project was one which was of great importance to DBIO.

73. The bid for the project was to be submitted by 31st March 2022 and the Claimant would be involved in an HR type role recruiting the key individuals to start work in April 2022 in the event that the bid was successful. The Claimant accepted the proposal to work on the project. Although it was a project which DBIO were bidding on, the Claimant remained employed by the Respondent.

74. The Claimant had also been due to undertake some other work as well as recruiting the key individuals but was asked to step away from that by consultants working on the project because of availability issues. Those matters were not the fault of the Claimant and Ms. Harbich made plain at the time that this did not mean that DBIO did not want her working on the Toronto project anymore (see page 88 of the hearing bundle).

75. The Claimant's work on the project commenced in or around November 2021. She was working alongside Gerrard Skelton who was a consultant engaged by DBIO.

76. Prior to her commencing work on the project and during her discussions with Mr. Roder and Ms. Harbich there had been reference to roles which might be available after the end of the bidding phase in the event that DBIO were successful in their bid. The Claimant's case is that she was to be offered a permanent role for at least two years in Canada working on the project. The Respondent denies that that was the case and that any employment would be dealt with locally and not by DBIO or the Respondent other than for the key figures who would be recruited and issued with letters of intent in the event that the bid succeeded prior to the close of the bidding process.

77. We accept that the intention may have been for the Claimant to have stayed in a role in Canada if one was available and if she was suitable for it but no promises were made and on the Claimant's own account no role was identified either during those discussions or at any other time that was offered to her.

Events of 27th January 2022

78. On 27th January 2022 Mr. Hunefeld arranged a UK team event which included dinner and drinks. He was present as were the Claimant and Mr. Skelton. After the dinner some members of the team, including the three of them, returned to a hotel where they were staying.

79. The Claimant was in the bar along with other members of the team when she was approached by Mr. Skelton. It is not in dispute that he had been drinking alcohol and in all likelihood was somewhat the worse for wear. During his interaction with the Claimant, Mr. Skelton put his arm around her more than once. We accept that the Claimant did not welcome his advances and was uncomfortable. That was evident from the CCTV footage of the incident that we have seen and that she was seeking to remove herself from Mr. Skelton's touch.

80. During this time Mr. Skelton slapped the Claimant on her bottom twice and we accept that he also leaned into her and bit her earlobe. None of that was remotely invited by the Claimant and we accept that she was shocked and upset by it.

81. Mr. Hunefeld witnessed what had happened and after Mr. Skelton had left the bar area asked her if she was alright. The Claimant said words to the effect that she was not. Mr. Hunefeld spoke to Mr. Skelton about the incident before he left the hotel.

82. The Claimant initially told Mr. Hunefeld that she did not want to take matters further. We accept that that was because she had not made any reports of that nature previously in her career rather than it being the case that she was not shocked and upset about what had happened.

83. The Claimant had cause to reflect, however, on what had happened and after speaking with friends and family determined that she did wish to make a complaint about the actions of Mr. Skelton on the evening of 27th January 2022. There was a delay in the Claimant raising the matter again. That was not only because of the time taken to process whether to do so and the fact that the Claimant had been absent from work as a result of illness.

84. She spoke to Mr. Hunefeld about that and he in turn sent a text message to Ms. Harbich on 16th February 2022 asking her to contact the Claimant (see page 103 of the hearing bundle).

85. Ms. Harbich contacted the Claimant the same day. The Claimant told Ms. Harbich what had happened in the hotel bar on 27th January 2022. It is common ground that the Claimant was very upset. Ms. Harbich expressed her regret that those events had happened to her and it was agreed that the Claimant would contact Kristina Ruoff, the then Head of International HR Management with the Respondent.

86. There is a dispute between the Claimant and Ms. Harbich about what was said about the Claimant continuing to work on the Toronto project. Ms. Harbich contends that she told the Claimant that she did not have to attend any meetings with Mr. Skelton whilst the Claimant's evidence was that she was told that she was being removed from the project. We prefer the evidence of the Claimant on that point. Her evidence has been consistent throughout. The Claimant's position is that she was told that this was being done to protect her. That chimed with the fact that Ms. Harbich accepted what the Claimant had told her. Whilst Ms. Harbich's evidence was that she saw no issue with the conduct occurring again with the Claimant or other female employees because there would be no other events with alcohol involved, we nevertheless prefer the Claimant's account that she was told that she was removed from the project and that that was being done to protect her. We find it more likely than not that Ms. Harbich did not realise at the time that she was doing anything wrong by removing the Claimant from the project.

87. We have considered the point made by the Respondent that Ms. Harbich would not have had the authority to remove the Claimant from the project and that could only have been done by Christine Pluberg. There is nothing that confirms that position other than the say so of Ms. Harbich and we do not accept that as International Head of HR she would not have been able to take such a step.

88. We did consider whether there may have been a misunderstanding or miscommunication between the Claimant and Ms. Harbich about this issue given that the Claimant was very upset and English is not Ms. Harbich's first language. However, Ms. Harbich was very clear in her evidence that that could not have been the case.

89. We should observe that Ms. Ruoff's evidence was that she had told the Claimant that she had been removed from the Toronto project on instruction from Ms. Harbich. We are satisfied that Ms. Ruoff is simply mistaken about that. We do not consider that it affects her credibility or that it calls into question the Claimant's account.

90. We therefore accept the Claimant's evidence that she was removed from the Toronto project upon telling Ms. Harbich about what Mr. Skelton had done on 27th January 2022. We are reinforced in that view from an email that Mr. Hunefeld sent to Ms. Ruoff expressing concern about the Claimant's removal from the Toronto Project on 24th February 2022. The relevant part of the email said this:

> *"Have you consulted with Ogletree and Deakins with regard to how to proceed? As I understand it, Joanne is currently not working on the project in Canada whilst Gerrard is still working on it. I understand the motivation here but also the risk of unfair treatment because, under UK law, this can be interpreted as "Punishment for Complaining".*

91. He included within the email an extract from ACAS advice about handling sexual harassment complaints.

92. Of itself the email would not have persuaded us that the Claimant's account was correct because it was clearly relying on what Mr. Hunefeld had been told by her as he was not a party to the conversation with Ms. Harbich. However, that email was copied to Ms. Harbich and we find that she would have read it. If it was inaccurate that the Claimant had been removed from the Toronto Project and that all that she had been told by Ms. Harbich was that she did not need to attend meetings with Mr. Skelton, then we are satisfied that she would have told Mr. Hunefeld precisely that but she did not.

93. We accept the evidence of Ms. Ruoff that her advice to Ms. Harbich was that Mr. Skelton should be suspended but that did not happen. It was clear to us that Mr. Skelton was seen as being key to the Toronto Project and we can see that his suspension before the bids had closed and the contract had been signed would have been potentially damaging to an important business opportunity.

94. As a result of having been told that she was removed from the Toronto project the Claimant scheduled some surgery that she had been putting off whilst on the project and took a period of sickness absence to do so. The Claimant was able to schedule that surgery promptly because it was private treatment. The Claimant was thereafter absent from work firstly as a result of her surgery and thereafter with stress at work and in fact did not ever return as we shall come to below.

95. We accept the Claimant's evidence that but for being told that she had been removed from the Toronto Project she would have completed the key work on it before scheduling the surgery.

96. On 11th April 2022 the Claimant was removed from a team chat group about the Toronto Project (see page 184 of the hearing bundle). By that stage, the bidding process on which the Claimant had been working had closed and DB IO had been successful in their bid. We are satisfied that the reason that the Claimant was removed from the team chat was because she was no longer working on the project and so did not need access to it.

Conversation with Ms. Ruoff and the Claimant's grievance

97. On 15th February 2022 the Claimant contacted Ms. Ruoff and explained what had happened with Mr. Skelton on 27th January. Ms. Ruoff was rightly extremely concerned about what she had been told and formed an early view that Mr. Skelton would need to be dismissed by the Respondent. Indeed, she said as much in email communications with the Respondent's Managing Director of HR (see page 107 of the hearing bundle).

98. Ms. Ruoff asked the Claimant to put matters in writing which the Claimant did on 16th February 2022. The Claimant termed her letter as a grievance and she set out that Mr. Skelton had bitten her on the ear and slapped her backside. She referred to Mr. Hunefeld as having witnessed that and that that evidenced the sexual harassment that she had been subjected to (see page 112 of the hearing bundle).

99. The Respondent relies on the Claimant not having raised the issue about being removed from the Toronto project within that grievance but we accept that the focus at that time was on the events of 27th January and we do not consider that that effects our findings on that issue. She had in fact told Ms. Ruoff that she had been removed from the Toronto Project orally when she spoke to her on 15th February and had told her that she was "not happy" about being taken off the project.

Investigation into the events of 27th January 2022

100. Ms. Ruoff acknowledged the Claimant's grievance and asked for permission to share it with Ms. Harbich and the Respondent's solicitors. She had in that regard been in touch with Mr. McNenemy, a partner at Ogletree Deakins solicitors who provided employment law advice to the Respondent, and had arranged a consultation with him and Ms. Harbich for the following day.

101. Ms. Ruoff was aware from her conversation with the Claimant that Mr. Hunefeld had witnessed the events of 27th January and she emailed him on 16th February 2022 asking for his account.

102. Mr. Hunefeld replied the same day saying that he had seen Mr. Skelton slap the Claimant on the buttocks and that a detailed account would follow. That account did follow with Mr. Hunefeld providing a memo on 23rd February 2022 (albeit it was wrongly dated as 2020). That memo set out that he had witnessed Mr. Skelton slap the Claimant on the buttocks; that he had taken him to task about it and told him that it would be better for him to go to bed. He said that Mr. Skelton had then approached the Claimant who had said that she was not happy

with his behaviour and that after that he had gone to bed (see page 131 of the hearing bundle).

103. Mr. Hunefeld asked for progress on the investigation more than once and Ms. Ruoff provided those updates and also an update on request to Jens Roder (see page 142 of the hearing bundle). By the time of that latter update Ms. Ruoff had resigned from her position and that was to be filled by Giada Feroce-Vernikovsky who took over dealing with matters after that point.

104. As we have already touched upon above, Ms. Ruoff had arranged a call with Mr. McNenemy which took place on 18th February 2022. Her notes of the takeaway points from that discussion were emailed to Ms. Harbich the same day (see pages 129 and 130 of the hearing bundle).

105. Whilst Mr. Horan was critical of Mr. McNenemy for not having commenced an earlier investigation, we fully accept that he could not do so without having had his instructions formalised and agreement for his fees to be met. We accept his evidence that that did not come until 28th February 2022. We are therefore entirely unsurprised that he waited before taking any further steps after the meeting with Ms. Ruoff and Ms. Harbich.

106. There was a short delay in Mr. McNenemy being able to commence the investigation once he had received formal instructions because he had taken into account the fact that the Claimant was absent on sick leave until 7th March 2022 and he had other matters in his diary the following week. Mr. McNenemy is a partner in a large firm of solicitors and so we find that unsurprising.

107. Mr. McNenemy went about arranging to meet with the Claimant and with relevant witnesses to investigate the grievance. We accept his evidence that the order of witnesses that he saw was determined by availability issues with his own diary and that of those individuals. He scheduled a meeting with Mr. Skelton before anyone else because Mr. Skelton had told him that he would be travelling to Canada and could only meet on certain dates. Whilst it is maintained on behalf of the Claimant that she should have been interviewed first, we accept the evidence of Mr. McNenemy that he did not consider that that created any problem because he already had the Claimant's clear account of events in her grievance.

108. Mr. McNenemy accordingly arranged a meeting by video conference with Mr. Skelton on 14th March 2022. He had attempted to arrange the meeting on 16th or 17th March in person in Derby but Mr. Skelton said that he could not attend on those dates as he would be en route to Toronto and would not return before 31st March 2022. He asked for details of the nature of the investigation which were duly provided by Mr. McNenemy (see page 145 of the hearing bundle). Mr. Skelton indicated that he could attend a meeting remotely by Teams given that he was not near the Derby office on 14th March 2022 which was accepted by Mr. McNenemy. We accept that whilst he would have preferred to meet in person there was no particular issue with the meeting proceeding remotely.

109. Mr. McNenemy's notes of the meeting, which we accept are accurate, appear in the bundle at pages149 to 155.

110. By the time that Mr. McNenemy held his meeting with Mr. Skelton the Claimant had supplied CCTV footage from the hotel to Ms. Ruoff which showed the events of 27th January 2022. It is the same footage that we have seen as part of these proceedings and which clearly showed Mr. Skelton slapping the Claimant more than once on her bottom. At the time of the meeting Mr. Skelton was not aware of and had not seen that footage.

111. Mr. Skelton denied that he had either bitten the Claimant's ear or touched her on her bottom. He maintained that he had only been anywhere near the Claimant because she had been sitting on his coat but that he had not either intentionally or unintentionally touched the Claimant on her backside.

112. He said that he had been drinking but was only "merry" and not drunk and that he had no loss of memory of the events in question. That, as we shall come to, was in sharp contrast to what was contained in his later resignation letter after he had seen the CCTV footage which showed him doing precisely that which he was denying to Mr. McNenemy.

113. Mr. Skelton sought to divert any wrongdoing on his part firmly onto the Claimant. Although we have not heard from him it was plainly not to his credit to do so. He maintained that the Claimant had been badgering him about being appointed to a senior HR role in Canada which she was not suitable for because of a lack of experience. He said that she had pushed the matter on the evening of 27th January and had even followed him into the car park when he was taking a call to discuss the matter and that her tone with him had changed. He described her as "festering" for the remainder of the evening.

114. Mr. Skelton also contended that the Claimant had laughingly said when he returned from his hotel room that he had bitten her on the ear but that he did not understand that because he had not done so and that Mr. Hunefeld had shrugged at the comment when it was made. He said that he had no sexual interest in the Claimant, that she would not "make his list" even if there was a shortage of women and that she was not his "cup of tea". He maintained that the Claimant had made allegations of sexual harassment previously and that she liked to tell people that she had been pursued by men in a former employment and that she believed that "every man with a pulse has designs on her".

115. He contended that he was being "set up" by the Claimant and Mr. Hunefeld and suggested that their relationship may have been something other than a professional working relationship.

116. The clear account that was being given was that the Claimant was "setting up" Mr. Skelton with a false allegation in retaliation for him not having supported her for the senior HR role in Canada and that Mr. Hunefeld was assisting her in that because of a close relationship. None of that was true and it was a grossly offensive thing for Mr. Skelton to have said.

117. Mr. McNenemy met with the Claimant on 16th March 2022 for a face to face meeting in Derby. The Claimant explained what Mr. Skelton had done on 27th January 2022 and that she had been removed from the Toronto Project whilst Mr. Skelton was working on it which she did not think was fair and that it should have been him who was removed instead. She also discussed her wish to move to Canada and that there had been discussions about HR roles but no specific role had been identified as that was a matter for Lia Cho, the HR Project Manager

based in Berlin.

118. She was asked by Mr. McNenemy is she or Mr. Hunefeld had set the situation up which the Claimant obviously denied. We can see why she was asked about that, however, given the version of events which Mr. Skelton had given.

119. When asked what she wanted as an outcome to her grievance the Claimant said that she wanted Mr. Skelton to be dismissed.

120. Mr. McNenemy also met with Mr. Hunefeld on 17th March 2022. That meeting took place at Mr. McNenemy's office in London. Mr. Hunefeld told him that he had seen Mr. Skelton slap the Claimant on her bottom and that he had told him that what he had done was inappropriate. He confirmed that he had spoken to the Claimant and she had told him that Mr. Skelton had also bitten her on the ear.

121. The issue as to a role in Canada was also discussed. Mr. Hunefeld said that the Claimant had told him that the Head of People role had been discussed but that Mr. Skelton had been of the view that she was not up to it and they had been discussing a lesser role. It was also mentioned that the Claimant had told Mr. Hunefeld that she had been taken off the Toronto Project and that she was not happy about that. Mr. Hunefeld was also asked about the allegation that Mr. Skelton had made that he and the Claimant had set him up. Mr. Hunefeld naturally denied that because it was not true and also explained that it would be financially detrimental to his side of the business if Mr. Skelton left the Respondent.

122. As part of his investigations into the Claimant's grievance Mr. McNenemy also visited the restaurant when the team dinner had taken place and the hotel where Mr. Skelton had slapped the Claimant's bottom and he viewed the CCTV footage from the hotel which she had earlier provided to Ms. Ruoff. We are satisfied that Mr. McNenemy undertook a thorough investigation.

123. He also completed it within a reasonable timescale completing it on 23rd March 2022 which was only four working days after his final investigation meeting.

124. Mr. McNenemy produced an investigation report and sent that to the Respondent. His report made it plain that the decision maker would have to make their own decision on the CCTV footage but that it was clear to him that Mr. Skelton had slapped the Claimant twice on the bottom. He said that it was not possible to tell if he had bitten her on the ear.

125. By the time that the report was concluded Giada Feroce-Vernikovsky had taken up her position as Ms. Ruoff's replacement. She contacted Mr. Hunefeld on 28th March 2022 to say that the report had been concluded and that she had had a call with Mr. McNenemy that day.

126. Ms. Feroce-Vernikovsky also made contact with the Claimant on the same day. She said that she had received the report and would be discussing it with Mr. McNenemy and that she would keep her updated.

127. She next contacted the Claimant on 31st March 2022 saying that she and Mr. van Houten had been working on the process and offered the Claimant a meeting on 12th April 2022 to convey the outcome of her grievance.

128. The Claimant accepted the meeting on 12th April and replied to Ms. Feroce-Vernikovsky to confirm that on 5th April 2022. She did, however, express her disappointment as to how the grievance process had been handled and in that regard the relevant parts of her email said this:

> *"In regards to my situation, and how this process has been handled I have to admit I am hugely disappointed. I initially reported the incident to Kristina and Christine back on 14th February. Kristina was supportive of me in the first instance however this certainly doesn't still remain the case.*
>
> *I suggested dur to the position that Gerry holds, and my inability to support with this HR matter that you in-list* (sic) *a lawyer to provide you with the correct advise* (sic) *on how to process this in line with UK Employment law. I'm curious to know had I not suggested this option what route the investigation would have taken, if at all.*
>
> *I appreciate the Lawyer Simon J McNenemy was instructed to carry out the investigation and interview all parties involved, however the length of time it took for this to happen in the first place was unacceptable. I did not expect to have to wait a month to be interviewed, nor to find out Gerry was working out in Canada at the time, so he was interviewed before me to work round his travel arrangements.*
>
> *When I initially reported the assault it was decided by Christine that I would be removed from the Canada project to protect myself, this decision was solely Christine's and not my own. Thus allowing Gerry to continue the project whilst under apparent investigation. This has not only penalised me but goes against UK legislation. I have felt victimised by this decision and like I am being punished for reporting it in the first place.*
>
> *Throughout the last 7 weeks I have received very limited chain of care, updates or reassurance from HR. I have received no well-being checks and very minimal contact considering the nature of the incident I reported.*
>
> *I have been left to feel like the project in Canada has taken priority. I would of thought that DB as a group takes reports of sexual assault extremely seriously, and that of the well-being of their employees is of up most priority. Especially in present time* (sic) *where there is an international movement (Me Too) concerning women being victims of sexual assault and harassment.*
>
> *Can I ask given the nature of the incident, and that even with CCTV was provided along with a witness statement, why Gerry wasn't suspended pending investigation? Instead he has been allowed to travel on more than one occasion and represent DB, even though a very serious complaint has been made against him? This would be standard procedure under UK legislation due to nature of the claim and evidence put forward.*
>
> *The Police however are taking this incident very seriously and have confirmed they will be in touch with you this week to request certain information. It's a shame I have been left to feel that the company I work for, for nearly 4 years haven't taken a similar stance to them on this*

matter".

129. We should observe that the Claimant denied in her evidence that she was being critical of Ms. Ruoff. Plainly she was. However, we do not hold this against the Claimant in terms of credibility particularly as Ms. Ruoff was appearing as a witness for her and the Claimant's feelings may have changed from the picture as she understood it to be in April 2022.

130. The Claimant's position was that she had not received a response to that email. That is correct in part in that she did not received one from Ms. Feroce-Vernikovsky. However, that is not the whole picture because what Ms. Feroce-Vernikovsky did instead is to escalate that email to the Board of Directors of the Respondent.

131. In that regard on 11th April 2022 two senior directors of the Respondent, including the Managing Director of HR, wrote to the Claimant in connection with her email to Ms. Feroce-Vernikovsky.

132. The letter apologised for the Claimant's experiences during the grievance process and made it plain that the Board wished to respond so as to emphasise the seriousness with which her concerns were taken. It also made it plain that the Respondent did not tolerate sexually motivated assaults, that the disciplinary process had completed and that the confirmation of the grievance outcome would take place the following day.

133. The letter also set out that the Respondent did not "deprioritise" the grievance and disciplinary process for its business interests and invited the Claimant to contact them if they could assist further.

134. Whilst it may have been better for Ms. Feroce-Vernikovsky to have acknowledged the email at the time and made plain that she had escalated the matter to Director level, we are satisfied that she did not intend to ignore the complaint as her escalation clearly demonstrates and she was aware that they intended to reply to the Claimant.

135. She also emailed the Claimant on the same day as the letter from the Board was sent and referenced that particular communication. In the same email she offered the Claimant details of an employee support service although that was not required by the Claimant because she was accessing such support elsewhere.

Resignation of Mr. Skelton

136. On 6th April 2022 the Respondent wrote a letter to Mr. Skelton inviting him to a disciplinary hearing on 8th April 2022 with Mr. van Houten and Ms. Feroce-Vernikovsky. The letter made plain that one outcome might be dismissal for gross misconduct.

137. It also attached the CCTV footage of the incident at the hotel which was as we understand it the first time that Mr. Skelton had been made aware of the existence of CCTV footage or that the Respondent had obtained it. We should observe that Mr. Skelton was only shown the footage after the bidding for the Toronto Project had already closed on 31st March 2022 and he was actively working on it before that point.

138. Mr. Skelton wrote to Ms. Feroce-Vernikovsky asking for the disciplinary hearing to be postponed to 11th April 2022 to give him time to take advice and prepare for the meeting. That was agreed to by Ms. Feroce-Vernikovsky but it was made plain that no additional time would be provided.

139. However, prior to the disciplinary hearing taking place Mr. Skelton resigned. Although we have not heard from him it is clear that having viewed the CCTV footage he realised that the position that he had advanced to Mr. McNenemy was entirely untenable.

140. It is worth setting out his resignation email in full because much of it contradicted the account that he had given Mr. McNenemy. The resignation email, sent on 8th April 2022, said this:

> *"I would firstly like to begin by saying that I am deeply sorry for any unintended concern and unpleasantness I may have been party to, as a result of the events of 28 January.*
>
> *I have had an unblemished and successful career of over 30 years in numerous senior leadership roles and I have never ever been in a situation such as this. I am distraught at the events and feel really disappointed and apologetic that this has occurred.*
>
> *I would be more than happy to apologise to Joanne Attridge in any way that may be suggested as being helpful. My apology would be genuine and heartfelt.*
>
> *This was an event that had at its core a free alcohol laden evening and one which in hindsight should never have been allowed to be so alcohol laden with the company paying for significant amounts of wine, beer, spirits and cocktails across the whole of the night and which must have cost hundreds of pounds.*
>
> *None of that can help me to offer a rational explanation to an irrational act, other than to assure you that this was not in keeping with my normal character or my professional behaviour across my career or my personal life. This was truly a one-off situation, completely influenced by the alcohol provided, and one I will regret very deeply for the rest of my life.*
>
> *I genuinely have no recollection of the incident and when asked by Mr. McMenemy if I had made contact with Joanne's posterior, I answered genuinely and honestly at the time, as I have absolutely no recollection of this taking place. I can promise you that.*
>
> *If there were any way possible for this to be managed without it leading to a dismissal, I could guarantee this type of incident would never happen again but I am doubtful that would be possible. If it were, I'm sure the senior colleagues involved in the RER project such as Jens Roder, Andreas Wegerif, Christine Harbich and others in the team I work with could speak positively as to my true nature and character but I appreciate that may also not be possible.*

It is with this in mind that I believe the most appropriate course of action I can take is to tender my resignation with immediate effect as of today Friday 8 April 2022. This is a decision I have taken with a truly heavy heart and with the intention to cause no further disruption or unpleasantness.

I will arrange for the return of my DB Laptop, Mobile and Mouse as well as the keys to the Derby office and will send these by post to the Torgauer Strasse 12-15, EUREF-Campus, Haus 21/22, 10820 Berlin offices. If you need to contact me, please do so only via my personal email address[1].

I will truly miss the opportunity to continue to help and support on the RER Toronto project. I believe I still had much to add to its success and will always regret not being able to finish being able to finish the job I started".

141. Mr. van Houten and Ms. Feroce-Vernikovsky wrote to Mr. Skelton on 19th April 2022 acknowledging his resignation and confirming that his employment had terminated with immediate effect with his last day being 8th April 2022.

142. The Claimant's position as advanced in the claim is that Mr. McNenemy accepted the resignation of Mr. Skelton. We accept the Respondent's position that this is inaccurate. Firstly, the resignation letter was not sent to Mr. McNenemy. It was sent to Mr. van Houten and Ms. Feroce-Vernikovsky. Secondly, Mr. McNenemy was not employed by the Respondent and had no authority to accept a resignation and we accept his evidence that it was not him and thirdly the Respondent's Amended Response made it plain that that was a decision taken by Mr. van Houten (in conjunction with HR advice) which would make logical sense because the resignation was addressed to him, he was to chair the disciplinary hearing and he was the one who acknowledged the resignation along with Ms. Feroce-Vernikovsky.

143. On 12th April 2022 the Claimant emailed Ms. Feroce-Vernikovsky asking why she had seen that Mr. Skelton had been active on a Microsoft Teams chat about the Toronto Project from which she had been removed. It does not appear that there was any reply to that email. The Claimant's evidence was that Mr. Skelton had been presenting on the Teams platform. Whilst we accept that the Claimant may believe that we do not find that that actually happened because Mr. Skelton had already resigned with immediate effect. We accept that what may have happened is that the Respondent's IT Department were taking steps at the time to deactivate the account which made it look like it was in use by Mr. Skelton. We acknowledge that the Claimant has a deep mistrust of the Respondent and as such we are unsurprised that she formed the view that she did and the lack of response from Ms. Feroce-Vernikovsky would not have assisted with that.

144. She did, however, raise the matter with Ms. Harbich who made some enquiries and established that Mr. Skelton had been removed from all chats except a defunct one which she arranged his removal from along with that of the Claimant.

[1] Although it featured in the email we have not included that address for obvious reasons.

Grievance outcome

145. On 12th April 2022 the Claimant met with Mr. van Houten and Ms. Feroce-Vernikovsky by video call. They informed the Claimant that Mr. Skelton had resigned and that was effectively the end of the matter.

146. That was followed up by a short outcome letter in a similar vein which said this:

> *"Based on your formal grievance concerning an incident at a work social event in Derby and after completed investigation the company implemented a disciplinary procedure in accordance with the ACAS Code of Practice on disciplinary and grievance procedures.*
> *We would like to inform you, that the procedures are concluded now. After we confronted Mr. Skelton with the evidence, he resigned with immediate effect. As a result, he is no longer an employee of the company".*

147. We can well see why the Claimant was upset that Mr. Skelton had resigned and would not be dismissed as she had wanted as an outcome to her grievance. However, in reality there was not much that the Respondent could have done. Mr. Skelton resigned with immediate effect. The Respondent could not, other than seeking injunctive relief, have prevented him from terminating his employment in that way and were no longer in a position to dismiss him.

148. In addition, the position of Ms. Feroce-Vernikovsky was that the resignation of Mr. Skelton was a good outcome because she did not want him in the business anymore because of what he had done on 27th January 2022.

149. It would however nonetheless have been much better for the Respondent, who had the benefit of the CCTV footage, the evidence of Mr. Hunefeld and the admission of Mr. Skelton, to have made an admission that she had been sexually harassed and to have upheld the grievance on that basis.

150. The Claimant had asked at the outcome meeting for the reasons why she had been removed from the Toronto Project and why she had been removed from the Teams chat. The Claimant chased that up on 3rd May 2022 with Ms. Feroce-Vernikovsky. She replied to say that she and Mr. van Houten had offered to speak to the Claimant about that when she was better (by this time the Claimant was suffering with stress and anxiety) and back in the office. The Claimant sent a further message on 6th May 2022 to say that she would rather have the information at that stage. It does not appear that Ms. Feroce-Vernikovsky replied to that message or a follow up message on 3rd June 2022 but we accept that her intention was to discuss matters when the Claimant was recovered and able to return to work.

Company chats

151. DBIO have an instant messenger style chat facility in which members of the senior management team frequently communicated with each other. Between 22nd March and 29th March 2022 there were a number of chats between Jens Roder, Ms. Harbich and Vincent van Houten (the Respondent's Executive Director or Europe and the Middle East) had a number of chats about the Claimant. It is worth setting out a number of those.

152. The chat began with Christine Pluberg who was the project manager overseeing the Toronto project indicting that she was aware from Mr. Skelton that the Claimant had not worked on the project for several weeks. This followed with a message from Ms. Harbich referring to Mr. Hunefeld being a witness and his close working relationship to the Claimant.

153. The next chat was from Mr. van Houten asking if the Claimant *"knew that he was out of the running for CHRO or that she is out"*. CHRO was a senior HR role on the Toronto project.

154. The Respondent's Managing Director of International Markets and Consulting, Andreas Wegerif, replied to that message as follows:

> *"Dear Jens, can we speak to Gerry soon as a matter of urgency. The legal opinion is available (as a result of the first hearings), and the result is not good for Gerry. He denies everything (probably doesn't know that there is a video recording) and claims that Joanne has a vendetta against him because she sees him as a competitor on the RER project. He seems not to grasp the situation and is not willing to apologise. There should be another hearing (Vincent van Houten will chair), and then a decision will be made whether he should be terminated without notice or given a warning. If he continues with this attitude my opinion is we should fire him".*

155. The next few messages were from Mr. Roder which read as follows:

"Gerry:
-Serious offence
-No admission of wrongfoing
-Project needs
-Tactics Joanne (hypothesis)
-Good work ethic Gerry unlike Joanne
-Options: Termination without notice, ordinary termination. Warning. Verbal warning.

Joanne
-Not good work attitude, not good communication, not good work results
-Wants Gerry out, but we and E&C won't want to employ her, regardless of the proceedings with Gerry
-She will then sue and try to invoke the facts: result but rather independent of the outcome of the process?
But: Reputation damage! Plus, possibly consequential costs
Options: none with a view to her, but possibly to the decision about Gerry.

Our relationship with E&C.
-Strong recommendation E&C that Joanne is a top candidate, but by no means the case – Gerry clearly used in terms of content
-Christmas party at the hotel during Covid with lots of alcohol is not a good idea".

156. It appears clear to us from those messages that a decision had already been made at a senior level that the Claimant would not be considered for any position with DBIO nor remaining in employment with the Respondent. The only thing that had happened since the change in stance from the Claimant being a good fit for the project and no negative issues having been raised about her was her

grievance about Mr. Skelton.

157. By the time of those conversations Mr. Skelton knew that the Claimant had raised a grievance about him and what the subject matter of that grievance was. We consider it likely that the comments that he clearly made about the Claimant and her performance were as a result of that and so as to seek to paint her in a poor light. We do not accept the evidence of Ms. Harbich that those were observations that Mr. Roder had made for himself about the Claimant.

158. Mr. Horan contends that there was what he terms as an "inner circle" within the Respondent which included Mr. Skelton but not the Claimant. We do not find that there was any such "inner circle". Whilst we have not heard from Mr. Roder it is clear that Mr. Skelton was key to the bid for the Toronto project and doubtless that operated on the minds of senior figures when they considered his position in the chats to which we have referred. We do accept that Mr. Skelton made reference in his resignation email to senior colleagues such as Mr. Roder effectively vouching for him, we do not find that that equates to any "inner circle". If there had been an "inner circle" protecting Mr. Skelton then we find it more likely than not that they would have accepted his suggestion of a way back without there being a dismissal as he suggested in his resignation email.

159. We should say that the evidence of Mr. Ruoff was also to the effect of there being an "inner circle". Whilst we accept that that may be her view there was nothing in her evidence which advanced that proposition factually and it was based on generics only.

160. We accept the evidence of Mr. Hunefeld that the Derby office had not closed and that he was in fact picking up the work that the Claimant would have been doing if she was still employed by the Respondent. The intention had the Claimant not been engaged to work on the Toronto project was that she would take over Mr. Hunefeld's role in the UK and Irish operations given his amended focus to take over duties in Egypt (see page 80 of the hearing bundle).

161. We accept his evidence that the Respondent was still tendering for work in the United Kingdom and we prefer his account in that regard over the position adopted by the Respondent.

Proposed return to work

162. The Claimant had in one way or another been off sick since the incident with Mr. Skelton on 27th January 2022. That was firstly because of her having contracted Covid-19, then because of her surgery and recovery and then latterly because of work related stress and anxiety. During the course of her absence there was a change of line management from Mr. Hunefeld to Kai Klees. We have not heard from Mr. Klees during these proceedings.

163. The Claimant emailed Mr. Klees on 2nd February 2023 to tell him that her last day of sickness absence was 15th February 2023. She asked for approval to take a period of accrued annual leave and for a return to work date to be 3rd April 2023. She asked what the work integration plan was to be at that date.

164. Mr. Klees did not reply directly and that response came from Karim El-Nacoury, the Respondent's Senior International HR Business Partner who proposed a call with the Claimant in March 2023 to discuss re-integration. The Claimant agreed to that proposal.

165. The Claimant was invited to a meeting by Athina-Isabelle Durre to take place on 24th March 2023. The Claimant was told that Mr. Klees was not available and so a colleague, Mr. Bossmann, would be attending. The role of Mr. Bossmann was in fact limited to taking notes although as we shall come to, the notes came to be the subject of dispute.

166. The email inviting the Claimant to the meeting indicated that there was to be a discussion about her future role with the Respondent and how she could be supported in a return to work. The meeting was re-arranged at the Claimant's request and it took place on 28th March 2023.

167. We accept that at the meeting the Claimant was told by Ms. Durre that her role was "no longer" and that there were no projects in the United Kingdom. She was told that she could be offered the role of Office Manager and that other roles could be considered but that they would require the Claimant to relocate. The Claimant naturally asked when that decision had been taken but Ms. Durre was not able to confirm that and said that she would need to discuss that position with Mr. Klees. Despite the fact that Mr. Klees had returned from annual leave by that stage he still did not attend the meeting. It is clear that he should have been in attendance as the Claimant's line manager and given that she was being informed that her role was no longer available.

168. Ms. Durre did not appreciate that what she was essentially telling the Claimant was that her role was redundant. She believed that if there was an offer of another role then there was no issue as to redundancy.

169. The Claimant emailed Ms. Durre on 3rd April 2023 requesting a copy of the minutes of the meeting. Ms. Durre replied on 6th April attaching a copy of what were referred to as minutes of the meeting. It was indicated that on the Claimant's return to work there would be a meeting with Mr. Klees to "clarify responsibilities and share all the information needed". She also proposed weekly or twice weekly meetings to see how the Claimant was progressing once she had returned to work. Ms. Durre arranged those recurring meetings by Teams with effect from 11th April 2023 (see page 357 of the hearing bundle) and also for a meeting on that day (see page 359 of the hearing bundle).

170. The minutes of the meeting have been something of a controversy. Particularly, they did not record all of the meeting including the fact that the Claimant had been told that her job was "no longer". We accept the evidence of Ms. Durre that the process of taking notes in Germany is not the same as we would usually see in the United Kingdom and are more of a bullet point account without significant detail.

171. The Claimant emailed Ms. Durre on 11th April 2023 to say that the minutes which had been provided were not a true account of what had been discussed. The Claimant's email said this:

"I have gone through your minutes of meeting and this is not a true account of what was discussed and is a very high level overview which is missing key

discussion points.

For instance you have not listed any questions that I raised during the course of our meeting, which I have listed below:

You clearly stared at the beginning of our meeting that my job is redundant and the offer on the table is for the position of Office Manager. This then led to many questions from me where I asked when it was decided my job was redundant in which you did not have an answer. I also stated that there is a lawful process you need to follow when making someone's job redundant (consultation period) again you said you would have to revert back to me with answers

You stated you would send me the job description of office manager

I talked about making reasonable adjustments and the legal requirement for this in the workplace.

I asked about referral to occupational health for assessment

Detailed phase return working plan which you stated that this is not in place yet as you wanted to speak to me first

I asked why Kai was not on the call which you explained he has just returned back from vacation so you didn't want to overload him with work but I will have a further meeting with him at a later date

I talked about sickness policy regarding if I was sick in the future, you stated what the German policy was but would have to look into the UK legal requirements. I clearly highlighted that the company does not have any policies in place, hence why I raised the question for guidance.

All of the above you said you would revert back to me asap and its now been two weeks with no answer other than you do not have to provide a phase return working.

If you wish I can send my minutes of the meeting as what you have sent is not sufficient and has very little detail with no answers to many of my questions raised.

I was led to believe Maik Bossmann was in the meeting to record all minutes, so why is there very little detail? You clearly asked at the beginning of the meeting for me to not record the call in which I agreed as you have a note taker, so this is very disappointing in what I have received.

Please get back to me asap".

172. The Claimant forwarded her email to Ms. Feroce-Vernikovsky along with a further email expressing her disappointment with the way in which her return to work had been handled. Her email said this:

"I am writing to you to express my disappointment in the handling of my return to work interview and the protocol followed in the recording of minutes of meeting. Please refer to email chain below and attached minutes of meeting.

This protocol is not acceptable and is not how it should be conducted for an official meeting. What has been sent to me is more like an agenda and is not sufficient to send as minutes of meeting.

I therefore would like answers to the following questions:
When was it decided that my role is redundant?
Why was I not informed of this?
I do not believe the position of Office Manager is an acceptable alternative of employment without consultation and is not comparable to my current position and will not offer any career prospects. Please explain why you believe this is an acceptable position for me?
It's the post that is made redundant, not the person, so when was it decided the post would be removed from the company structure?
I identify as a person with a disability due to a mental injury, I believe you have enough evidence regarding my disability due to all of the medical treatment I have been receiving, I therefore request an Occupational Health Assessment to ensure a safe return to work in a safe environment, to decide what reasonable adjustments that will need to be made.
As the minutes don't reflect my post of Head of Business Development is now redundant and the alternative employment offered is Office Manager, I don't believe enough thought was given to suitable Alternative Employment.

It seems to me that you are putting me in a redundancy situation. Can you offer a way forward now as I am due to return to work next week and these issues need to be resolved before my return date of 19th April and would like to know what you propose going forward.

If you could please get back to me asap it would be appreciated".

173. The Claimant did not receive a response dealing with those matters from Ms. Feroce-Vernikovsky. She did, however, receive amended minutes from Ms. Durre which went into more detail and included the further points that the Claimant had raised in her email (see page 382 of the hearing bundle). The Claimant replied to say that she was still unhappy with the content of the revised minutes and a third set were subsequently produced albeit only during the course of these proceedings and some considerable time after the Claimant had complained about the content.

174. Ms. Durre sent the Claimant an invitation to discuss proposed changes within the Respondent which she declined (see page 368 of the hearing bundle). That was because, as we come to below, the Claimant had determined by that point to resign from employment with the Respondent.

The Claimant's resignation

175. On 18th April 2023, the day before she had been due to return to work, the Claimant resigned from employment with the Respondent. Her resignation letter which was sent to Ms. Feroce-Vernikovsky and Mr. Klees said this:

"I would like to address the following in relation to my return-to-work meeting that taken (sic) *place on the 28th March 2023, with two HR Business Partner – Athina Durre and Maik Bossmann. I was informed during this meeting that my job no longer exists as the company are no longer pursuing business in the UK so the only job on offer for me is an Office Manager position. Athina explained that my*

conditions of contract would remain the same and that she would send me the job description to review.

During the meeting I raised many questions which I have listed below:

1. When was it decided that my role is redundant?
2. Why was I not informed of this?
3. Why was there no consultation process?
4. What is my return-to-work plan?
5. What reasonable adjustments will be made to assist with my disability?
6. Can they refer me to Occupational Health?
7. I explained as we do not have any policies in the UK, in particular, regarding sickness I asked what would happen if I found myself having to go off work with sickness again?
8. Why was my line manager Kai Klees not present in this meeting – I was informed that he had just returned from annual leave, so they didn't want to overwhelm him with work.

None of the above could be answered on the day with the exception, of point 8. I was informed Athina will revert to me regarding my questions and send the job description. To date 18th April 2023 I am yet to receive a response to the above, other than an email stating that they are not required to provide an integration plan (Phase return working) under UK legislation.

I since received the minutes of meeting which were inadequate and not a true account of our meeting, omitting key questions I raised, in particular – making my role redundant. What I received was more like an agenda.

I would like to point out that further breaches have been made in line with ECHR – discrimination in Employment concerning redundancy. The following steps must be made when making a position redundant in which you failed to comply:

Identify a plan
Put a consultation process in place
Work with work counsel throughout consultation process
Identify what position need to be redundant in the UK
Explain why my position is being made redundant
Identify new organization restructure
Look at all UK employees' roles when making redundancies

I believe that you have further discriminated against me due to being a woman and am considered as a "discrimination complainer". You are aware that I currently have a complaint raised against the company for discrimination and victimisation for sexual harassment and failure to address my grievance.

I do not have any confidence in the company to raise this matter as part of an internal grievance process.

To my knowledge, there has not been any other UK employees affected by redundancy other than solely myself.

I believe I have no other option but to resign as of today (18th April 2023) on the grounds of Constructive Unfair Dismissal due to my contract being broken. For the avoidance of doubt, I resign because of the treatment I received from you

regarding the above and in conjunction to previous discrimination received, which is outlined in my ET1 to the Employment Tribunal. My return to work is the 19th April 2023 with still no plan in place which is unacceptable.

The above will now be added to my list of issues in my ET1 form to the Tribunal.

I am aware that my contract states I am required to provide 3 months' notice. Please inform without delay if you wish for me to carry out such notice or you will pay be 3 months' notice as part of my final salary."

176. We are satisfied that that was a dismissal with notice and not with immediate effect. Whilst the Claimant referred to resigning "as of today" the final paragraph of the resignation letter made plain that the Claimant was indicating that she would either work her notice or questioning whether she would be paid in lieu. That is also reinforced by a later email sent by the Claimant which we will come to below.

177. Ms. Feroce-Vernikovsky replied to the Claimant's resignation letter on the same date. She had interpreted the Claimant's resignation as being with immediate effect. Ms. Feroce-Vernikovsky indicated that she had sent the Claimant an invitation for a meeting the following day on 11th April 2023 and had intended to discuss the points that she had raised at that point. She indicated that she had intended to discuss that the Claimant's role was at risk of redundancy and to seek to enter into consultation. She asked the Claimant to still attend the meeting.

178. The Claimant declined to do so saying – not unreasonably – that it was too little too late and that she believed that the Respondent had realised that they had not followed the correct process and were trying to backtrack. She referred to her trust in the Respondent being broken and asked for confirmation as to whether her annual leave request had been granted and whether the Respondent wanted her to work her notice or whether she would be paid in lieu. Again, that was consistent with the fact that the Claimant had not resigned without notice and with immediate effect.

179. Ms. Feroce-Vernikovsky replied to say that the Claimant's email and letter of resignation had been unclear about whether she was resigning with immediate effect. She asked the Claimant to confirm the position and indicated that if the resignation had been with notice then she felt that it was reasonable to expect her to attend the meeting on 19th April 2023 because he was still an employee.

180. The Claimant replied to say that she would attend the meeting if required and her annual leave request was refused but that in the circumstances she did not see what the benefit would be. As to the position with notice, the Claimant said this:

"I believe my letter is very clear and that I resign but with 3 months' notice, as per my contract".

181. Again, that made it plain that the Claimant had not resigned with immediate effect but on three months notice which would have expired on 18th July 2023.

182. Ms. Feroce-Vernikovsky replied to say that the annual leave request would be granted and so the meeting the following day would not go ahead and that they would revert to her further.

183. She also sought to arrange a further meeting with the Claimant for 27th April 2023 regarding the issue of the Business Development Manager role. That meeting took place with Ms. Durre seeking to discuss with the Claimant the proposed redundancy of that role. The Claimant was accompanied by Mr. Hunefeld.

184. Following the meeting the Claimant emailed Ms. Durre. The relevant parts of her email said this:

> *"With respect and to avoid any misunderstanding, I am resigning on the grounds my contract of employment being broken, I therefore respectfully decline your offer to now discuss redundancy, as I do not believe we will be able to reach a compromise going forward.*
>
> *We also discussed about my 3 months' notice period and whether you wish for me to carry out such notice or that I leave the company as soon as possible. Ad you made it clear in yesterday's meeting that there is no work for me, so therefore you will pay my 3 months' notice in lieu".*

185. We do not take that email as a further or immediate resignation as is relied upon by the Claimant. It was simply her reflection of what had been said in the meeting and the position that she would not be required to work her notice period. It did not provide that the Claimant's resignation was now somehow effective immediately.

186. Ms. Durre emailed the Claimant after the meeting. The relevant parts of her email said this:

"As discussed, prior to your resignation on 17 March, we wanted to meet with you to discuss the questions you had regarding your role and your return to work. Until today, we have been unable to do this as you were on sick leave and then on vacation. Whilst we had been more than willing to facilitate your return to work (including implementing reasonable adjustments where required and having regular catchups on your return), we had realised that the role you would be returning to was no longer required due to there being no upcoming project in the UK and a lack of opportunities in the UK market for future work. This meant there was a need to enter into a consultation process with you to discuss making your role redundant, which is documented in the attached At-Risk letter. Had you not resigned (or waited until out next meeting), we would have met with you to discuss these points in good faith. We have therefor attached the At-Risk letter for the sake of completeness.

However, we appreciate that you have now resigned (giving three months' notice) and you do not wish to enter into a consultation process with us.

In light of this, we have considered the rationale behind the proposal to make you redundant and the fact that there are no suitable alternative roles for you in the business and have made the decision to make your role redundant.

As such, you will receive the following payments in the company's next payroll in may (less any required deductions):

1. Payment in lieu of your three months' notice period, meaning your employment will end on today's date.
2. Payment of any accrued but unused holiday entitlement as far as they are still existing.
3. Payment of your statutory redundancy payment, which will be tax-free.
4. Payment of your 2022 performance bonus".

187. The email had attached a letter which purported to be one that the Claimant would have received had she engaged in the consultation process. Given that she did not it is difficult to see the purpose of that letter nor why the Respondent continued with a redundancy process when the Claimant had already resigned and would be leaving employment in all events.

188. The relevant parts of the letter said this:

"As explained in yesterday's meeting, DB Engineering & Consulting Limited ("the Company") is experiencing a downturn in work in the United Kingdom, which means that it might need to make your role redundant.

Rationale
There are no upcoming projects in the UK, and we have made the decision not to bid for any more projects in the UK market due to the lack of opportunities. The Company is currently completing one project as a subcontractor for a UK company, WSP. However, the outcome of the tender has been delayed until September 2023. We have made a bid to continue working on the follow up project if WSP's bid is successful. However, this is not guaranteed. Furthermore, the work on the project has mainly been carried out by partner companies and would not even generate the costs incurred in the UK branch. As a result of the downturn in work, there are no projects that you could work on with your skill set and experience that would amount to full-time duties.

Furthermore, the company has also made the decision to close the office in Derby. As you know, this has been unoccupied since the COVID-19 lockdown, and we are in the process of terminating all contracts in order to save costs. There are no plans to recruit stuff for UK projects due to the lack of opportunities. The three other employees who work for the company work for other group subsidiaries engineers and either work remotely, or travel for work.

Consultation

As a result, there is a risk that we would be unable to continue providing work for you I might need to make your role redundant. However, no firm decision has been made and we would like to consult with you before doing so.

We can arrange a consultation meeting via Microsoft Teams. You may bring a trade union representative or colleague to the meeting as your companion. If you wish to do so, please let me know the name of your companion as soon as possible.

The aim of the meeting is to give you a chance to discuss the proposed redundancy in more detail and, in particular, how it affects you and whether there

is any way of avoiding it.

Following that meeting, the Company will consider any submissions you make, and we will then arrange a further meeting to discuss our response.

If your role is ultimately made redundant, you will be entitled to:
The three months notice. Set out in your contract or an equivalent payment in lieu.
Payment in lieu of any accrued but unused holiday entitlement as far as they're still existing.
A statutory redundancy payment, which is calculated on the basis of your age, weekly salary (subject to a maximum, currently £643) and length of service.
Payment of your 2022 performance bonus".

189. That was followed by a further letter from Ms. Feroce-Vernikovsky and Ms. Durre on 3rd May 2023 confirming that the Claimant's employment had ended on 28th April 2023 and setting out what payments would be received (see page 401 and 402 of the hearing bundle).

190. We are satisfied that the Claimant resigned on three months notice and that before that notice period came to an end her employment was terminated by the Respondent with effect from 28th April 2023. That was therefore an express dismissal of the Claimant.

191. We have not been taken to any evidence of a lack of/cessation of projects in the United Kingdom by the Respondent which we find very surprising given that the Respondent says that that was the basis for the termination of her employment by reason of redundancy. There must undoubtedly be documents about that in the form of emails, board minutes and the like but we have absolutely no documentation in support of that position and particularly nothing evidencing a decision made not to bid for any further work in the United Kingdom. We did not accept the evidence of Ms. Durre that there were absolutely no documents that could have assisted us in that regard.

192. We have also not heard evidence from Kai Klees as the Claimant's line manager about any such cessation or downturn of projects within the United Kingdom nor from Michael Ahlgrimm who we heard evidence from the Respondent had also been involved as the successor to Mr. van Houten in determining that the Claimant should be made redundant.

193. We accept the evidence of Mr. Hunefeld that there has in fact been no such cessation and that there were ongoing projects in the United Kingdom and further bids were being made by the Respondent. We also accept his evidence that the business development role that the Claimant had undertaken was still required and that in fact he himself was now having to pick that up alongside his other duties following the termination of her employment.

CONCLUSIONS

194. Insofar as we have not already done so we turn now to our conclusions in respect of each of the complaints before us.

Sexual harassment or harassment relating to the protected characteristic of sex

195. We begin with the complaints of harassment related to the protected characteristic of sex. The first of those complaints is the treatment of the Claimant by Mr. Skelton on 27th January 2022 which relate to him having smacked her on the bottom and bitten her on the ear. We can deal with this in short form because the Respondent has now conceded that this occurred and that it amounted to sexual harassment. Had that not been conceded then having viewed the CCTV footage we would have had no hesitation in reaching that conclusion.

196. Although all complaints are termed in the list of issues as being "sexual harassment" none of the other complaints could reasonably be properly categorised in that way and so we have considered them as complaints of harassment relating to the protected characteristic of sex.

197. The next act of alleged harassment is Ms. Durre announcing in a meeting of 28th March 2023 that the Claimant's role was no longer required. We are satisfied that in that meeting Ms. Durre did say that the Claimant's role was "no longer". That was information that we accept she had been given by Mr. Klees although having not heard from him we cannot know how he had apparently reached that conclusion or whether he had been given an instruction about that from anyone else.

198. We accept that the conduct was unwanted in that it was unwelcome news to the Claimant. However, we do not find that this had the purpose or indeed effect of creating the prescribed environment on the Claimant. It was unpleasant news to the Claimant but it could not reasonably be said that it had violated the Claimant's dignity of created an intimidating, hostile, degrading, humiliating or offensive environment.

199. However, even if we had reached a contrary conclusion, there is nothing at all to say that this related to the protected characteristic of sex. The Claimant's sex had nothing at all to do with what happened at the meeting which was simply Ms. Durre conveying to the Claimant what she had been told by Mr. Klees. This prt of the claim therefore fails and is dismissed.

200. The third act of alleged harassment was Ms. Durre sending an email to the Claimant minutes of the meeting of 28th March 2023 which did not reflect what had actually happened in that meeting. We accept that it is factually accurate that the minutes did not reflect much of what was said at the meeting and that is evident by the fact that the notes were revised following communications from the Claimant. However, we do not accept that this amounted to unwanted conduct. The Claimant was expecting the minutes and whilst they were not to her satisfaction this could not reasonably be described as unwanted conduct.

201. However, even if we had found that it did amount to unwanted conduct we would not have concluded that those minutes had the proscribed purpose or effect of violating the Claimant's dignity or creating a intimidating, hostile, degrading, humiliating or offensive environment. Whilst the Claimant was understandably irritated that the minutes did not accurately reflect the conversation that had been had that does not come anywhere near to violating her dignity or creating the proscribed environment.

202. However, even if we had not reached that conclusion there is nothing at all to suggest that sending abridged minutes had anything at all to do with the Claimant's sex. The notes were sent in that way because that is typical for the production of notes in Germany and it was not anticipated that anything else would be required. There is not link at all to suggest that the way in which the notes were produced were in any way related to the Claimant's sex. This part of the claim therefore fails and is dismissed.

203. The next act of alleged harassment is that there was no response to the complaint that the Claimant had raised in her emails of 11th April 2023 to Ms. Durre and Ms. Feroce-Vernikovsky regarding the notes before 18th April 2023 when she resigned. Whilst the Claimant doubtless wanted a more timely response to her concerns, we are not satisfied that a failure to respond within the period concerned could be reasonably said to amount to unwanted conduct.

204. Similarly, a failure to respond promptly to correspondence in these circumstances cannot reasonably be said to have violated the Claimant's dignity or had the proscribed purpose or effect of violating the Claimant's dignity or be such that it created an intimidating, hostile, degrading, humiliating or offensive environment.

205. Even if we had formed a different view in respect of both of those matters, there is nothing which suggests that the failure to respond had anything to do with the Claimant's sex. It was not therefore conduct related to sex and this part of the claim similarly fails and is dismissed.

206. The next act of which the Claimant complains is Ms. Feroce-Vernikovsky inviting the Claimant to the meeting on 18th April 2023 despite the Claimant having resigned. This cannot logically be said to be unwanted conduct because the invitation had been sent on 11th April 2023 one week prior to the Claimant's resignation. At that time the Claimant remained in employment with the Respondent and was seeking to return to work.

207. Even if it had been unwanted conduct, it cannot reasonably be said even taking into account the Claimant's perception to have violated her dignity or having had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. It was a simple invitation to a meeting via Teams. On no objective standard could it have had those effects.

208. Even if that was not the case, there is again nothing at all to reasonably suggest that sending the invitation to the meeting in any way related to the Claimant's sex. It follows that this complaint of alleged harassment must also fail and be dismissed.

209. We come then to the next complaint of alleged harassment sending the Claimant revised minutes of the meeting of 28th March 2023 on 20th April 2023. This cannot in our view be reasonably said to amount to unwanted conduct. The Claimant had raised the issue that the minutes were incorrect and had set out what she says should have been included. It cannot be reasonably said to be unwanted conduct for Ms. Durre to have sent the Claimant revised minutes in those circumstances even if those were still not to her satisfaction.

210. However, even if we had found that to have been unwanted conduct, we would not have concluded that it either violated the Claimant's dignity or had the proscribed purpose or effect of reasonably and objectively creating an intimidating, hostile, degrading, humiliating or offensive environment. All that was being done was the correction of some notes to include points that the Claimant herself had said needed to be included.

211. However, even if that had been the case again the amendment of the notes had nothing whatsoever to do with the Claimant's sex on the evidence before us. It therefore did not relate to sex and fails as a complaint of harassment.

212. The next complaint of alleged harassment is said to be Ms. Durre trying to make the Claimant redundant on 27th April 2023 but this time with a consultation process. We do consider that this was unwanted conduct because the Claimant had made plain on a number of occasions that she considered that she had resigned and did not want to attend a meeting and saw no purpose in doing so. The insistence that she attend a consultation meeting therefore was in our view conduct that was unwanted to the Claimant.

213. However, on a reasonable and objective standard we do not find that the meeting had the proscribed purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Whilst she did not want to attend the meeting it cannot reasonably be said that such an environment was created or that the Claimant's dignity was violated.

214. Again, similar to other complaints of harassment there is also nothing at all to say that the meeting had anything to do with the Claimant's sex and for all those reasons this complaint of harassment also fails and is dismissed.

215. The penultimate complaint of alleged harassment is Ms. Durre having sent the Claimant the "at risk" letter on 28th April 2023. Again, we find that that conduct was unwanted for the same reasons as in respect of the allegation immediately above.

216. However, again it did not have reasonably and objectively the proscribed purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Whilst we have no doubt that the Claimant was frustrated by receiving the letter given her position that she had resigned, but that as not by any stretch sufficient to violate dignity or create the relevant environment.

217. Even had we not reached that conclusion, this complaint would have failed in all events because once again there is nothing at all to say that the sending of this letter had anything whatsoever to do with the Claimant's sex. There is simply no evidence that the letter related in any way to sex and so again this allegation fails as an allegation of harassment.

218. The final act which is said to amount to harassment is Ms. Feroce-Vernikovsky sending the Claimant a letter purporting to terminate her employment on the grounds of redundancy.

219. For the same reasons as for the last two allegations we are satisfied that the sending of that letter amounted to unwanted conduct. However, again for the same reasons as given above the sending of that letter whilst again doubtless frustrating for the Claimant was not something that could reasonably or objectively be said to have violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

220. Even had we not reached that conclusion then again like the other acts of alleged harassment there is nothing at all which suggests that this related in any way to the Claimant's sex. It follows that this allegation also fails of one of harassment related to the protected characteristic of sex.

Victimisation – protected act

221. We begin with whether the Claimant had done a protected act. The Claimant relies on six alleged protected acts in that regard.

222. The first of these is the Claimant's report of sexual harassment which is accepted by the Respondent to be a protected act. Similarly conceded to be protected acts are the Claimant's grievance which she sent to Ms. Ruoff on 16th February 2022 and the first claim that the Claimant lodged with the Employment Tribunal. However, we accept the submissions of Ms. Brewis that that latter protected act could not result in any of the allegations of victimisation because all of them pre-dated the presentation of the Claim Form on 26th May 2023. The position has not been framed either in the list of issues or in the second Claim Form that there was any reliance placed on the fact that the Claimant *might do* (our emphasis) a protected act.

223. We turn then to those alleged protected acts which are not conceded by the Respondent. The first of those is the Claimant informing Ms. Ruoff on 15th February 2022 that she had been removed from the Toronto Project. This could only fit logically within Section 27(2)(d) EQA 2010.

224. We do not consider that this could amount even impliedly to an allegation that the comment had contravened the Act. The Claimant's evidence was that she had told Ms. Ruoff that she was "not happy" that she had been taken off the Toronto Project but even on her own account said no more about that. She did not suggest that Ms. Harbich had done that because of her complaint and the nature of her comment to Ms. Ruoff was that she was unhappy about that decision. We are therefore not satisfied that this was a protected act.

225. The next thing that the Claimant relies on as being a protected act is her email of 11th April 2023 to Ms. Durre. We have set out the content of that email above. It was sent in the context of the Claimant complaining that the minutes which had been sent to her did not convey what had been said in their meeting. This could only again fit logically within Section 27(2) EQA 2010. There was nothing within that email that came close either expressly or impliedly from suggesting that she was suggesting any breach of the EQA 2010. The closest that matters came was a reference to reasonable adjustments but that was in the context of the

Claimant saying that that was something that she had raised at the meeting which had been omitted from the minutes. Nothing in the Claimant's evidence explained how she was making any allegation that the EQA 2010 had been breached in respect of this email and for the reasons that we have given we are not satisfied that this amounted to the doing of a protected act.

226. The final protected act which is not conceded which the Claimant relies on is her email of 11th April 2023 to Ms. Feroce-Vernikovsky. We remind ourselves that that forwarded on the email to Ms. Durre and to also raise concerns and ask questions about the process that was being followed in relation to a return to work. The Claimant also sent a separate email to Ms. Feroce- Vernikovsky. That was similar in content to that which had been sent to Ms. Durre which complained about the process that had been adopted. Again, the nearest that the email came to raising any issue with regard to the EQA 2010 was referring to her mental health and requesting a referral to occupational health. Again, nothing in the Claimant's evidence explained how she was making any allegation that the EQA 2010 had been breached in respect of this email and for the reasons that we have given we are not satisfied that this amounted to the doing of a protected act.

Victimisation – detriment and/or direct sex discrimination

227. We should observe that each of the allegations of victimisation are also advanced as complaints of direct sex discrimination save as for the final two. For ease and to avoid repetition, we have therefore dealt with both allegations at the same time.

228. The first allegation is the removal of the Claimant on 15th February 2022 from the Toronto Project by Ms. Harbich. We have found as a fact that that happened. The first question is therefore whether this amounted to a detriment. We are entirely satisfied that it did. The Claimant was happy to have been seconded to work on the project and it may have led to the possibility of a permanent position (or at least one of a reasonable duration) in Canada which was something which suited her ambitions.

229. We then turn to whether the reason that the Claimant was materially influenced by the protected act – which can logically only be her complaint to Ms. Harbich about the events of 27th January 2022 concerning Mr. Skelton.

230. The only reason that the Claimant was removed from the project was because of her complaint about Mr. Skelton to Ms. Harbich. Indeed, the reason for removal was that it was to "protect" the Claimant. Whilst that maybe have been done with good intentions, it nevertheless would not have happened if the Claimant had not made a complaint about sexual harassment. It follows that this complaint of victimisation is well founded and succeeds.

231. We have also considered it as an allegation of direct sex discrimination. Other than the Claimant's contention to that effect there are no facts which would lead us to draw an inference that her sex had anything to do with the decision to remove her from the Toronto Project. If a male employee had made a complaint of sexual harassment against Mr. Skelton there is nothing to suggest that they would have been treated any differently to the Claimant. This allegation as one of direct sex discrimination therefore fails and is dismissed.

232. The second allegation is the removal of the Claimant, on or before 11th April 2022, from the Microsoft Teams chat and Sharepoint relating to the Toronto Project. We do not accept that this placed the Claimant at any detriment. She had already been removed from the project and as such did not need access to the chat or SharePoint. She therefore cannot have been subjected to any disadvantage by not having access to something that she did not in fact need.

233. However, even if we had found that the Claimant was subjected to a detriment in that regard, we find that the reason why the Claimant was removed from the chat and Sharepoint was as a direct result of the fact that she had been removed from the project by Ms. Harbich. That being the case, there was no reason for the Claimant to remain part of those groups. There is no evidence that any of the things that the Claimant relies on as being protected acts pre-dating this matter had anything at all to do with that decision. There is also nothing before us to suggest that the Claimant's sex had anything to do with her removal from those groups other than her contention to that effect. Indeed, we accept that Mr. Skelton was also removed after his resignation because he was no longer part of the project either. It follows that the complaints of victimisation and direct discrimination in respect of this allegation fail and are dismissed.

234. The third allegation is that between 11th April 2022 and 17th May 2022 the Respondent did not explain why the Claimant had been removed from the chat and Sharepoint for the Toronto Project. We do not consider that this amounted to a detriment to the Claimant. She was in no way disadvantaged from a delay in being provided with an explanation for removal from chats/groups which she no longer needed access to because she was not working on the project. Therefore, she suffered no disadvantage.

235. However, even if we had not reached that conclusion there are no facts which we have been taken to which lead us to infer that any of the protected acts relied on by the Claimant had anything to do with the failure to provide her with an explanation about the removal from the chat and Sharepoint nor are there any facts which suggest that her sex had anything to do with the matter. It follows that this allegation of victimisation and direct discrimination also fail and are dismissed.

236. The next allegation is Ms. Durre announcing on 28th March 2023 that the Claimant's role was no longer required. We do consider that there are inferences to be drawn in this regard. Firstly, the Respondent called no evidence from Mr. Klees who apparently made that decision on the advice of HR nor from Mr. Ahlgrimm who was also involved. Secondly, we had no documentation at all to evidence a downturn in UK projects or an intention to no longer bid for UK projects and we find it inconceivable that there would not have been anything at all in existence in that regard for the reasons that we have set out in our findings of fact. Thirdly, the alleged position as to redundancy only came to the fore after the Claimant raised her intention to return to work and was hitherto never mentioned before that point. Fourthly, there was the evidence before us of Mr. Hunefeld that there had been no downturn in work in the UK markets and that after the termination of the Claimant's employment he had had to pick up the work that she would have been doing alongside his own.

237. Finally, there had been the open "chats" from key members of the Respondent's senior leadership team over a year previously that the Claimant was "out" and that the Respondent would not want to continue to employ her. That had only come about in the context of the Claimant having raised the complaints of sexual harassment against Mr. Skelton and prior to that there had been no criticism of her or her work during her time at the Respondent.

238. We are therefore satisfied that there are sufficient facts before us to shift the burden of proof to the Respondent to prove firstly that the protected acts which we have found to be made out played no material part in the decision and that the Claimant's sex in no way resulted in that position. The Respondent has failed to discharge that burden. It has adduced no evidence other than witness evidence of people who were not the decision makers and were relying on what they had been told by others that there was any genuine redundancy situation in respect of the Claimant's role. It follows that the complaints of victimisation and of direct sex discrimination in respect of this allegation are well founded and succeed.

239. The next allegation is Ms. Durre sending an email to the Claimant enclosing the minutes of their meeting which was missing approximately 75% of the information that had been discussed. We do not accept that this caused the Claimant a detriment. Once she raised the issue, the notes were amended to take into account her points. No decisions were taken off the back of incorrect notes and the Claimant was in no way disadvantaged by them.

240. Moreover, there are no facts that the Claimant has proved which suggest that either any protected act relied upon or her sex materially influenced or were the reason why the notes were produced in the way that they were. We have accepted the reason that the notes appeared in the form that they did was because that is the way that minutes are taken in Germany. When the Claimant raised her concerns that the notes were unsatisfactory they were amended by Ms. Durre. We make no finding that they notes were in any way doctored by Ms. Durre (or indeed anyone else) as Mr. Horan contends and they were simply amended to include the points that the Claimant had raised.

241. It follows that the burden of proof does not shift to the Respondent but had we needed to make a finding as to the "reason why" then as we have already indicated above this is because the notes were being taken in the way that is customary in Germany. It was nothing to do with any protected act or sex.

242. The next allegation is that the Respondent failed to answer the Claimant's complaints about the minutes which she had made on 11th April 2023 before she resigned from employment on 18th April 2023. We do not consider that this can reasonably have been a detriment to the Claimant. There is no evidence that she was in any way disadvantaged by that delay. It was a relatively short period of time when on any account as a busy member of the HR team Ms. Durre and Ms. Feroce-Vernikovsky would also have been attending to other matters. Once Ms. Durre had considered the Claimant's points, she amended the notes to take account of them. Other than irritation that the notes were not as the Claimant believed that they should be in the first instance, there was no detriment in the delay in reverting to her about them.

243. Moreover, again, there are no facts which the Claimant has proved that any protected act relied on or the matter of her sex had anything to do with that delay. The burden of proof therefore does not pass to the Respondent. It follows that this complaint of victimisation and direct sex discrimination fails and is dismissed.

244. The next complaint of victimisation and direct sex discrimination is that on 18th April 2023 Ms. Feroce-Vernikovsky invited the Claimant to a meeting despite having received notice of her resignation. This is an allegation that fails on its facts. Ms. Feroce-Vernikovsky did not send the invitation to the Claimant on 18th April. The Claimant saw it on that date and declined it but that does not alter the fact that it was sent on 11th April 2023 well before the Claimant's resignation which would not have been known to Ms. Feroce-Vernikovsky at that time. Having failed on its facts the allegations of victimisation and direct sex discrimination in respect of this complaint are therefore dismissed.

245. The next allegation of both victimisation and direct sex discrimination is Ms. Durre trying on 27th April 2023 to make the Claimant redundant. We do consider that this amounted to detriment to the Claimant as by that point the landscape had changed as she had tendered her resignation and had made it abundantly clear that she did not consider that putting her through a redundancy process was of any benefit whatsoever.

246. We then have to consider if there are facts from which we can draw an inference that either the Claimant's protected acts (as made out and which pre-date this allegation) materially influenced this act and/or that her sex played a part in the treatment complained of. We are satisfied that there are and repeat all of the same points as we took into account with regard to allegation 7(d) of the list of issues.

247. We then turn to whether the Respondent has proved that it was in no way motivated by the relevant protected acts and the Claimant's sex did not play a part in the treatment complained of. Despite the evidence of Ms. Durre that she was in some way trying to in some way financially advantage the Claimant by making her redundant, we did not accept that. The Claimant had made it abundantly clear that she had resigned and as such any redundancy process was now no longer applicable. There was no benefit to the Claimant in taking her through a process that she did not want when she had already resigned.

248. We are therefore not satisfied that the Respondent has provided a non-discriminatory explanation for the treatment complained of in this regard and it follows that these complaints of both victimisation and direct sex discrimination are well founded and succeed.

249. We can take the final two allegations – which are said to be acts of victimisation only – together because they relate to the "redundancy" process which led to the termination of the Claimant's employment. Those are set out at paragraphs 7(j) and (k) of the agreed list of issues and in reality they cannot be divorced from each other. We are satisfied for the same reasons that we have found in relation to allegation 7(i) of the list of issues that the actions of the Respondent in this regard was such as to subject the Claimant to detriment.

250. We turn then to consider whether the Claimant has proved facts from which we could conclude that the protected acts which have been made out (save as for the first Employment Tribunal claim which had not happened yet) had materially influenced the Respondent's actions towards her. We would repeat all of the same points as in respect of allegation 7(i) in the list of issues in this regard and are satisfied that the burden of proof has shifted to the Respondent.

251. Again for the same reasons as we reached in respect of our conclusions with regard to allegation 7(i), we are not satisfied that the Respondent has discharged that burden of proof and accordingly both allegations of victimisation are well founded and succeed.

Victimisation – allegations against Mr. McNenemy

252. As indicated above, these allegations did not feature in the list of issues but having been granted as amendments by Employment Judge Welch we accepted that we should determine them. The allegations were as follows:

"That Mr. McNenemy as agent for the Respondent, acted unfairly in the investigation and lack of action to deal with the Claimant's grievance in that he:

-Delayed the investigation between 16th February 2022 and 8th April 2022;
-Interviewed Mr. Skelton on 14th March 2022 prior to any interview of the Claimant; and
-Accepted Mr. Skelton's resignation on 8th April 2022 instead of refusing it and continuing disciplinary action against him".

253. The only protected acts which could realistically be at play in respect of the allegations concerning Mr. McNenemy are the complaint to Christine Harbich about the actions of Mr. Skelton on 27th January 2022 and the grievance to Ms. Ruoff concerning the same subject matter.

254. The first of these allegations fails on its facts. Mr. McNenemy did not delay the investigation. He did not receive formal instructions and agreement as to fees until 28th February 2022. He took into account the fact that the Claimant was on sickness absence recovering from surgery until 7th March 2022 and – rightly or wrongly – did not consider that she would be available for interview until after that period and also unsurprisingly had his own diary commitments the following week. He concluded the interviews, site visits and review of the CCTV footage by 17th March 2022. His report was concluded and sent to the Respondent by 23rd March 2022, only four working days after his final interview. He had no further involvement and any delay thereafter lay at the door of the Respondent. There cannot therefore be any reasonable suggestion that there had been any delay on the part of Mr. McNenemy in relation to his investigation of the Claimant's grievance.

255. That brings us to the fact that Mr. Skelton was interviewed ahead of the Claimant. There can be no reasonable suggestion that this put the Claimant to any detriment. Mr. McNenemy already had the Claimant's account of what had happened on 27th January 2022 from her grievance letter. He also had the CCTV footage. He therefore did not need to interview her first to gain a better understanding of what it was that he was investigating.

256. Even had that not been the case there are no facts whatsoever that the Claimant has proved to suggest that the complaint to Ms. Harbich or the content of her grievance had anything at all to do with the timing of the commencement and conclusion of the investigation or the way in which interviews were scheduled.

257. Mr. McNenemy was an independent party tasked with looking at the grievance. He had no interest in seeking, whether consciously or subconsciously, to subject the Claimant to detriment for having raised her complaints. Indeed, it was clear that he believed the Claimant over Mr. Skelton and as such there is no basis for us to conclude that he had any motivation to subject the Claimant to detriment as alleged. We consider that in all likelihood the inherent difficulty in respect of this part of the claim – and the third allegation particularly - that was the reason for the application to amend which was made by Mr. Horan on the third day of the hearing.

258. Moreover, even if the Claimant had been able to proven any facts which shifted the burden of proof it is clear that it was the availability of Mr. Skelton that dictated when Mr. McNenemy was able to meet with him and not any other factors.

259. The final allegation is that Mr. McNenemy accepted the resignation of Mr. Skelton rather than refusing it and continuing disciplinary action against him. That allegation fails on its facts. Mr. McNenemy did not and could not accept the resignation of Mr. Skelton. Indeed, it was not even sent to him. That was a matter for Mr. van Houten in conjunction with advice from Ms. Veroce-Vernikovsky.

260. It follows that the complaints of victimisation levelled against Mr. McNenemy therefore fail and are dismissed.

Unfair dismissal

261. For the reasons that we have already given in our findings of fact above, we are satisfied that the Claimant at no point resigned from employment with immediate effect and that at all times her resignation was on notice. The Respondent expressly dismissed the Claimant when they terminated her employment by reason of alleged redundancy as that brought forward her termination date from what should have been 18th July 2023 to 28th April 2023. In dismissing the Claimant during her notice period, the Respondent dismissed the Claimant.

262. We turn then to whether the Respondent had a potentially fair reason to dismiss the Claimant. We remind ourselves that the burden in that regard is firmly upon the Respondent. The Respondent relies on the potentially fair reason of redundancy.

263. In order to find that there was a genuine redundancy situation we would need to find that the Claimant's dismissal resulted from a diminution in the requirement for employees to do work of the type for which she was employed. There is no evidence of that whatsoever that is before us. We have heard no evidence from Mr. Klees and not one single document evidencing that there were no projects in the United Kingdom or that a decision had been made not to bid for anymore work there. Mr. Hunefeld was the only person before us who was in a position to give evidence on that point. His evidence, which we accept, is that the

Respondent was still operating on projects in the United Kingdom and there was work that would be the subject for bids. We accept that evidence and the Respondent has failed to discharge the burden that there was a potentially fair reason for dismissal. It follows that the Claimant's dismissal was accordingly unfair.

264. As a result of that finding we do not need to deal with the question of reasonableness of the dismissal.

265. However, we have gone on to consider whether, had we found that the Claimant had not been expressly dismissed by the Respondent whether we would have found that she had been constructively dismissed. That is because that would it seems to us be relevant to the question of remedy.

266. The Claimant relies on the same nine acts, either singularly or cumulatively, as relied on for the complaints of harassment contrary to Section 26 EQA 2010 as being a breach of the implied term of mutual trust and confidence. Some of those acts must obviously be discounted because they occurred after 18th March 2023 when the Claimant tended her resignation. They cannot of course therefore have been causative of that resignation because they had not happened yet.

267. We do not find that of itself the incident with Mr. Skelton on 27th January 2022 cause the Claimant to resign. It had happened well over 14 months previously and the Claimant had thereafter and once she had recovered from her ill health absence signified an intention to return to work for the Respondent.

268. However, we do consider the Respondent's actions on 28th March 2023 in announcing completely out of the blue, without any factual foundation and at what was supposed to be a meeting to discuss the Claimant's return to work the fact that her role as Business Development Director was "no longer" – i.e. was redundant – was a breach of the implied term of mutual trust and confidence. There was no genuine redundancy situation for the reasons that we have already given and the fact that the Claimant was "out" and the Respondent would not want to employ her had been decided over a year previously in circumstances that could only relate to the fact that she had complained of sexual harassment.

269. If there was a genuine redundancy situation there was no reason why that could not have been communicated to the Claimant previously and why that was dressed up as a return to work meeting which was never going to happen. Taking away the Claimant's role in such circumstances and without any evidential justification, presence of Mr. Klees to be able to answer questions about that or Mr. Durre being in a position to provide those answers amounted to a breach of the implied term of mutual trust and confidence.

270. That was compounded by the minutes of the meeting omitting key details from the meeting. Although we have accepted the explanation for that, it was not something the Claimant was told when she challenged those minutes or at any point prior to her resignation and her communications about those matters and questions about the process were not addressed prior to that stage.

271. For those reasons alone we are satisfied that the Respondent did breach the implied term of mutual trust and confidence in respect of allegations 2(b), (c) and (d) of the agreed list of issues and that had the Respondent not terminated the Claimant's contract of employment on 28th April 2023 within her notice period then she would have been rendered constructively dismissed.

272. The claim remains listed for a Preliminary hearing on 18th March 2025 as previously notified to the parties.

Approved by:

Employment Judge Heap

Date: 10th March 2025

RESERVED JUDGMENT SENT TO THE PARTIES ON

.....10 March 2025.....

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FOR THE TRIBUNAL OFFICE

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