Case Number: 2206055/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms Indrani Gungadin		R&B Management Services Limited

Heard at: London Central **On**: 22-28 September 2020

Before: Employment Judge Stout
Mr D Schofield
Mr D Carter

Representations
For the claimant: Mr J Heard
For the respondent: Ms L Veale

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Claimant's claim for constructive unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is not well-founded and is dimissed;

(2) The Respondent did not discriminate against or harass the Claimant because of her sex in contravention of ss 13, 26 and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010) and that claim is dismissed;

(3) The Claimant's claim under Part II of the ERA 1996 for unlawful deduction of wages in respect of her salary for the period 1-15 October 2019, and the holiday pay to which she would otherwise have been entitled on termination of her employment, is not well-founded and is dimissed.

REASONS

Introduction

1. Ms Indrani Gungadin (the Claimant) was employed by R&B Management Services Limited (the Respondent) as Manager/Company Secretary/Finance Controller from 2009 until she resigned, in circumstances which she contends amounted to constructive dismissal, on 15 October 2019. In these proceedings she claims, in summary, that the Respondent harassed her for reasons related to her sex, directly discriminated against her because of her sex, and wrongly, unreasonably or dishonestly accused her of theft or financial irregularities. She claims that she resigned in response to that conduct by the Respondent and that she was thereby constructively unfairly dismissed. She further contends that the Respondent has unlawfully withheld her wages (including holiday pay) for the last two weeks of her employment. The Respondent maintains that it had reasonable grounds to suspect the Claimant of taking money for her own use from the Respondent's bank account without authorisation, and denies that it discriminated against or harassed the Claimant or constructively dismissed her.

The type of hearing

2. This has been a hybrid hearing conducted in-person from London Central, but with video evidence from the Respondent's witnesses which was taken using Cloud Video Platform (CVP) from the hearing room. In accordance with Rule 46, members of the public present in the hearing room could both see the witnesses on the large screen in the Tribunal room, and hear them via the laptop or screen speakers.

The issues

3. The issues to be determined were agreed to be as follows:-

Constructive unfair dismissal:

1. Did R commit any of the following acts:

a. In September 2019 did R mishandle C's grievance about bullying against Dr Roh's wife (MD) by saying "I am sure you can get another job easily and will be okay", rather than addressing the issue.

b. On 17 Sep 2019 [in LOI it says 17th Sep, but it's actually 18th Sep, p.184] did Dr Roh accuse C of playing a trick on him when C enquired whether he would be interested in making her redundant.
c. On 18 Sep 2019, did Dr Roh send C a curt and critical email requesting an explanation as to why C would be absent at short notice in circumstances where he had given his unreserved blessing prior to this.
d. On 14 October 2019 did SR sarcastically say to C, "Oh, single mother is early today".
e. On 14 October 2019, did SR sarcastically say "why don't you take a maternity leave, single mother" when C asked for time off for physiotherapy?
f. On 14 October 2019, did SR grab the company debit card from C's personal purse and cut it up with a pair of scissors and demand from C all other devices to be returned immediately, before backing up this request with a text message?
g. On 15 Oct 2019 did SR accuse C of theft in an unreasonable manner and without due investigation and process?
h. On 15 October 2019 did SR dishonestly accuse C of theft or financial irregularities or set her up for such an allegation?

2. If so, did any such acts, individually or cumulatively, amount to a breach of the implied term of trust and confidence?

3. If so, was C's resignation at least in part because of such a breach?

4. Did C affirm the contract of employment before terminating it?

5. Did R have a potentially fair reason for acting as alleged and were such actions fair within the meaning of s.98(4) ERA?

Harassment

6. Did SR engage in following conduct:

a. In May/June 2019 point to C and say "she is a single mother you could marry her" while speaking to his co-director?
b. Mishandle C's grievance about bullying by Olga Roh saying "I'm sure you can get another job easily".
c. On 17 Sep 2019, did Dr Roh accuse C of playing a trick on him when C enquired whether he would be interested in making her redundant.
d. On 18 Sep 2019, did Dr Roh send C a curt and critical email requesting an explanation as to why C would be absent at short notice in circumstances where he had given his unreserved blessing prior to this?
e. On 14 October 2019 did SR sarcastically say to C, "Oh, single mother is early today".
f. On 14 October 2019, did SR sarcastically say "why don't you take a maternity leave, single mother" when C asked for time off for physiotherapy?

g. On 14 October 2019, did SR grab the company debit card from C's personal purse and cut it up with a pair of scissors and demand from C all other devices to be returned immediately, before backing up this request with a text message?
h. On 15 Oct 2019 did SR accuse C of theft in an unreasonable manner and without due investigation and process?
i. On 15 October 2019 did SR dishonestly accuse C of theft or financial irregularities or set her up for such an allegation?

7. Was the alleged conduct unwanted conduct?

8. Did it have the purpose of effect of violating C's dignity or creating intimidating, hostile, degrading, humiliating or offensive environment for C?

9. Was the conduct related to sex?

Direct Discrimination

10. Was the treatment referred to under harassment (a-i) less favourable treatment because of sex?

11. Are Mr Lingden and Mr Cox suitable comparators?

12. If not, is the correct hypothetical comparator a male company secretary?

Unlawful deduction of wages / holiday pay

13. The C's pro-rata holiday entitlement as at the termination date was 1.5 days. Was C entitled to that holiday pay and her wages from 1 Oct 2019 to 14 Oct 2019 and did R unlawfully withhold this pay?[1]

Remedy

14. If C is successful with her claim for harassment/discrimination, what compensation is she entitled to in respect of injury to feelings?

15. If the Claimant is successful with her claim for unfair dismissal:

    a. What is the basic award?
    b. What losses arise from the dismissal?
    c. Has she failed to take reasonable steps to mitigate her loss?
    d. Should any basic or compensatory award be reduced on account of contributory fault by C on the basis that she is alleged to have

[1] This particular issue is expressed as reformulated by the Tribunal in the light of the parties' agreement at the hearing as to the issues.

made unauthorised transactions set out in Schedule in R's grounds of Response? If so by what amount?

e. Should any compensatory award be reduced on basis that C might have been dismissed lawfully in any event because of the financial transactions? If so by what amount.
f. Should any compensatory award/ damages be reduced in accordance with the *Devis v Atkins* principle on the basis of the alleged unauthorised financial transactions? Is so by what amount
g. Should any award be adjusted under s.207A Trade Union and Labour Relations (Consolidation) Act 1992 on account of a failure to follow applicable ACAS code? If so by how much?

4. The Respondent originally sought to bring a counter-claim for breach of contract against the Claimant in these proceedings in respect of its schedule of alleged unauthorised expenditure that it appends to its Grounds (and Amended Grounds) of Resistance in these proceedings. However, at a Case Management Hearing on 13 May 2020 it was recorded that the Claimant had not brought a contract claim and that there was no employer contract claim before the Tribunal. The Respondent has since commenced proceedings in the County Court with a view to recovering the alleged unauthorised expenditure. Default judgment was given in those proceedings, but that was recently revoked and the Claimant granted relief from sanctions and permission to file a Defence to those proceedings. The parties do not yet have a date for hearing in the County Court. We ascertained at the outset that both parties were content for us to make any findings in these proceedings that we consider properly arise in relation to the claims before us. They did not suggest that there is any reason for us to approach these proceedings any differently than we would if there were no County Court proceedings on foot, and we agree. Neither side wanted an adjournment.

The Evidence and Hearing

5. We read the bundle and the parties' witness statements. We also admitted into evidence, and read, certain additional documents from both sides which were added to the bundle during the course of the hearing.

6. We heard evidence in person from the Claimant and her ex-husband Mr Krishna Gungadin and, for the Respondent, we heard evidence by video (Cloud Video Platform) from Dr Roh and Mr Gomshiashvili. They gave evidence from, respectively, Moscow (Russia) and Dubai (UAE). We were satisfied that it was lawful for them to do so, the Respondent having received (and provided to us) confirmation from the Foreign and Commonwealth Office to that effect in respect of Russia, and a signed legal opinion from Lutfi & Co, a firm of solicitors based in UAE, in respect of the position in UAE.

7. We explained our reasons for various case management decisions carefully as we went along and neither party requested that we provide written reasons for those decisions, so we have not done so (save insofar as some of those

decisions are relevant to our findings of fact and are therefore referred to below).

8. We feel it is important to record that this case was not well prepared by either side, which was surprising and unfortunate given the serious allegations against the Claimant that lie at the heart of this case. Witness statements for both sides did not refer in any systematic way to documents in the bundle. The chronology of basic events in the case was unclear in part because emails in the bundle were not in chronological order, and some were missing date or time stamps. The Respondent's schedule of transactions that it alleges the Claimant had carried out without authority (totalling £10,193: pp 29K-L) contained at least one material typographical error and was not supported by any detail in the witness evidence; the basis for it had to be ascertained by reference to the bank account statements. Likewise, the Respondent's list of receipts and pictures of receipts (pp 117-118) contained anomalies and was not supported by any detail in the witness evidence. The Respondent had also not provided witness evidence from its accountant or disclosed any documentary evidence from the accountant such as VAT returns which may have provided some illumination about the Respondent's financial procedures. The Claimant's payslips were not in the bundle, nor were those of Mr Lingden or Mr Cox against whom she sought to compare her salary. We had to request these and it was not until the last day of the hearing that legible payslips were produced (in relation to the Claimant and Mr Cox). Even then, they did not go back as far as January 2019 as we requested. The Claimant herself had also not provided disclosure prior to trial of significant documents such as those relating to the £600 overseas payment even though she referred to this payment in her witness statement. Nor had she sought disclosure from the Respondent of various documents and emails which she alluded to in the course of her oral evidence, but which there was in our judgment no reason for the Respondent to have searched for absent some indication from the Claimant that the said documents existed or were relevant to the proceedings.

9. Against this unsatisfactory background we have approached our fact-finding very carefully. Ultimately, however, we have concluded that despite the unfortunate deficiencies in the preparation of the case and the evidence, there was sufficient material before us on which to make positive findings on all the issues.

The facts

10. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

The witness evidence

11. We were invited by both sides to take an over-arching approach to the credibility of their respective witnesses, with the Claimant contending that Dr Roh, and the Respondent contending that the Claimant, should be disbelieved on everything as a result of inconsistencies in their evidence, or their evasive or unclear answers to questions in cross-examination. However, we do not consider that is the appropriate approach to take in this case. We did not find either the Claimant or Dr Roh to be wholly reliable witnesses. Further, the Claimant was frequently unclear in her oral evidence, but we have taken into account that she does not have the professional skills and experience of Dr Roh (who is a lawyer by profession and evidently more accustomed to public speaking than the Claimant). Although we have ultimately rejected much of her evidence, this was largely because it was not corroborated and/or was contradicted by the documentary evidence, rather than because of her difficulties in expressing herself.

12. Mr Gomshiashvili played a small part in these proceedings and we found no reason not to accept the evidence which he gave.

13. Mr Gungadin gave evidence which supported the Claimant in that, in relation to many of the allegations she makes in these proceedings about the events of 2019, he was able to confirm that she had complained to him about them at times during the course of her employment. He said that these conversations were mainly by phone as he and the Claimant were separated. We were impressed with him as a witness and accept his evidence as to what the Claimant told him, but we have ultimately concluded that it does not follow that what the Claimant told him had happened was the truth. As we set out below, there have been a number of points in this case where it is possible to trace in the Claimant's emails her apparently developing, or convincing herself of, something that happened which did not happen (we refer in particular to the events of 16/17 September 2019 and 14/15 October 2019 which we deal with below). Moreover, we have found that the Claimant formed, and brooded upon, grievances about her treatment by Dr Roh's wife and personal assistant, Isabel Fung, which were without substantive foundation. Against that background, the fact that the Claimant reported some of these grievances to Mr Gungadin was not sufficient to persuade us to accept her evidence on those issues.

The Respondent's business

14. The Respondent was set up by Dr Roh in 2007 offering advice and administrative services to corporate and private clients. Dr Roh is a lawyer and businessman. He is a doctor of economics not medicine, but uses the title in his business dealings and correspondence and we have used it too in these proceedings. Mr Gomshiashvili became the other director of the business in 2012.

15. The Respondent is a small business and at all times material to the claim before us had only two or three employees: the Claimant, Mr Deoman Lingden (who was a driver, general helper and assistant who joined the company in 2015) and, until May 2019, Mr Georgy Gomshiashvili. The Respondent also utilises the services of an accountant called Anita Bagree who runs her own accounts and book-keeping business and prepares the Respondent's VAT returns and annual accounts.

16. Dr Roh also runs other businesses around the world and travels frequently. We heard about homes in Switzerland and the UK and he gives his address in his witness statement as Monaco. In particular, we heard in these proceedings about a company or group called IL Consultants, which is based principally in Hong Kong and which employs Dr Roh's personal assistant, Isabel Fung. We also heard about Moor Place Development Limited ("Moor Place"), which is the company that runs Dr Roh's country house estate in Hertfordshire, and which employs a gardener and estate manager called Steve Cox. The Respondent is responsible for the administration of Moor Place.

17. Dr Roh's wife runs a fashion business called Rohmir, through a company called Rohmir Limited, which had a shop in London and was a client of the Respondent. That shop closed in 2018, although in 2019 the company held a fashion show, which took place in September 2019 and budget for that show of £6,240 is included in one of the versions of the Respondent's July 2019 budget that is in our bundle (p 288). Mrs Roh also used Ms Fung as a personal assistant.

18. Dr Roh's evidence in his witness statement was that the Respondent's business had declined by 2019 and that by September 2019 they had no clients. The Claimant disputed this and said that the Respondent did have clients. She was not specific, but in cross-examination she said that she thought there was a client in Russia and *"other companies we were looking at"* and that *"we do have clients for Dr Roh himself"*. We find that Dr Roh's evidence in this regard was not wholly reliable as it is clear at least that he was wrong to suggest that Rohmir was no longer a client by September 2019 given that its show appeared in a version of the July 2019 budget. However, otherwise we accept that the Respondent was doing no other significant business at that point as the Claimant's evidence was vague and there is no other significant business identified in the Respondent's budgets, or any documentary evidence of the same before us. The bank statements that we have seen do not apparently include transactions relating to any other clients (and no witness suggested that they did).

<u>The Claimant's employment, pay and working hours</u>

19. The Claimant joined the Respondent in 2009. The Claimant's employment contract was signed in August 2011. Her job title on the contract is Manager/Company Secretary/Finance Controller. She was responsible for all administrative and finance aspects of the Respondent's business, including

human resources, and property management. The last two pages of her contract state that her duties include *"Analysing all the expenses along with petty cash for accounts purposes"* and *"In charge of PAYE / payroll issues"*.

20. The contract provides (at clause 5.2) as follows:-

> For the purposes of Sections 13-19 (inclusive) of the Employment Rights Act 1996 or otherwise, you authorise the Company to withhold or deduct from your Salary or other money owed to you (i) any monies due from you to the Company including any overpayment of Salary, overpayments or unauthorised payments of expenses or any other sum or sums due to the Company by way of a debt or a loan repayment …

21. The contract provides for the Claimant to work full-time, on flexible hours starting between 8.30 and 9.30 and finishing between 16.30 and 17.30, provided she has completed a minimum of 8 hours work per day. Her salary in the contract was £32,000 per annum, which was paid net monthly in arrears by bank transfer. In addition she was (like Mr Lingden) paid £300 per month travel and phone expenses, which was paid without deduction of tax monthly by bank transfer.

22. The Claimant gave evidence that from 2018 she had started working 1 day per week from home on a Friday. Dr Roh denied this and contended that she was not working on a Friday when she was at home. There was no dispute, however, that the Claimant's 'official' salary (we use that term advisedly for reasons that will become clear) had remained at £32,000 per annum from 2011 up until her resignation on 15 October 2019 and had not been reduced when she stopped attending the office on Fridays.

23. The Claimant on 10 October 2019 (p 233) shortly prior to her resignation expressed her unhappiness that she was paid less than Mr Lingden and Mr Cox and this is an allegation that she repeats in these proceedings by way of evidence in support of her discrimination claims (although she does not bring an equal pay claim). There is no dispute that so far as monthly payments labelled as salary are concerned, Mr Lingden's and Mr Cox's salaries were higher than the Claimant's. Nor is there any dispute that they were doing very different jobs to the Claimant and appointed at different times.

24. Dr Roh's response to the allegation of discrimination in pay was that the difference in pay was not because the Claimant is a woman but because she was not working Fridays, and was thus only on 80% working (or even less than that as she had in fact reduced her hours still further as she was only in the office from 8.30-3.30, with a working lunch, so as to be able to collect her children from school). Dr Roh says that if she had been working 100% she would have been paid more. The Claimant, however, contends that she was still working full time, but had since the Rohmir shop closed in 2018 been working Fridays from home. She also says that she worked from home after collecting the children from school each day. We find that it was unlikely that she was doing much work on a Friday. We understand from the Claimant's oral evidence and various annotated documents in the bundle that the Claimant appears to regard herself as 'working' every time she responds to

emails outside office hours. However, this is a standard feature of life for employees who, like the Claimant, have access to work emails on their phones. We were shown no evidence that the Claimant was required or expected to respond to emails outside her normal working hours. If she did so, that was a matter of choice on her part.

25. Dr Roh further states, in response to the allegation about inequality in pay, that it was the Claimant who negotiated the salaries both for Mr Lingden and Mr Cox and presented their contracts to him for approval, which he gave. The Claimant denies negotiating their salaries. Her evidence, as we understood it, was that at least in relation to Mr Lingden the salary had been that proposed by an agency and she had simply presented that to Dr Roh for approval. We find that, although Dr Roh misunderstood the extent to which the Claimant played a role in determining salaries for Mr Cox and Mr Lingden, the critical point here was that he simply approved salaries that were presented to him and did not apply any independent consideration to those salaries. Further, Mr Cox's and Mr Lingden's jobs were very different to that of the Claimant and there was no reason why he should have engaged in a comparative exercise. In short, we find that the sex of these individuals played no role whatsoever in Dr Roh's agreement to their salaries at the outset of their employment.

26. However, it does not necessarily follow that thereafter there was not some element of discrimination in the salaries being maintained at different rates, but in considering this aspect, it seems to us relevant at this point to take account of a payment of £600 that was paid monthly to the Claimant from IL Consultants to an overseas account she held in Mauritius since if this was part of the Claimant's salary then she was paid more than Mr Lingden and Mr Cox and the Claimant's discrimination argument fails. The issue of this £600 payment has also been relied on by the Claimant as going to the credibility of the parties' witnesses.

27. We find that this payment started in 2011 and was at that time authorised by Dr Roh as evidenced in an email of 27 January 2011 which was disclosed by the Claimant part way through the hearing. That email refers to the money being paid as *"reimbursement of costs"*. The Claimant's oral evidence in answer to a question from the Tribunal was that this money was paid because of *"keyholder duties and looking after his wife's shop and his property in the countryside – he gave me £600 because I was being PA to his wife and daughters – he said that all these things were included in my role"*. The Claimant confirmed in oral evidence that she did not pay tax on the money.

28. In these proceedings, the Claimant's position has thus been that this £600 was money in respect of a separate job that she did for Dr Roh and his family personally rather than the Respondent. Hence, she has not claimed that this money was unlawfully deducted from her wages when payment was not made in September or October 2019. However, it is apparent that this is not how the Claimant viewed the payment prior to her resignation. At the beginning of September 2019 the payment of £600 from IL Consultants to the Claimant's Mauritian bank account was not made. During the hearing, the

Claimant disclosed an email exchange between the Claimant and Ms Fung of 3 September 2019 which shows, we find, that there had been a bank error and Ms Fung had had to ask the Claimant again for her bank details in order to make the £600 payment. We find that it was this non-payment to which the Claimant referred in her email of 17 September 2019 (which we return to below) when she said: *"Recently my salary has been reduced for nothing and after this slot* [sic] *of money is being given to another staff."* We find that there is no other reduction in *"salary"* to which she could be referring as at 17 September 2019 because this preceded the Respondent's discovery of the alleged unauthorised transactions and the deduction of wages about which the Claimant now complains in these proceedings. Moreover, when in October 2019 the Respondent did indicate that it would be deducting her wages for that month and asked her to repay two salary advances of £500 that she had paid to herself in January and July 2019, she maintained that she was not liable to repay that sum in full in part because she had not received the £600 into her Mauritian bank account in September 2019 (see pp 233, 234, 266 and 268).

29. In any event, even without these emails, we would have concluded that the matters for which the Claimant said she was being paid the £600 could not properly be separated from the job that she was employed to do for the Respondent. The nature of the business was that there was a considerable overlap between Dr Roh's and Mrs Roh's personal lives and that of the Respondent. Moreover, the Claimant's own job description included *"working closely with other team members, directors", "working closely with Rohmir staffs"* and *"Keyholders for some of the [Rohmir] properties"*. We find that she was not doing a separate job as PA to Dr Roh's wife and daughters for the £600. The activities that the Claimant mentions were all part of her work for the Respondent.

30. The Respondent's position with regard to the £600 payment developed in the course of the evidence. As already noted, the fact of the payment of this £600 was mentioned by the Claimant three times in emails sent to Dr Roh before she resigned (pp 233, 234 and 268). On none of those occasions did Dr Roh respond to or acknowledge this reference. In answer to questions in cross-examination, he said that his failure to respond was probably because he thought it was something to do with the £300 travel expenses money he knew the Respondent paid the Claimant each month (i.e. that she was asking about two lots of those expenses). The £600 was also mentioned by the Claimant in her witness statement. The Respondent's counsel's instructions at the time she was cross-examining the Claimant were that £600 had not been paid. The Claimant then produced (and we decided to admit) evidence of the 2011 email aforementioned, a copy of her Mauritian bank statement showing transfers from IL Consultants on 1 July and 2 August 2019, and the email from Ms Fung of 3 September 2019 to which we have referred. When presented with this evidence, Dr Roh said that he could not remember authorising any such payment and did not know what it was for, although he thought it might possibly have been rent for a parking space in Victoria which he recalled was £600. He denied that the Claimant was paid any such sum

for keyholding duties and did not consider they would be worth so much money. He said he would need to ask Ms Fung about the payment.

31. When given an permission by the Tribunal over the weekend (during his evidence) to make factual enquiries about the payment with Ms Fung and anyone else he wished to talk to (other than his lawyers), Dr Roh said that he had found out that this was a payment of client money (he would not say which client, other than to confirm that it was not his wife) which he said the Claimant had instructed Ms Fung to pay on a monthly basis. He said he did not know about it or need to know about it as it was client money and had no 'balance impact' on his company.

32. We find that Dr Roh had genuinely forgotten he was paying the £600 to the Claimant via IL Consultants. The email of 2011 which shows him authorising this was nearly 10 years ago, there is no evidence to suggest that it had been mentioned again between the Claimant and Dr Roh at any time prior to September 2019 and it would be consistent with Dr Roh's 'hands off' approach to the finances of the Respondent that he was also not keeping a very careful eye on the finances of IL Consultants. However, Dr Roh's explanation about the client we find implausible. There has been no evidence presented at all that the Claimant was doing work for some other client in this way or as to what reason a client could possibly have to pay a regular salary to the Claimant. While the fact that no tax was paid on that £600 may have given Dr Roh a reason to lie about the purpose of this payment, that particular suggestion was not put to Dr Roh and in the absence of any independent evidence before us about Dr Roh's conversation with Ms Fung over the weekend, we are not prepared to find that Dr Roh was telling a deliberate untruth. Even if we had so found, while that would have been damaging to his credibility (and, indeed, the implausibility of his explanation is in any event damaging to his credibility), we do not find that his evidence on this point undermines his evidence on other issues. As we have said above, we have evaluated both the Claimant's and Dr Roh's evidence on each issue by reference to the evidence that we have on those issues.

33. It follows from the above that we find that the £600 paid by IL Consultants into the Claimant's Mauritian bank account each month from around January 2011 to August 2019 was part of the Claimant's wages for her work with the Respondent, paid by IL Consultants as agent for the Respondent, and no tax was paid on those wages. We return at the end of the judgment to the implications of the failure to pay tax on this sum. So far as the Claimant's discrimination claim is concerned, however, it means that the Claimant was not paid less than Mr Lingden and Mr Cox and so there is no inference of sex discrimination to be drawn from the differences in their 'official' salaries.

<u>The Claimant's role and responsibilities, the Respondent's finances and the alleged unauthorised cash withdrawals</u>

34. As already noted, the Claimant was responsible for all aspects of the company administration and finance. The Claimant was the sole person with

online access to the Respondent's bank account, and the sole holder of the Respondent's sole debit card. She was responsible for making all payments on behalf of the company, including for staff salaries and expenses. Her role included, from time to time, as requested by Dr Roh, Mrs Roh, or (to a lesser extent) Mr Gomshiashvili, dealing with matters such as the sale, letting or other use of a flat owned by the Respondent at Turner House (TH). The Claimant was, we find, often in the office on her own as Mr Lingden did not have a 'desk job' and Dr Roh and Mr Gomshiashvili travel frequently.

35. Budgets were set and agreed monthly between Dr Roh and the Claimant. These were done on excel spreadsheets, and we have those for the relevant part of 2019 in the bundle. The budget usually included £1,000 per month for *"Petty Cash / staff transport and phone refund"*. The Claimant's evidence was that she was authorised to spend that amount in cash each month, that the other items in the budget were dealt with by bank transfer, and that if cash was needed for anything else she would ask Dr Roh and he would tell her where to get more money or transfer more funds. However, the Claimant said that if there was an urgency to spend the money she would do it and then tell Dr Roh about it afterwards. We noted her evidence as follows: *"if there was any urgencies to spend the money – I will do it and I will put everything in the envelope the next day I will call him to say – I will say there was this urgency – I did not speak about each withdrawal – I spoke to him like three days in a week"*.

36. Dr Roh denies that during 2019 he ever authorised cash spend going beyond the budgeted amounts and for the reasons that we deal with at the end of the fact-finding section of our judgment we accept his evidence on this point. For present purposes, however, we record that Dr Roh's evidence was initially in agreement with the Claimant that it was only the petty cash line in the monthly budget that was authorised for spending in cash and that everything else in the monthly budget was to be done by bank transfer. However, when questioned by the Tribunal about where the £300 travel expenses payment that was made to each of Mr Lingden and the Claimant monthly by bank transfer appeared in the budget, he said that was supposed to be *"staff transport and phone refund"* and so fell to be deducted from the Petty Cash figure. We find that this must be correct as otherwise this regular expenditure was not in the budget at all. It follows that in most months the authorised cash figure was in fact £400 rather than £1,000 and in months where that budget line was £700 (such as July 2019) the authorised cash spend was £100.

37. The Claimant said that she kept receipts for cash spends (and required Mr Lingden to do so too) and that she would put receipts each month in an envelope and give them to the accountant when she did the quarterly VAT returns. Although she may have in the past kept proper management records of income and expenditure (in accordance with her job description), at least in 2019 it is clear that the Claimant did not produce any regular reconciliation or record of receipts on a computer or she would have produced them when asked on and after 23 September 2019 as detailed below. She did, very shortly before she resigned, say that she was working on an excel spreadsheet, but she never sent it to the Respondent and the Claimant did

not mention that spreadsheet (or indeed any other account reconciliation evidence) in her witness statement or seek specific disclosure of it from the Respondent prior to trial. There was, belatedly, during the trial an application by the Claimant for specific disclosure of the spreadsheet she was working on shortly before she resigned or, at least, an application that a search should be made for the document on the Claimant's laptop computer which was, the Respondent said, in storage without its power lead and password-protected. We refused that application not only because it was late and locating the computer and the document would possibly have resulted in the case going part-heard, but because we could not see that the excel spreadsheet, if it existed, could help us. The Claimant had not sent the document to the Respondent at the time and it was incomplete on her own evidence. Whatever work she had done on it would have had to have been a construction from memory as she had no records other than the bank statements to go on and a bundle of receipts which she said were incomplete. The record reconstruction exercise could have been done by the Claimant in her witness statement, but it was not. So, the position as we find it to be was that, at least for 2019, the Claimant had not maintained any form of management accounts or monthly reconciliations.

38. It was Ms Bagree's job to prepare quarterly VAT returns and statutory accounts. The Claimant suggested that to do this Ms Bagree would have checked receipts and carried out reconciliations to the bank statements. The Respondent did not call Ms Bagree as a witness, or produce any evidence of documentation that she held, including any VAT returns. Statutory accounts were produced at one point by the Respondent, but not added to the bundle as they were agreed not to be relevant. The Respondent's position, to which Dr Roh attested in oral evidence, was that nothing that Ms Bagree had or did could assist with the question of the transactions that it alleged to be unauthorised, in particular given that for the crucial period of cash overspend (June and July 2019) no VAT return had been prepared before the discovery on 23 September 2019 that there was virtually no money in the Respondent's bank account. While we consider that it would have been preferable for the Respondent to have called evidence from Ms Bagree given the seriousness of its accusations against the Claimant, we have ultimately found that we have been able to reach conclusions about the alleged unauthorised transactions without this evidence. This is because, without receipts for cash expenditure during the relevant period, we cannot see that there is any relevant evidence that Ms Bagree could have given other than that which is apparent from the bank statements. As we pointed out to the parties at the hearing, it is not necessary to the preparation of VAT returns for reconciliations of expenditure to be made to bank statements. Only business expenditure on which a company seeks to reclaim VAT need be included on a VAT return so although it might have been illuminating to see the VAT returns prepared by Ms Bagree, there is no particular reason to expect that these would have assisted in identifying the reasons for the various unexplained cash withdrawals from the bank accounts. Only the Claimant can explain what the various cash withdrawals were spent on. Although the Claimant did at times suggest that Ms Bagree had a record of explanations that the Claimant had given her, she has never suggested that she gave Ms

Bagree receipts for the crucial period of April to July 2019 and so any explanation that she gave Ms Bagree could have been given to the Respondent prior to the Claimant's resignation or to us in these proceedings. It has not been.

39. Dr Roh did not keep a careful eye on the Respondent's finances. He did not have access to the online accounts and had, we find, not looked at bank statements for 2019 at any point prior to October 2019.

Relationship between the Claimant and Respondent prior to 2019

40. Dr Roh gave evidence, which we accept, that prior to September 2019 he had had no doubt that the Claimant was paying the expenses and bills according to the budget and was a wholly trustworthy employee.

41. The Claimant mentioned a number of past incidents as part of her case that she had been mistreated and/or harassed by Mrs Roh as part of the background to her constructive dismissal claim. She said that in 2010 there was a night when she was called out to reset Mrs Roh's house alarm. Mr Gungadin also gave evidence about this. We accept that this was inconvenient for them as they had to take their child with them, and Mrs Roh did not acknowledge their efforts, but it was nearly 10 years ago and really has little bearing on the matters with which we are concerned.

42. The Claimant also gave evidence that on an occasion she was in Central London with her husband when she received a call from Mrs Roh on a Saturday (her day off) when Mrs Roh 'screamed' at her over some relatively minor clerical issue which was not her fault. Mr Gungadin gave evidence of how the Claimant was upset by this. He says that it was between 2010 and 2012. We accept their evidence on this point, but again this was a long time before the events with which we are concerned and we cannot see that it has much bearing on the matters with which we are dealing.

43. The only relevance of these earlier incidents, in our judgment, is that the fact that they are brought up at all by the Claimant now indicates that the Claimant has harboured for many years resentment against Mrs Roh. However, as we set out below, she did not complain to Dr Roh about Mrs Roh at all until 17 September 2019.

44. Dr Roh helped the Claimant financially with a loan of £12,000 in 2014, of which there is a written record in the bundle (p 135). There was a dispute between the parties as to the reason why the Claimant needed that money, but we do not need to resolve that. Whatever the money was for, this was generous of Dr Roh and he did not seek any collateral for that loan, only her signature on a letter.

45. In 2015 Dr Roh also helped the Claimant with fees for her husband's defence to a criminal charge that he was facing (a charge of which he was subsequently acquitted). The amount the Claimant asked for was £30,000.

Dr Roh thought that this was a lot and so he (quite reasonably in our judgment) asked for the Claimant to provide some security by registering the loan as a charge against her property. Dr Roh said in his witness statement that the charge was never registered. In response to that, the Claimant produced (during the hearing) a copy of a completed, signed Land Registry Legal charge form CH1 which states on it that when sending to the Land Registry it should be accompanied by *"either Form AP1 or Form FR1"*. Dr Roh said that it did not follow that this form had actually been sent to the Land Registry and he recalled being told by the Claimant at the time that the charge had not in fact been registered. On this point, we accept the evidence of Dr Roh. We have no reason to doubt that he genuinely believed that he had been told that the charge had not been registered, and we find that was likely the case because if the charge had been registered, we would have expected the Claimant to produce evidence of that rather than merely the completed form. However, what is really relevant about this incident to the present proceedings is that Dr Roh was again very generous to the Claimant and went well beyond what would normally be expected of an employer, but that the Claimant did not acknowledge this at all. Indeed, in oral evidence she said that she thought any employer would have done this and clearly considered Dr Roh to have acted unreasonably in asking for security for the loan.

Single mother marrying comment May/June 2019

46. For some time prior to May or June 2019 Mr Gomshiashvili was also an employee of the Respondent and the bank statements with which we have been provided show that he received a salary from the Respondent up until May 2019. The Respondent was sponsoring his UK visa. Mr Gomshiasvili gave evidence that he was no longer that active in London and no longer needed the employment. We have no reason to disbelieve him on that. However, the Claimant gave evidence that Home Office representatives had visited the Respondent's offices around this time, and we have no reason to disbelieve her on that either. We infer that there was, at least, an issue in May/June 2019 as to whether Mr Gomshiashvili's visa could or should be continued or extended and we accept therefore that there was a discussion between Dr Roh, Mr Gomshiashvili and the Claimant about the visa around this time.

47. The Claimant's evidence is that in the course of that conversation Dr Roh pointed at the Claimant and said *"she is a single mother you could marry her"*. The Claimant says she responded with words along the following lines *"at least if you can't help someone don't make fun of someone's situation as you don't know what's going on in their life"*. Dr Roh and Mr Gomshiashvili deny that anything like this was said and we find that it was not said. This is because they were both aware of the Claimant's difficult marital circumstances, the criminal charge previously made against her husband and her recent separation from her husband. While the comment *"she is a single mother you could marry her"* is the sort of comment that might have been made in jest in the context of discussing visa issues, we find it implausible

that Dr Roh, who is (we find) in general very measured in his response to situations, would not have joked about this with her, particularly given her personal circumstances. Further, this comment was not mentioned by her to anyone other than Mr Gungadin at any point prior to resignation. While we have no reason not to believe Mr Gungadin, and find his evidence to be credible, it is not evidence of what was actually said that day. It is what he recalls of what the Claimant told him. He gives no date for when this particular allegation was mentioned to him. They were living apart at the time so he accepts it must have been conveyed over the telephone. We consider the Claimant has retrospectively convinced herself that this comment was made and has told Mr Gungadin about it. As we find below, she did something similar in relation to the 'single mother' comment she alleges Dr Roh made shortly before she resigned, and on that occasion there is documentary evidence to support the inference that the Claimant invented the allegation. It follows that we find as a fact that Dr Roh did not say *"she is a single mother you could marry her"* in May/June 2019.

Salary advance

48. On 11 January 2019 and again on 8 July 2019 the Claimant made payments to herself by bank transfer to which she gave the references *"part salary"* and *"part of salary pmt"*. The Claimant's evidence was that she had sought authorisation from Dr Roh for those payments in advance of making them. Dr Roh denied this. The first reference to these payments in any email in the bundle is on 10 October 2019 when Dr Roh explains to the Claimant that he did not approve a full salary payment to her for October *"in particular, as you have unduly paid you* [sic] *2 times GBP 500 (January, July) this year, and you did not adjust your salary payment accordingly. You are requested to reimburse the amount of GBP 1000 immediately to the company."* As already mentioned above, the Claimant thereafter refused to reimburse the £1,000, asserting that this should be off-set against the £600 overseas payment and the £300 travel expenses she contended she was owed.

49. On the question of the salary advances, we prefer Dr Roh's evidence. We find that Dr Roh genuinely only found about them for the first time in October when he obtained the bank statements from the bank and the documentary evidence entirely supports his evidence that this was the first he knew about these advances. When the Claimant was first challenged about these payments on 8 October 2019 by Dr Roh by email (pp 211-212 and pp 225-226) she did not suggest that Dr Roh had authorised them. She accepted that the money was owing and indeed in her email of 8 October 2019, 11.59 (p 225) she said that she had already told Ms Bagree to deduct £500 from her salary in respect of the July 2019 advance and she stated *"FYI it was the first time I have taken part of my salary – Its only £500 not a billion of dollars! Previous staffs have done it which you approved and I have been honest at least to tell the Accountant"*. We note that in this email the Claimant does not appear to have realised that Dr Roh had also noticed she had paid herself a £500 salary advance in January 2019. Her assertion that the July 2019 salary advance was the first time she had taken part of her salary was untrue and it

is damaging to her credibility that in this email she untruthfully asserted that the July salary advance was the first such. The reference to it being *"only £500 not a billion of dollars"* is further evidence of a thread in the Claimant's thinking that we have noticed at a number of points in the evidence that she considered she was 'owed' something by the Respondent, or that Dr Roh was being 'mean' in not freely loaning her money. We add that, contrary to the Claimant's email, we have seen no evidence of any other staff having done this or anything like it and as the only other members of staff were Mr Lingden and, previously, Mr Gomshiashvili, neither of whom had access to the bank account, there can be no one else who has done this. Finally, although the Claimant said in this email that she had directed Ms Bagree to deduct the £500 from her salary, it was of course the Claimant's job to make salary payments, not Ms Bagree's, and the Claimant at no point repaid either of these salary advances. The position she took from 10 October 2019 onwards (pp 233, 234, 266 and 268) was that she would not repay the £1,000 until she had been reimbursed the £600 overseas payment and £300 travel expenses she maintained she was owed.

Rohmir cashed cheques

50. On 17 May 2019 the Claimant, who was also a signatory on the account of Rohmir Ltd, made out a cheque for £300 payable to "Cash" and cashed it at the bank. She did the same on 3 July 2019, this time in the sum of £500. The Claimant said in oral evidence that she had told Dr Roh about this before she cashed these cheques, either on the phone or in person. Dr Roh denied knowing anything about these cheques prior to October 2019 and we accept his evidence. These cheques came to Dr Roh's attention on or perhaps slightly before 15 October 2019. He challenged the Claimant about them by email on the morning of her resignation, 15 October 2019. He wrote (p 267) at 07.27: *"Have you cashed these cheques to take cash money from Rohmir's account? I remember that you have signature on Rohmir's account, but Rohmir had no cash need in May and July. It is very strange to see cash withdrawals from Rohmir's account. …. This is an urgent info required as I would need to inform HSBC fraud team asap. Otherwise, please explain the reasons for such cash withdrawals, as well till this Friday"* [sic]. The Claimant responded at 08.50: *"It was VAT refund cheque which was deposited in the account. The cash was used for TH and R&B"* (i.e. for Turner House and the Respondent). She did not there suggest that she had previously obtained Dr Roh's authorisation for those withdrawals and we find that if she had she would have said so at this point. In our judgment, the Claimant is not telling the truth about having obtained prior authorisation. The bank account (p 95) shows a cheque for £939.40 being paid into the Rohmir account on 14 May 2019. We heard no evidence about what that cheque deposit was for or who it was from. It is possible it was a VAT refund cheque, but it does not follow that the Claimant was authorised to take cash out of the Rohmir account for any purpose at all. This was an improper transaction for which she had no authority. Moreover, we do not accept that this money was spent on Turner House or the Respondent's business. The Claimant has never produced any

evidence of what that money was spent on, and the only expenditure on Turner House authorised in the budget is payment of Council Tax.

The luggage incident and the overtime claim

51. On 16 July 2019 the Claimant was asked to stay late because Dr Roh's luggage was lost at the airport and needed to be delivered. She was unhappy about doing this because she needed to get home to get her children. She arranged for it to be delivered to her home address, but Dr Roh said that the suitcase was needed as he was flying out early in the morning. The Claimant said that Dr Roh said it was needed because his wife 'needed her pedicure'. Whatever the reason for it, Dr Roh asked the Claimant to change the delivery to 5 Buckingham Place and then wait for the suitcase herself, as is shown by her own text of 16 July 2019 (p 172). She said that in discussion with Dr Roh he said *"I do not care about your children"*. In her text she expressed her upset about how she had *"always worked hard for the company and I am very disappointed that the way I'm always treated. I have never get what other staff have got so far. I appreciate I work flexible but in return I have not received any increment for the past 7 years like wise other staffs who usually got similar flexibility like me. When I worked till late and start work early no one recognise."* She then waited for the suitcase until 6pm and did not get home until 8pm (see pp 171 and 246-247).

52. At the end of July 2019 the Claimant instructed the accountant, Anita, that she was owed 8 hours overtime for July and paid herself that amount, which also appears on her payslip for that month. Dr Roh says that the Respondent's overtime policy, as created and applied by the Claimant in respect of Mr Lingden, provided for time off in lieu not overtime payments. This was not a written document, but in the light of Dr Roh's email of 14 October 2019 (p 248) we accept Dr Roh's evidence that this is what it said in Mr Lingden's contract. The Claimant denied that this was the Respondent's policy and said that Mr Lingden did get overtime and that he received this most months. We do not accept her evidence on this point This is because of Dr Roh's evidence about what is said in Mr Lingden's contract, because of the email evidence that supports what we find to be his genuine surprise that the Claimant had considered she was entitled to overtime, and also because, after the Claimant had given this evidence, we were provided with Mr Lingden's payslips from April to September 2019 which show no overtime payments. There are also no payments to Mr Lingden in the bank statements for January to September 2019 that are identified as overtime, or which look as if they might have included overtime.

53. Further, when challenged by Dr Roh about this overtime payment on 10 October 2019, the Claimant did not suggest that she was claiming it in accordance with any usual policy, but instead replied (p 233): *"Yes I have taken the overtime because you never give me increment and my salary is less than a driver and a gardener which you will have to give explanations. I was working overtime when your wife staff were not able to handle the shop.*

And was even working when I was on holidays on many occasions. I am not blaming my employer as I have all details to account for the cash etc." The Claimant further gave this explanation for the 8 hours overtime claim in an email to Ms Bagree (p 244): it was *"with regards to the 16 July 201[9], the day I started work at 8.30am and finished at 6pm (excluding lunch time) as I was waiting for the delivery of a suitcase at the 5 Buckingham Place. I reached my home at 8pm on that day. There was also few hours I was contacted by the agencies after office hours as Dr Roh wanted to push for the sales of TH"*. Even giving the Claimant the benefit of the doubt, that latter explanation does not account for why she paid herself 8 hours overtime for 16 July 2019 when she worked less than two hours more than her contracted hours. These emails are further evidence of the Claimant's belief that the Respondent 'owed' her something and this entitled her to make unauthorised payments to herself.

54. The Claimant's case in these proceedings has been that Ms Bagree had told her that she was entitled to overtime, but this is inconsistent with the above emails. Had she discussed the overtime claim with the accountant at the time, she would have mentioned this in the above emails. We do not therefore accept the Claimant's evidence in this regard. In any event, even if we did accept that evidence, we do not see how it would assist the Claimant given that Ms Bagree plainly had no authority to decide whether the Claimant should be permitted overtime or not.

55. We add that the Claimant's payslips, produced towards the end of the hearing, also show that she paid herself 5 hours overtime in April 2019. Dr Roh had not realised that she had done this until we pointed it out in these proceedings and it is for this reason that it is not included on the Respondent's schedule of unauthorised transactions, although it must follow that if overtime was not permitted, this was also an unauthorised transaction.

56. In the premises, we find that the Claimant knew that she had no entitlement to overtime and that she decided to pay herself 8 hours' overtime on 16 July 2019 because of her developing (and, in our judgment, unjustified) sense of grievance that the Respondent 'owed' her something.

Office move and Claimant's holiday

57. In April 2019 the Claimant had informed Dr Roh that in August 2019 she would be travelling *"Home"* for her parents' memorial service and would be away from London from the end of July until late August (p 176). She was away from work from 27 or 28 July 2019 until 1 September 2019. The company was moving offices at this time and, prior to going on holiday, the Claimant packed all the files in the office into boxes. On her return in September 2019, the Claimant said that all the files were still in boxes. Her evidence was that she did not look for the petty cash file when she returned to work in September, but she did ask Mr Lingden if he had any receipts and asked him to keep them until they had opened all the boxes and put them in the filing cabinet.

Grievances about Mrs Roh and Ms Fung

58. The parties give conflicting accounts about whether and, if so, when and how the Claimant made complaints about Mrs Roh and Ms Fung (who, as set out above, acted as personal assistant to Dr Roh and Mrs Roh).

59. The Claimant in her witness statement said she complained to Dr Roh about Mrs Roh on a number of occasions, first in 2016, but she said that her complaints were always dismissed out of hand and that Dr Roh said words to the effect *"You know how my wife is and I am sure you can get another job easily and will be okay"*. In her Amended Particulars of Claim, however, it was asserted that this comment was made by Dr Roh in September 2019 when she complained to him on 16 September 2019 about Mrs Roh demanding the Claimant apologise to Ms Fung about some misinformation that was sent and about Mrs Roh 'bullying' her and calling the Claimant names such as *"Ms Office", "Miss Her"* and *"X"*. In oral evidence, the Claimant maintained that she had complained about Mrs Roh in 2016 and then again on 16 September 2019. She said that on 16 September 2019 she said to Dr Roh that she did not wish to work in a hostile environment. She said that Dr Roh mishandled her complaint because *"he had seen all the text messages and everything"* and *"a few emails from his PA [Ms Fung] as well though I don't have them in the bundle"*. However, she was not clear as to what emails or texts she thought she had shown to Dr Roh. It may be that those she had in mind included those that are now in the bundle, which we deal with below. She maintained that Dr Roh had made the comment about *"I am sure you can get another job easily"* on 16 September 2019 and added that he said that she could go and look for another job, and that *"we are moving to the countryside and closing the business"*. She also said that she used to get instructions direct from Mrs Roh when she was in London, but now instructions came from Mrs Roh via Ms Fung and that although she accepted in answer to the Tribunal's question that this was *"not problematic"* she added *"in my heart I feel like I am being demoted for some reason"*. The Claimant said that on 16 September 2019 Dr Roh had said that Mrs Roh said she should apologise to Ms Fung.

60. There are emails in the bundle (pp 160-170) from October 2018 that have a handwritten comment on them *"Few rude emails from Mr Roh's wife"*, but the Claimant did not refer to these in her witness statement and no one was cross-examined on them. In an effort to understand the Claimant's case regarding Mrs Roh, however, we have read these. While the emails indicate that Mrs Roh was stressed about her Rohmir business at that time and demanding of the Claimant, we cannot see anything particularly inappropriate or rude or otherwise remarkable in these emails.

61. There is also a set of undated text messages at p 182 which have a handwritten label on them *"Messages to Mr Lingden on telling me what to do. Record messages which read as forward the message to 'office'"*. We understand these to be what the Claimant referred to when she said in

evidence that during 2019 Mrs Roh's 'bullying' of her had been done by way of messages to Mr Lingden that she had seen. She implied there were others, but no request for specific disclosure had been made and there were no other examples in the bundle. The text messages are incomplete and do not show anything untoward or that could be construed as bullying or name-calling.

62. Dr Roh in his witness statement says that the Claimant and his wife had a falling out in 2017 and that the Claimant, being a sensitive person, took it badly. However, he said that after the Rohmir shop closed his wife had not communicated further with the Claimant and he did not recognise the Claimant as raising any grievance about Mrs Roh in September 2019. He does recall that in September 2019 Ms Fung had asked the Claimant questions about the stock for the closed Rohmir UK shop, in order to be able to prepare the audit for Rohmir Hong Kong. Dr Roh said that the Claimant had not responded satisfactorily, possibly (he thought) because she did not want to take instructions from Ms Fung, but that it was important that she hand over the information. He said that he cannot remember how he resolved the issue, but he believed he would have discussed this with them openly and tried to settle matters between them. Dr Roh was not cross-examined about this aspect of the 16 September conversation. However, he did deny that he had said that the Claimant could get another job easily or anything like that. He said: *"this is a made up story to support a claim which has no grounds I am very sorry it is a made up story and it is hurtful to me in a situation which I simply don't understand because we had done so much for Indrani* [the Claimant]*"*.

63. We are assisted in resolving the above conflict of oral evidence by the documents which follow. In particular, on 16 September 2019 the Claimant texted the accountant, Ms Bagree, asking her to call and stating (p 172): *"when he comes he start shouting at me for* nothing*. I just send an email to Isabel saying I was not on holiday. He said I should apologise to Isabel. I told him I don't in fact I'm being bullied for long time so many other people has to apologise to me first. Then he did not say anything."* There was then an exchange of emails between the Claimant and Dr Roh on 17 September 2019 in which the Claimant asserted that she felt she was being forced to resign, but Dr Roh made clear that was not the case, that he did not wish her to resign and that it would be a bad time for her to leave. The Claimant in her email of 17 September 2019, 23.01 (p 179) referred to the conversation of 16 September 2019 in the following terms: "*And sadly when it happen to listen to my side of issues you mention nothing can be done from your end – this was a way of forcing me to resign."* It is only in her email of 18 September, 23.19 (p 183) that she first suggests that Dr Roh said something closer to what she alleges in these proceedings, although it is still not precisely the allegation that she now makes. She wrote: *"Regarding the resignation I approached you for an advice – I wanted your wife to be happy. And your reply was if I want to leave I can as you cannot do anything – something I did not expect. Although, what I do not understand is why it is thought I have come up with the idea to resign it is because though I was working professionally by hiding my depression as created since last year. In the end, I have approached for a solution"*.

64. Taking into account the documentary evidence, we prefer Dr Roh's version of the conversation on 16 September 2019. In particular, we find that Dr Roh did not on 16 September 2019 say *"You know how my wife is and I am sure you can get another job easily and will be okay".* Had he said that, we find that the Claimant would have mentioned it either in her text to Ms Bagree or in her subsequent emails. Instead, in her text sent immediately after the conversation she says he said 'nothing' in response to her alleging she was being bullied. This develops in the course of her subsequent emails but even in those what she says Dr Roh said is inconsistent with the account she now gives of that conversation.

65. Further, we find that Dr Roh was aware that the Claimant resented receiving instructions from Mrs Roh via Ms Fung (as, indeed, she admitted was the case in evidence, although, as she also accepted, it should not have been problematic). He also knew that the Claimant had had no direct contact with his wife for a year and thus could have no current complaint about her behaviour. In the circumstances, we find that the fact that he did not respond to anything the Claimant did say in this conversation about being bullied or mistreated by Ms Fung or Mrs Roh was because he regarded that (rightly, in our view) as not being a complaint of any substance, but a product of the Claimant's unjustified resentment of Ms Fung and Mrs Roh. In the circumstances, there was no need for him to treat the Claimant's complaints in this regard as a formal grievance.

<u>The Claimant's threatened resignation</u>

66. On the morning of 17 September 2019 the Claimant emailed Dr Roh as follows: (p 180):

> Further to our discussion regarding my job today. I have thought about it and I understand that I am being forced to resign which I think is not fair and equitable as I have been with this Company for 10 years.
>
> If you would like to make me redundant I am fine with this as I am entitled to some allowances for the past 10 years I have been with the Company. Also this will give me an opportunity to find a job.
>
> I don't hold any grudge against anyone but I feel there should be a right way to end this situation as I have a family to care and I will not get a job so quick.
>
> Many thanks for understanding.

67. Although the Claimant refers in that email to a discussion "today" neither party gave evidence about there having been a further conversation between the Claimant and Dr Roh on 17 September 2019 and we find that this was in fact a reference to the conversation on 16 September 2019. Dr Roh replied on 17 September 2019 at 14.25:

Nobody is asking you to resign. This idea was brought up by you today.

Personally, I think you should, with your decision, take into account all what we have done for you in these years.

This being said: I am not well prepared for you leaving the Company, in particular, in our today's political and economic situation. But if you want to change your job for a better position, I am not able to say anything. I hope that till then we have a good cooperation.

68. The Claimant's response, sent at 11pm that night, included the following. We observe that this reveals her resentment about Dr Roh reminding her of the help he has given in the past. It also makes reference to her longstanding grievance against Mrs Roh, but makes clear that she has not mentioned this previously but has deliberatey chosen to remain 'silent':

> *"From our conversation of yesterday and today I am under the impression that you and your wife want me to go. I know the situation are not pleasant between your wife and myself. However, despite having heard many awful things on me I have never complained on a single matter with yourself.*
>
> *I have always put all my heart in the work for all the companies. I made all the efforts to help finish the work that Mme Roh sent through to Deoman. Despite calling me by funny names like office, Mrs X etc etc I still carry on with my duties propertly by not giving you any trouble.*
>
> *I understand you have helped me financially before (and the world know this one) but we have returned your money and I would not expect that I should be reminded every time by yourself or other people. …*
>
> *It was very unfair to only listen to Isabel complains on being offended yesterday but not giving me a chance to explain my situation. And sadly when it happen to listen to my side of issues you mention nothing can be doen from your end – this was a way of forcing me to resign.*
>
> *Recently my salary has been reduced for nothing and after this slot of money is being given to another staff.*
>
> *I have many things to show or to tell you Dr Roh on how I have been treated for the past few months but I have chosen the silent option. As I said I am not holding any grudge against anyone and for me to continue working with cooperation in the company I would be glad on not to be further bullied, being called by funny names, or getting*

rude emails from your HK staffs – though I am happy to receive instructions from Mr Lingden to perform my job."

69. Dr Roh did not reply directly to this email.

70. In his statement, Dr Roh said Mr Gomshiashvili became ill at the end of September 2019 and was hospitalised until October 2019 and that is why Dr Roh says he did not look into the Claimant's grievance as set out in this email. Mr Gomshiashvili, however, says that he was only off work from 10 October to the end of the month, and since we find that Mr Gomshiashvili is much more likely to be right about these dates, we find that Mr Gomshiashvili's absence does not explain Dr Roh's failure to reply to this email.

71. However, we do accept Dr Roh's oral evidence on this point, which was to the effect (consistent with his evidence about the conversation on the 16 September) that he did not register the Claimant's email of 17 September at 23.01 (which arrived after he would have been in bed that day) as being an email that required a response. He read it as the Claimant saying (having threatened resignation) that she was willing to carry on working with the company, provided that she was not bullied or called by funny names or sent rude emails from Ms Fung. We find that this is a legitimate reading of this email. Further, given that Dr Roh considered (with good reason as we have found above), that the Claimant was clearly not being bullied or badly treated, we find that he acted reasonably in not responding immediately to that email or treating it as a formal grievance. In any event, even if the Claimant was trying to raise a grievance in her email of 17 September 2019, that grievance was overtaken by subsequent emails and events and at no point between 17 September and her resignation did the Claimant suggest that there was an outstanding grievance that Dr Roh needed to deal with. In the circumstances, we find that Dr Roh did not 'mishandle' a grievance by the Claimant as she has alleged.

72. For the avoidance of doubt, we have in considering this issue of the Claimant's grievance taken account of the ACAS Code of Practice and in particular the definition therein of a grievance as being *"concerns, problems or complaints that employees raise with their employers"*. We accept that the Claimant's email of 17 September 2019 constitutes a grievance within that definition, but it does not follow that it needs to be treated under the Code as a formal grievance. The Code envisages that grievances will in the first place be dealt with informally. In the absence of any indication from the Claimant that she wished her email to be treated as a formal grievance, for the reasons we have given we do not consider that Dr Roh was obliged to do anything further with the email of 17 September 2019.

<u>Dr Roh complaining about a "trick" and the short notice parents evening</u>

73. On the morning of 17 September 2019, in addition to the emails set out above the Claimant also sent Dr Roh a blank email with the subject *"Today – Dear Dr Roh I will be leaving office a bit early today as I have parent meeting.*

Thank you." Dr Roh did not respond to this email until 9.30am on 18 September 2019, when he wrote: *"This is really short notice to inform of absence. While I understand urgent matters, I think our company has a practice for taking holidays/days off. Sorry, Deoman said you left before 3pm, I would hope it will not give a bad example to company staff. So please explain."*

74. We have not been provided with the original of the Claimant's email so we cannot tell for sure when in the sequence of emails on 17 September it was sent. The Claimant's counsel in cross-examination suggested that Dr Roh did not respond to the Claimant's grievance email of 17 September 2019, 11pm but instead retaliated by complaining about her giving late notice for leaving the office. However, there is an explanation for this in Dr Roh's own email of 18 September 2019, 19.34 in which he says *"As you informed about resigning and in this context you send an email 11am same day to inform about same day absence for a teacher meeting, I may be surprise, may I"* [sic]. So far as Dr Roh is concerned, therefore, the Claimant had started referring to forced resignation before then sending a same-day request to leave the office early. He had dealt with the big issue of resignation and reassured her that he did not want her to resign, and then returned to the smaller issue of the late request to leave early. We accept that this explains why he did not respond to the request to leave early on the same day, and also why he was sharp with the Claimant in the email questioning the "example" it would set to company staff. We agree this is making too much of a request to leave early for a parents' evening, but it is not unreasonable in the circumstances given the surprising animosity and (we have found) unheralded and baseless allegations about forced resignation that the Claimant had made in her emails the previous day. Further, in this respect we do not accept the Claimant's evidence that she had mentioned the parents' evening to Dr Roh the previous day before sending the email. Dr Roh denies it and if she had done so, she would have alluded to it when sending her first email. We find this is a false detail that the Claimant adds only when challenged by Dr Roh about the short notice.

75. Dr Roh's reply to the Claimant later that evening on 18 September 2019, 19:34 contains his reference to her playing a *"trick"* on him about which the Claimant complains in these proceedings. The relevant part of the email is as follows:

> *"As explained, your resignation arrives for me at the most difficult moment. Your problem with staff in HK, or even with my wife ... who are not in London, or only occasionally, and who you do not even meet, cannot be reason for your resignation. You report to the director of the company, and to George by delegation and I think that we have acted always with most respect and helped you in your difficult times.*
>
> *Since the closure of Rohmir your workload has been reduced significantly and further when we lost all our clients. This for several years. You cannot even complain about workload.*

I request you to find the way to a serious and professional cooperation and to continue to fulfill the tasks which we have given in full trust to you. If you do not want to do so, please let me know urgently as I would need to find a replacement. I think I deserve, after all what I have done for you and your family, a fair play and not a trick to pay some more money for a not intended redundancy.

Hope you will be fine tomorrow as we do have some work to do."

76. On an objective reading of the whole email, and bearing in mind that English is not Dr Roh's first language, we find that it was not unreasonable for him to use the word *"trick"* to describe how the Claimant appeared to be behaving at this time. What his whole email conveys is genuine (and, in our judgment, reasonable) hurt feelings at the Claimant's apparent lack of gratitude for their long history and help he has provided in the past and a desire for her to be straight with him about her current intentions. While the Claimant does (we accept) appear to have held a genuine sense of grievance about Mrs Roh and Ms Fung, there was no reasonable foundation for that sense of grievance. We therefore consider that it is understandable that Dr Roh felt at this point that she was trying to engineer a situation where the Respondent would agree to pay her some additional compensation if she resigned.

77. The Claimant's response to the *"trick"* email included the following: *"Dr Roh I am not money minded am I? I am not tricking you for redundancy payment? This is truly hurtful. I mentioned if I am being pushed to leave the company there should be a way to terminate things. Finally despite not meeting certain co workers I have been bullied and being called by names. It's hard to work in a hostile environment. I have made my decision and will discuss with yourself tomorrow."* She thus persisted with her attempts to secure agreed terms for departure on the basis that she was asserting (without any reasonable foundation) that she had been bullied and was being pushed to leave the company.

<u>The Respondent runs out of cash</u>

78. On 23 September 2019 Mr Lingden asked Dr Roh for some petty cash. Dr Roh told Mr Lingden to ask the Claimant and Mr Lingden then told him that the Claimant had said there was no money left for petty cash. Dr Roh gave evidence that he was very surprised to hear this, and we accept that evidence as it is consistent with his subsequent response to the situation as evidenced before us in emails and text messages. He immediately texted the Claimant: *"Deoman said you cannot give him petty cash? No money. Please explain all expenses for august, Sept. Please send me the bank statements for all accounts and the relevant comments for all payments. Thanks, regds SCR"* (p 189). There then follows a series of text messages as detailed below in which we find that Dr Roh keeps his tone measured (if persistent) and is simply asking for management account records that the Claimant ought to

have been keeping as part of her Finance Controller role. In contrast, the Claimant is defensive and evasive, jumping to the conclusion that she is being accused of stealing, referring Dr Roh to the accountant rather than offering immediate explanations herself, and offering to give up being a signatory on the business bank accounts and reduce her salary. We find the Claimant's behaviour at this point to be indicative of a guilty conscience on her part.

79. The Claimant's initial response was to say that there was only £85 on the bank account, the petty cash was only £700 for the month of September, that this was used for Turner House and petrol, that she would get receipts from Mr Lingden, that they always ran out of money at the end of the month and asking him if he was accusing her of taking the money (although he had made no such accusation). She added that she thought Dr Roh had asked Ms Bagree for the bank statements and that she had sent these. Dr Roh in response said that he thought they had received some *"nice tax and deposit returns"* and that if nothing was left on the 23rd of the month he would need a reminder. He said he would go through all accounts as *"really sorry, our financial situation is very bad (not like Thomas Cook) and need to suppress all unnecessary expenses"*. The Claimant replied saying that she had sent the budget early mentioning the balance on the account and that she had previously given Mr Lingden money from her own account when the company runs out, but that on this occasion she did not have her card with her. Dr Roh observed that this was the first time that Mr Lingden had no petty cash and asked for a budget plus actual spend for 2019. The Claimant responded that it was not the first time Mr Lingden had run out and *"I remember he asked you few times ago"* and added *"Please kindly confirm what you want me to do in this company as this is becoming too much harassment for me. Since this morning! Thank you! If you want to find a replacement for me please do so and I will check with CAB. I have already sent the budget which you discussed today!".*

80. Dr Roh then asked that she send a report for all accounts since 1.1.19. She said that she would ask Ms Bagree to do this as *"I am afraid I might again be accused of something"*. Dr Roh replied *"Better you explain in a quick note. Anita would bill for your explanation. Please send via gmail if email does not work. Any savings suggestion is welcome. There is no accusation, just a request for help"*. The Claimant in response said *"please advise if you want to appoint another authorised signatories on the bank accounts. I have taken appointments with the bank for Wednesday to close Rohmir account …"*. To which Dr Roh replied *"No, why do we need other signatory?*". The Claimant said that Ms Bagree had been cross checking receipts and invoices, that she had asked Ms Bagree to recalculate her salary and offered to reduce her own hours of work to make savings. She said it would be better to get a report from Ms Bagree so that she the Claimant was not accused of anything further and said that she would provide an excel spreadsheet when her email was working again.

The Claimant's sick leave

81. The Claimant then went off on sick leave and commenced looking for alternative employment, securing a first job interview on 2 October 2019.

82. She did not immediately inform Dr Roh that she was on sick leave, however. A text message from Dr Roh on 25 September indicates that he did not know whether she was in the office that day. It reads: *"Dear Indrani. Sorry if I disturb. I have no info if you are in office today. Please let me know. Thanks"*.

83. On 27 September 2019 the Claimant submitted a sick certificate to Dr Roh and Ms Bagree (p 195). She asked Ms Bagree to let her know when her statutory sick pay would start as she was sure that Dr Roh would not agree to give her a full salary in October 2019. She referred to Dr Roh wanting to review the accounts, saying (wrongly) that this was because she had been leaving early from work at 3.30pm and said that she was planning to reduce her hours still further to 8.30am to 2.30pm and asked Ms Bagree to send Dr Roh her revised salary reflecting those changes. We find it noteworthy (and again indicative of a guilty conscience) that the Claimant's assumption that Dr Roh would not give her a full salary in October comes at a point when Dr Roh had not accused her of anything, let alone suggested that her salary should be deducted. All Dr Roh had done was to ask questions about why there was virtually no money left in the Respondent's bank account. He had no other information at this point. Although the Claimant had suggested in her text messages on 23 September 2020 that Dr Roh had received bank statements from Ms Bagree, we find that he had not. He did not have access to the online banking and we accept his evidence that he himself had to go to the bank to obtain hard copy statements when the Claimant failed to provide them.

84. On 27 September 2019 the Claimant also emailed Dr Roh saying that she had been working 8.30am to 3.30pm excluding lunch (making 7 hours per day) but that she picks up on calls and emails once at home and requesting to reduce her hours to 8.30am to 2.30pm. Dr Roh replied expressing sorrow about her health situation and indicating that the reduced hours could be discussed, although he was surprised to hear about her work schedule. There are further emails later that day between them which the Claimant suggested indicated that she was being required to work from home when ill and that Dr Roh was not genuinely sorry about her illness. We find, however, that it was not unreasonable for Dr Roh to continue communicating with the Claimant as she was emailing him and we cannot see anything that undermines his professed concern about her health or was inappropriate. There is an email on 25 September from Isabel Fung to which the Claimant responds on 27 September 2019, but there is nothing to suggest that anyone had made Ms Fung aware that the Claimant was off sick and nothing to indicate that anyone was requiring the Claimant to work while sick.

85. The Claimant has provided medical evidence relating to her sick leave. A report from John Jestico, Consultant Neurologist who saw the Claimant on 27 September 2019 (pp 74-75) states his opinion that stress at work was

contributing to ongoing health issues, including headaches, which had become worse since the death of her father. He expresses the view that he has *"no doubt she has been bullied. She was quite tearful throughout the examination mainly as a consequence of the way in which she sees herself being treated at work and I have no doubt this was accurate. She sensibly is attempting to find further employment at the present time."* We observe that Mr Jestico's opinion was, of course, based solely on information provided to him by the Claimant. Save that it supports our own view that the Claimant felt a genuine (albeit unjustified) sense of grievance toward Ms Fung and Mrs Roh, Mr Jestico's opinion does not assist us with the matters we have to decide.

86. Dr Roh in his witness statement described his actions while the Claimant was away. He said that he had left London on 23 September 2019 but came back on 27 September 2019, in part because he needed to pay the staff salaries in her absence, which an email of that date indicates he arranged to be paid from his Zurich office, and in part because he needed to investigate the Respondent's finances. There is no dispute that the Claimant's salary was paid in full for September. A text message of 30 September 2019 (p 204) confirms that Dr Roh had managed to obtain the bank statements from the bank, which in oral evidence he told us (and we accept) he did by going in person to the bank and providing identification. He texted the Claimant saying that he hoped she would be better soon but that for cost and budget control he required her to seek approval before making any payments or taking any cash from the ATM. He added *"I have received the bank statements, but need explanation for payments. Please do as you soon as you are back at office. Thanks, rgds SCR"*. The Claimant responded *"There is a back folder in one of the boxes with all the 3 Cos bank statements together with my explanation etc. …"* Dr Roh replied *"No bank statements in office, excpt 1 month MPD"* (which we take to be a reference to Moor Place Development). The Claimant replied that she would check when she came and Dr Roh said *"No hurry, we will take the time"*. We find that Dr Roh maintained a measured and sympathetic tone with the Claimant in these texts, even though he now had the bank statements on the basis of which the Respondent's case on unauthorised transactions is advanced.

Return to work

87. The Claimant returned to work on 7 October 2019, as her email sent at 13.44 on that day shows (p 218). She thus had just over a week off sick, not 2 days as she said in her witness statement. In her email of 7 October 2019 she stated: *"As I am still unwell but tried to be in the office today – I have heard many bad things on me… To avoid any further accusations, I am returning the B5 house keys to Nicole. … For office – if you want to control my time please do ask the office directly – not nice to ask a colleague on mind to spy on me. Otherwise I will have to go to my doctor again to get cured from all these harassments and stress".*

88. Dr Roh's response of 8 October 2019 (p 222) says that he continues to have full trust in her attendance at work, does not see why she wants to give up being the B5 keyholder and says he is not sure what she means by *"bad things"* but asks if she is referring to his conversation with Ms Bagree about surprising cash withdrawals and various extra transfers to the Claimant's account, including *"cash and extra transfers in July 2019 of above GBP 4K (incl a 500 pounds payment to you mid July as advance salary which was not authorized, not deducted from your month end salary – same in January 19). When I asked you why there are no bank statements in the office, you said that they are with Anita, but Anita explained that all statements have been forwarded to the office: please allow my difficulties to understand. I am confident that you will be able to explain all the movements on the accounts and the cash withdrawals (2019). As well, I am confident that, as you are well and back to office, you can handle the few remaining things easily."*

89. The Claimant's reply, in red and using block capitals, said that she did not want to be accused of things she had not done, that she would not be so stupid as to take money by bank transfers to her own account, that *"when we run out of money in the account I pay … from my personal account – of course I have to get refund right? Again you are accusing me for nothing which I will have to take legal action now"*, and concluded *"Yes I will prepare everything if my files are not taken intentionally. I am not going to defend myself because I know its all a plan to make me leave and I know the reason behind this. You have done these kind of things with your previous staff in London, Zurich, Monaco and HK too – So all staff cannot be that bad"*. We add that the Claimant has adduced no evidence in these proceedings to support that latter allegation about treatment of other staff.

90. Three minutes later at 09.26 the Claimant emailed again to complain that her employment contract was missing, along with her folders, bank statements and invoices. The Claimant contends in these proceedings that the removal of her folders documents and invoices was deliberate and that the Respondent was setting her up. There is no evidence to support this allegation. The Claimant's contract was subsequently located, and Dr Roh gave evidence that he looked for the folders, bank statements and invoices, but found only a few receipts in envelopes and no receipts at all for June or July 2019. The Respondent's position was that all receipts it had found were included in our bundle and logged on the list in the bundle. The Claimant's counsel rightly pointed out that there were receipts on the list that were not included in the bundle, and that there was one receipt of £1.29 for June that is in the bundle but not on the list. Dr Roh could not explain these discrepancies, which are certainly unfortunate given the seriousness of the allegations levelled at the Claimant. However, we find that these discrepancies are indicative of honesty rather than conspiracy on the part of the Respondent. Had the Respondent been trying to set the Claimant up it is implausible that it would have retained a handful of receipts, or that it would not have been more careful with its list. We accept that the receipts in the bundle and on the list are the only receipts that the Respondent found in the office. Further, although we acknowledge the possibility that files and receipts went missing during the office move, given our findings about the Claimant's

various unauthorised transactions we are satisfied on the balance of probabilities that the reason why there are no more receipts for April to July 2019 is because the Claimant did not keep them. If she had kept them, and they were for business transactions, we would have expected her to have said this clearly and repeatedly in response to both Dr Roh's enquiries at the time and in these proceedings. She did not. Indeed, in her witness statement she did not even state that the receipts that had been found by the Respondent were incomplete.

91. In her email of 09.26 on 8 October 2019 the Claimant also complained that 'confidential' matters had been discussed with Mr Lingden. It was suggested by the Claimant (and put to Dr Roh) that there had been more favourable treatment of Mr Lingden in that Mr Lingden had been afforded a private confidential interview with Dr Roh about the allegations and/or that the allegations against the Claimant had been wrongly discussed with Mr Lingden. We do not accept this. The Claimant was being asked about financial records that it was her job to keep. It was not Mr Lingden's job and we find it was reasonable for Dr Roh to interview Mr Lingden in confidence as part of his investigations.

92. At 09.59 Dr Roh replied to the Claimant's email of 09.26 attaching some notes on cash withdrawals from April to July and asking *"Please kindly send explanation or correct me if I am wrong. In particular, re the many ATM withdrawals, the payments to you and to deoman, in particular the payment of £500 to you (8 July). Quite an amount in July, more than £4k."* The Claimant replied at 11.59 saying that £4k in July was the petty cash for four months and that she had withdrawn more cash at the end of July to cover Mr Lingden for August. She said that Ms Bagree would have details of the other transactions. What was said about the salary advances in this email we have dealt with above. The email concluded: *"If you believe I have taken your money for holidays then you are completely wrong … I have taken a personal loan from the bank to cater for my expenses and you can check on that or send your spy for verification. FYI My religion and culture do not allow me to steal money or things which do not belong to me. For the last time if I heard anything on me and my family which bring defamation, I will surely take legal action. I will prepare the cash report and put on file together with bank statements together and explanations. I will now need explanations too for all the false accusations and bullying unrelated things mentioned on me recently."*

93. On 9 October 2019 at 13.50 the Claimant emailed Dr Roh, Mr Gomshiashvili and Ms Bagree to say that she had started to do the bank transaction report and that she would send by next week.

94. On the same day Dr Roh by email demanded repayment of the £1,000 of salary advances from January and July 2019. The Claimant in response said that she understood from Ms Bagree that her salary was to be deducted in October 2019, that she needed to work out the overtime she was owed for all her work during the weekend and outside office hours over the years, complaining that she had not received her £600 for September (the overseas

payment we have dealt with above) and complaining of harassment, discrimination and bullying.

95. On 10 and 11 October 2020 the Claimant was away from the office for medical appointments, but Dr Roh responded to her email on 10 October challenging her about the overtime payment she made to herself in July 2019 *"for the first time ever, without consulting with your management, and in disrespect of the company's rules. We cannot accept you serving yourself from the company account. … As a first step to normalise our working relationship, you are requested to reimburse the GBP 1000 which you have paid yourself unduly, latest until 11 October 2019"*. The Claimant replied that she needed Dr Roh first to return her employment contract to her and stated: *"Yes I have taken the overtime because you never give me increment and my salary is less than a driver and a gardener which you will have to give explanations. I was working overtime when your wife staff were not able to handle the shop. And I was even working when I was on holidays on many occasions. I am not blaming my employer as I have all details to account for the cash etc. … You and your wife have been accusing me on many things including harassment, bullying and discrimination. Kindly advise if you would like me to resign as authorised signatory on the accounts as well – as your email are truly pushing me to do that. I need explanations on my previous emails as well. FYI the high cash amounts were used for TH to begin with. It's all because of you. Try to understand now. Thank you. I have asked for my £600 and £300 reimbursement yesterday. Please give explanation then I can make arrangements to return your £1,000."* We find that when the Claimant in this email says (our emphasis) *"the high cash amounts were used for TH <u>to begin with. It's all because of you</u>"* she comes close to acknowledging what we have ultimately found to be the case, i.e. that the *"high cash amounts"* were not all used for the Respondent's business and that she had felt able to take money without authority because of her (unjustified) sense of grievance about how she had been treated by Dr Roh and his wife.

96. On 12 October 2019 Dr Roh gave evidence in his witness statement, which he confirmed in cross examination, that he consulted a solicitor who gave his opinion that he was entitled to dismiss the Claimant without notice. A draft dismissal letter was prepared, but not disclosed by the Respondent or put before us. Dr Roh said he thought that was because it was privileged, which we accept is likely to be correct.

<u>14 October 2019 – single mother comments, cutting up of credit card</u>

97. There is a conflict between Dr Roh and the Claimant as to what happened in the office on 14 October 2019. The Claimant said in her witness statement, and maintained her account under cross-examination, that when she came into the office Dr Roh said *"Oh single mother is early today".* Later that day she asked for time off for physiotherapy and she says that Dr Roh responded by saying *"why don't you take a maternity leave, single mother"* which the Claimant says she found very offensive. Dr Roh denies making either of these

comments. The Claimant says that later again on that day Dr Roh *"slammed"* a file down on her desk and demanded explanations for the various transactions and that he then grabbed her purse, took out the company debit card and used a pair of scissors to cut it up in front of her. She said that she felt in physical danger and as if Dr Roh was going to attack her. She said that she felt ill as a result and left the office about 2pm. Dr Roh denies being aggressive and said in answer to questions in cross-examination that all he did on that day was to ask the Claimant to return the debit card, which she did.

98. On all of these points we prefer Dr Roh's evidence to that of the Claimant. So far as the 'single mother' comments are concerned, for the reasons we set out above in relation to the occasion in May/June 2019 when the Claimant alleged that Dr Roh said Mr Gomshiashvili could marry her because she was a single mother, we do not consider that Dr Roh would have been so insensitive as to make light-hearted remarks about her status as a single mother. That is even more so at this point when Dr Roh was very concerned about what he believed to be unauthorised transactions. It is implausible that he would suddenly start making sarcastic remarks of this sort at this stage.

99. Further, we consider it would have been out of character, and entirely at odds with the careful emails and text messages that Dr Roh sent to the Claimant from the very first point of his learning about the state of the accounts on 23 September up to and including her resignation on 15 October, for him suddenly to have become physically aggressive with her on 14 October. There is also no reason for Dr Roh to have cut up the debit card. It was the company's only debit card and would have been needed by the company for financial transactions. Although the Respondent has not produced the card (which was unfortunate as that would have easily resolved this particular allegation), we accept that this was because Dr Roh had not thought about that rather than because the card no longer existed. In the circumstances, we accept that Dr Roh did not cut it up. The Claimant relies on her having emailed Mr Lingden after this alleged incident at 12.29 on 14 October 2019 and told him to ask Mr Lingden to ask Dr Roh *"how you should pay for the parking slot now onwards since the company card is not in use now"*, but that email is equally consistent with the Claimant having given the card to Dr Roh. She also points to Dr Roh's text message at 14:50 (p 257) when he had found that she had left the office asking her also to return the devices needed to access the company's online bank accounts: *"As well, it would be needed that you leave the two devices to access the companies' accounts in safe place at office, and not travel home. Your employer insists that you remit the 2 devices (calculators). They cannot be used without your password. Thanks for confirming this message and also that both devices will be back to office."* However, this message we find also supports Dr Roh's version of events, i.e. that he had simply requested the return of all these items, and had not been aggressive.

100. We find further support for our conclusions regarding the events of 14 October in the emails exchanged between the parties on that day. In particular, we note that very shortly after arrival in the office at 09.03 and

09.04 the Claimant sent two emails to Dr Roh about missing receipts, without referencing any complaint about a 'single mother' comment or any other demand from Dr Roh. Then at 12.08 Dr Roh emailed the Claimant reminding her that no transaction or withdrawal from the companies' accounts should be done without his prior approval. The Claimant said that this email was sent around the same time as he slammed down the file, but if so that supports our conclusion that Dr Roh was being careful and not aggressive in his handling of this. It is implausible that he sent a politely worded email at or around the same time as being physically aggressive. Further, at 13.11 the Claimant emails Ms Bagree, copying in Dr Roh and Mr Gomshiasvili proferring a justification for the 8 hours' overtime that she included in her July 2019 salary (p 243). There then follows an exchange of emails, conducted after she had left the office, about the Claimant's overtime claim for July 2019. In the course of this exchange the Claimant makes complaints about the way she says Dr Roh treated her on 16 July 2019 when she had to wait for the suitcase, including alleging that he shouted at her a lot on that day. It is, we find, inconceivable that if she believed Dr Roh had shouted and been physically aggressive to her earlier on 14 October 2019 she would not also have made some reference to that in this email. It is also in the course of this exchange that the Claimant brings up the difficulties the luggage incident caused for her childcare arrangements, and it is in response to this that Dr Roh makes his sole documented reference to *"single mother"* in these prcoeedings when he writes in his email at 15.43 *"We have respected your situation as single mother, but in case of urgency we expect your help for the company, clients and management."* It is correct that in reply to this the Claimant writes in her email of 16.57 *"From single mother going on maternity leave (like you told me today) this is becoming too sarcastic and can affect my health more which you are taking advantage of"*. However, we find that her attribution of this remark to Dr Roh is not reliable. It is prompted by his entirely unobjectionable reference to *"single mother"* in his email. It is not something that he said to her in person.

101. By email of 17.54 on 14 October 2019 Dr Roh wrote to the Claimant that it appeared to him that she had made payments and cash withdrawals without his approval and stating that she had said she would prepare explanations and provide receipts for all payments and cash withdrawals for the months April to July 2019. He said that she could have until Friday 18 October 2019 to provide the explanations.

102. Late that night, at 00.23 on 15 October 2019 the Claimant emailed to say that she had justified the payments that she knew and remembered, but that if the receipts are missing or misplaced *"I can't do anything"*. She said she *"prepared the excel sheet and will send soon"*, but never did. She questioned again why the receipts had disappeared and again suggested that Dr Roh was setting her up, this time saying it was because he wanted to replace her with Ms Fung.

15 October 2019 – the Claimant resigns

103. Early in the morning of 15 October 2019 Dr Roh sent the Claimant two emails, which she said in evidence she may have read on the train on her way to the office, and we find that she did as they were sent well before her arrival at the office at 08.25. The first at 06.31 reiterated that she could have until Friday to explain the position for April to July and confirmed that all the receipts that had been found were the few receipts that they had seen in the office the previous day. The second at 07.28 put to the Claimant for the first time the matter of the two cashed Rohmir cheques from 17 May and 3 July as follows:

> Dear Indrani
>
> On 17 May and 3 July 2019, cash was taken from the account of Rohmir Ltd, one of our UK clients, by presenting Rohmir's own cheques.
>
> Have you cashed these cheques to take cash money from Rohmir's account? I remember that you have signature on Rohmir's account, but Rohmir had no cash need in May and July. It is very strange to see cash withdrawals from Rohmir's account.
>
> The amounts were GBP 300 (May) and 500 (July).
>
> This is an urgent info required as I would need to inform HSBC fraud team asap. Otherwise, please explain the reasons for such cash withdrawals, as well till this Friday.
>
> Regards,
> SCR

104. The Claimant in her witness statement said that on her arrival in the office Dr Roh immediately demanded that she reply to the email requiring her to account for the payments and cash withdrawals for the months April to July. Dr Roh denies this and we do not accept it as it is inconsistent with his having given her until Friday 18 October to provide that information. The Claimant says that she replied that she needed to take her medication first and that Dr Roh replied saying *"I don't care about your medicines just reply to the email"* and that he then started to open her drawers saying *"where did you put all the money, I will call the police now, the bank fraud line and you will go to jail, don't forget that you had family court issues a few years ago"*.

105. Dr Roh denies this and we accept his evidence. It would again have been bizarre for him at this stage to start hunting through drawers asking where she had put the money, when he had been so careful to give her until 18 October to provide a response. It is quite possible that he asked for a response to the email of 07.28 about the cashed Rohmir cheques which includes the reference to calling the HSBC fraud team, as that would have been consistent with him having asked for an urgent response on that point. But we do not accept that there was anything untoward about Dr Roh's behaviour on the morning of 15 October 2019. His evidence was that the Claimant came into the office, typed up her resignation letter on the computer and handed it to him *"in a celebratory manner"*. We accept that evidence. We do not consider that there was time for a scene such as the Claimant describes to take place between the Claimant arriving at 8.25 and starting to send emails at 8.50, particularly given that between 08.25 and 09.11 she also

typed up, printed and signed a resignation letter and sent a set of measured emails, including at 08.50 (where she responds to Dr Roh's email about the cashed Rohmir cheques), 08.55 where she writes to Ms Bagree and Dr Roh that she is returning £100 of the salary advances but maintains the Respondent still owes her £600 for the overseas payment and £300 for her transport for September, and then 09.11 when she emailed Dr Roh, Mr Gomshiashvili and Ms Bagree informing them that she has submitted her resignation letter (which she says she had by this point already given to Dr Roh together with the key and HSBC account devices) as follows:

> I have submitted my resignation letter today.
>
> Thank you for all your support for the past years.
>
> All what I want to say - the cash withdrawal was spent for TH. I have always protected Dr Roh companies and properties. I have not taken money for my personal use but I am surprised the way I have been treated very badly recently.
>
> I wish you all and Dr Roh and his family a great future ahead.
>
> At least one person dream will become true - she always said that my kids will beg after I loose my job.
>
> Thank you everyone.

106. The Claimant was not paid between 1 October 2019 and 14 October 2019. She was also not paid 1.75 days of holiday pay which the Respondent accepts is owed, subject to its contention that her salary and holiday pay have been lawfully deducted because of the unauthorised expenses that the Claimant incurred or took from the Respondent's accounts. There is a dispute between the parties as to the total amount deducted, but based on the Claimant's payslips we find it to be £1,054 net salary, plus £184.50 holiday pay.

107. The Claimant obtained new part-time employment in May 2020.

<u>The alleged unauthorised transactions</u>

108. We have already dealt with some of the alleged unauthorised transactions above. In particular, for the reasons set out above, we have found that the Claimant:

    a. Without authority paid herself two £500 salary advances on 11 January 2019 and 8 July 2019;
    b. Without authority cashed two cheques from the Rohmir UK Limited account of £300 on 17 May 2019 and £500 on 3 July 2019; and,
    c. Paid herself unauthorised overtime of 5 hours in April 2019 (£87.95) and 8 hours in July 2019 (£140.72).

109. In addition, the Respondent's bank statements show that:
    a. On 26 June 2019 the Claimant paid herself by bank transfer £300 for "TRANS/TEL" when she had already paid herself the £300 travel expenses she was entitled to in that month; and,

b. On 19 July 2019 she paid herself by bank transfer £300 for "TRANS/TEL" when she had already paid herself the £300 travel expenses to which she was entitled for that month.

110. The Respondent's bank statements also show that:
    a. In April 2019 the Claimant took £1,300 of cash out of the Respondent's bank account using ATMs when the authorised cash in the budget was £400 (i.e. £1,000, less the £300 that was paid to each of the Claimant and Mr Lingden each month for transport as we have found to be the case above at paragraph 36);
    b. In May 2019 the Claimant took £1,300 cash out of the Respondent's bank account using ATMs when the authorised cash in the budget was £400;
    c. In June 2019 the Claimant took £2,100 cash out of the Respondent's bank account using ATMs when the authorised cash in the budget was £400; and,
    d. In July 2019 the Claimant took £2,200 cash out of the Respondent's bank account using ATMs when the authorised cash in the budget was £100.

111. There is thus a total of £5,600 cash withdrawals that exceed the authorised cash budget for April to July 2019. The Claimant maintained in oral evidence that she had obtained Dr Roh's approval, in telephone calls and some in-person conversations, for all the allegedly unauthorised cash withdrawals in 2019. Dr Roh denied there had been any such conversations and we have ultimately decided to accept his evidence for the following reasons:-

    a. The Claimant said that Dr Roh did not approve expenditure in writing, but this is not correct as the budget represented written approval for expenditure, and the 27 January 2011 email regarding the £600 overseas payment (above paragraph 27) also shows Dr Roh approving a payment in writing. The Claimant said that Dr Roh encouraged expenditure to be made in cash, but we do not accept that. The budget is clear as to what expenditure is permitted to be made in cash, and the Claimant's evidence is that she understood that and that she had to obtain separate authorisation for additional cash spend;
    b. The Claimant's counsel submitted in closing that the budget had been underspent in April, May, June and July 2019 and that this indicated that, at least, expenditure in those months was all authorised as it was within budget. However, this was not explored in any detail with Dr Roh and, to the extent that it was, it was not accepted. Dr Roh was clear that if the budget was under spent that only meant that he did not need to make as large a contribution to the Respondent for the next month. He was emphatic that there was a maximum amount of cash in the budget each month and that if that ran out the Claimant had to ask for approval for more, but that she had not done so at any point in 2019.
    c. There is no documentary evidence at all to support the Claimant's assertion that any approval was given orally and since the Claimant

and Dr Roh were frequently in different countries and different time zones, if there had been any question of approval for excess expenditure we would have expected some trace of it in emails;

d. The Claimant did not retain receipts for cash transactions beyond the few that were found by the Respondent (a conclusion we reach for the reasons that we set out at paragraph 90 above);
e. For the reasons that we have set out above, the Claimant did take some money from the Respondent without asking as this is apparent from her own emails. We refer in this regard specifically to the two £500 salary advances of January and July 2019 and the two overtime payments from April and July 2019. It is also clear from her own emails that she did not obtain prior authorisation to cash the Rohmir cheques;
f. Despite many opportunities to do so, the Claimant has never provided explanations for the excess cash transactions, beyond bare assertions that the money was used for "Turner House" – an explanation we have rejected (see paragraph 0 above) because the only amount for Turner House allowed in the budget was the Council Tax and the Claimant was not able to identify any particular items of expenditure made in cash;
g. The Respondent had no clients except Rohmir and thus its business activities were absolutely minimal during this period (see above paragraph 18);
h. The Claimant's reaction when challenged by Dr Roh about the excess expenditure was overly defensive and indicative of a guilty conscience (see above paragraphs 78 and 83);
i. The Claimant's email of 10 October 2019 (above paragraph 95) appears to admit that she spent monies on things other than the Respondent's business because she resented the way she had been treated by Dr Roh and Mrs Roh;
j. We have at a number of points found the Claimant to be an unreliable witness and there is even e-mail evidence (see paragraph 49 above) of her not telling the truth about the July salary advance when she says this is the first time she has done that; and,
k. Although Dr Roh was not a wholly reliable witness either (in particular in relation to the £600 overseas payments), his oral evidence was more often than not corroborated by contemporaneous documentary evidence, and we found his surprise at the Respondent running out of money on 23 September 2019 was genuine (see above paragraph 78).

112. For all these reasons, we reject the Claimant's contention that she had obtained verbal authority from Dr Roh to spend cash going beyond the authorised budgets each month. It follows that there was £5,600 of unauthorised cash withdrawals by the Claimant between April 2019 and July 2019.

113. A total of £756.72 of receipts have been retained for the period April to July 2019, which is less than the £1,300 cash expenditure authorised in the budget for that period. It could be said, therefore, that the difference between

these two figures (i.e. £543.28) is also unauthorised expenditure by the Claimant, but we find that this is not established on the evidence before us because there is no evidence that the Claimant had ever been required to retain receipts for every transaction and cash expenditure up to £1,300 had been authorised in the budgets.

114. There were also additional transfers of money or payment of cheques by the Claimant to Mr Lingden over the period totalling £2,100 which are not payments that fall within the budgets. These are on their face also unauthorised transactions for which the Claimant was responsible. However, Mr Lingden has repaid £1,200 and given that we have not heard evidence from Mr Lingden, and neither party has given any evidence about his part in any of this, we do not consider that we can properly make findings about the payments to him.

115. In the circumstances, the unauthorised expenditure (comprising cash withdrawals and payments to the Claimant personally) that we have found proven in these proceedings totals £7,428.67.

The law

Sex discrimination

116. Under ss 13(1) and 39(2)(c) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in dismissing the Claimant or subjecting her to any other detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant is her sex.

117. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

118. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). The Claimant relies on Mr Lingden and Mr Cox as comparators, but if we find they are not suitable comparators, we are invited also to consider how a hypothetical comparator would have been treated. We bear in mind in this regard that evidence about an alleged comparator may still be of important evidential value even if their

circumstances are not materially the same so as to bring them within s 23(1) EA 2010.

119. The fact that someone is treated unreasonably does not mean that they have been discriminated against, they must have been treated less favourably: *Glasgow City Council v Zafar* [1998] ICR 120. However, where the evidence shows that the complainant is the only employee who has been subject to unreasonable treatment, the Tribunal must *"consider carefully and with particular scrutiny"* whether discrimination has played a part in the treatment: *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust* UKEAT/0269/15/JOJ at para 48 *per* Langstaff J.

120. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). Discrimination must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

121. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at para 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

Sex harassment

122. By s 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of: (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive

environment for the claimant. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at paragraph 47 Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*. As the EAT explained at paragraph 31 in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, harassment involves a broader test of causation that discrimination which requires a *"more intense focus on the context of the offending words or behaviour".* The mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic. The burden of proof is again on the Claimant under s 136(3) to establish facts from which it could be concluded that there has been an act of unlawful harassment before the burden shifts to the Respondent.

Constructive unfair dismissal

123. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"*.

124. It is well established that: (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

125. Not every breach of contract is a fundamental breach: the conduct of the employer relied upon must be *"a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract"*: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The assessment of the employer's intention is an objective one, to be judged from the point of view of a reasonable person in the position of the Claimant. The employer's actual (subjective) motive or intention is only relevant if *"it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person"*: *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at para 24 per Maurice Kay LJ, following Etherton LJ in *Eminence Property Development Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, at para 63.

126. In this case the Claimant claims breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.

127. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal held (at para 55 per Underhill LJ, with whom Singh LJ agreed) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
(5) Did the employee resign in response (or partly in response) to that breach?

128. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 is to be applied: see *Kaur* at para 41. The approach in *Omilaju* is that a breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so, and the 'final straw' may be relatively insignificant, but must not be utterly trivial. Where prior conduct has constituted a repudiatory breach, however, the claim will succeed provided that the employee resigns at least in part in response to that breach, even their resignation is also partly prompted by a 'final straw' which is in itself utterly insignificant (provided always there has been no affirmation of the breach): *Williams v The Governing Body of Alderman Davie Church in Wales Primary School* (UKEAT/0108/19/LA) at paras 32-34 *per* Auerbach J.

129. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons. It is not necessary, as a matter of law, that the employee should have told the employer that he is leaving because of the employer's repudiatory conduct: see *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425, at 431 per Pill LJ.

Unlawful deduction of wages / holiday pay

130. Section 13(1) of the ERA 1996 provides that, so far as relevant, that "an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a … relevant provision of the worker's contract". By s 13(3), *"where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*". By s 27(1), *"wages"* includes holiday pay.

Conclusions

131. We have considered the Claimant's sex discrimination and harassment claims first, and then her constructive unfair dismissal and unlawful deductions claims.

Sex discrimination/harassment

132. The Claimant relies on the same set of incidents as constituting direct sex discrimination or sex harassment. In relation to each, we have considered first whether what the Claimant alleges happened did happen as a matter of fact. If it did, we then go on to consider whether it constituted discrimination or harassment, applying the legal principles we have set out above.

a. In May/June 2019 point to C and say "she is a single mother you could marry her" while speaking to his co-director?

133. For the reasons that we have set out at paragraphs 46-47 above we find that Dr Roh did not make this remark in May/June 2019. It follows that there was no act of discrimination or harassment in May/June 2019.

b. Mishandle C's grievance about bullying by Olga Roh saying "I'm sure you can get another job easily".

134. For the reasons that we have set out at paragraphs 0-64 above we find that Dr Roh did not say to the Claimant *"I'm sure you can get another job easily"* on 16 September 2019 (or at any other time). For the reasons that we have set out at paragraphs 65 and 68-72 above we find that Dr Roh did not mishandle the Claimant's grievance. It follows that there was no act of discrimination or harassment in these respects.

c. On 17 Sep 2019, did Dr Roh accuse C of playing a trick on him when C enquired whether he would be interested in making her redundant.

135. Our factual findings in relation to this are set out at paragraphs 75-77 above. Dr Roh did accuse the Claimant of playing a trick on him, and for the reasons that we have set out in those paragraphs, we considered that it was not unreasonable for him to do so in the circumstances. However, we have nonetheless gone on to consider whether this constituted an act of sex discrimination or harassment. We find that it did not.

136. It is not an act of harassment because it has nothing at all to do with the Claimant's sex, but was a remark made by Dr Roh because the Claimant reasonably appeared to him to be trying to engineer a situation where he might agree to pay her some additional money if she resigned. The Claimant was in her email on the morning of 17 September 2019 (paragraph 66 above) suggesting that she was being forced to leave the company and should therefore be made redundant and given some *"allowances"* (i.e. money) to tide her over until she could find a new job, and this suggestion is repeated by her following Dr Roh's email in which he uses the word *"trick"* (paragraph 77 above). However, we have found that there was no reasonable basis for the Claimant to assert that she was being forced to leave her job. There was no substantive basis for her grievances against Mrs Roh and Ms Fung, and Dr Roh could not have made it clearer in his emails with the Claimant between 16 and 18 September 2019 that he did not want her to resign and, indeed, it was a bad time for her to do so. In the circumstances, when Dr Roh used the word *"trick"* he did so because of the Claimant's conduct and it had nothing to do with her sex. Moreover, we do not in any event accept that, when read in context and making allowances for English not being Dr Roh's first language, his use of the word *"trick"* could reasonably be regarded by the Claimant as creating an intimidating, hostile, degrading, humiliating or offensive environment for her. As Elias LJ put it, to do so would *"cheapen the significance of [the statutory] words"*.

137. The use of the word *"trick"* by Dr Roh was also not an act of sex discrimination. While we can accept that this incident crosses the threshold for being a 'detriment', the Claimant's named comparators (Mr Lingden and Mr Cox) are not appropriate comparators at this point because they had not just made unsubstantiated allegations of bullying, or said that they were being forced out of the company when they were not, or asked for a redundancy payment. We further have no doubt that a hypothetical male comparator would have been treated in exactly the same way by Dr Roh. The Claimant

has adduced no evidence (or no evidence that we have accepted) from which an inference of discrimination could be made.

d. On 18 Sep 2019, did Dr Roh send C a curt and critical email requesting an explanation as to why C would be absent at short notice in circumstances where he had given his unreserved blessing prior to this?

138. Our findings of fact with regard to this email are at paragraphs 0-74. For the reasons set out there, we have found that although Dr Roh's email was curt and critical he had not 'given his unreserved blessing prior to this' as the Claimant alleges. On the contrary, the Claimant had given short notice of her need to leave the office early, and had done so soon after she had started making unheralded and baseless allegations about being forced to resign. We find that these circumstances wholly explain the tone of Dr Roh's response. It has nothing to do with the Claimant's sex. As with the previous allegation, Mr Lingden and Mr Cox were never in the same circumstances as the Claimant and the Claimant has adduced no evidence (that we have accepted) from which we could infer that Dr Roh would have treated a hypothetical male comparator differently. While we again accept that this crosses the 'detriment' threshold, we do not consider it constitutes harassment. It was a reasonable reprimand for Dr Roh to issue in the circumstances, and not intimidating, hostile, degrading, humiliating or offensive.

e. On 14 October 2019 did SR sarcastically say to C, "Oh, single mother is early today".

139. For the reasons we have set out at paragraphs 97-101, we find that Dr Roh did not make this comment. It follows that there was no act of discrimination or harassment.

f. On 14 October 2019, did SR sarcastically say "why don't you take a maternity leave, single mother" when C asked for time off for physiotherapy?

140. For the reasons we have set out at paragraphs 97-101, we find that Dr Roh did not make this comment either. It follows that there was no act of discrimination or harassment.

g. On 14 October 2019, did SR grab the company debit card from C's personal purse and cut it up with a pair of scissors and demand from C all other devices to be returned immediately, before backing up this request with a text message?

141. For the reasons we have set out at paragraphs 97-101, we find that Dr Roh did not grab the company debit card from the Claimant's purse and cut it up with a pair of scissors. He did ask for the debit card to be returned, and the Claimant gave it to him, and he also asked by text message for her to return the devices needed to access the Respondent's online bank accounts. However, it was reasonable for him to ask for these items to be returned given his concerns about the unauthorised transactions at this point, and we do not understand the Claimant to be complaining about that *per se*. The heart of her allegation was the assertion that Dr Roh grabbed the debit card from her purse and cut it up. We find that did not happen and it follows that there was no act of discrimination or harassment.

h. On 15 Oct 2019 did SR accuse C of theft in an unreasonable manner and without due investigation and process?

142. We have set out our findings of fact on this point at paragraphs 103-105. For the reasons set out there we find that Dr Roh did not directly accuse the Claimant of theft at any point. He did by email of 07.28 on 15 October 2019 ask her about the matter of the two cashed Rohmir cheques, whether she had cashed them and, if so, he asked that she should provide her explanations in respect of the same by 18 October 2019 along with her responses to her other questions. We find it was reasonable of him to ask this question of the Claimant and to expect her answer. We do not consider that these questions were asked *"without due investigation and process"*. It was the Claimant's job to manage the Respondent's finances and it was appropriate that Dr Roh should (in relation to this and all the alleged unauthorised transactions) ask her in the first instance for her explanations. Unless and until she had provided an explanation (or the deadline set by Dr Roh for providing an explanation had passed), we do not consider that the Respondent needed to move to a formal disciplinary process. While it might have been open to Dr Roh to move straight to a formal process, had he done so he would have exposed the Respondent to the criticism that it had wrongly jumped to the conclusion that the transactions constituted misconduct, without first asking the Claimant whether there was an innocent explanation for them. We therefore reject this allegation by the Claimant on the facts: in our judgment Dr Roh did not accuse the Claimant of theft and, to the extent that he asked her questions about the allegedly unauthorised transactions, he did so in a reasonable manner and was duly investigating the transactions.

143. In this respect, we have taken into account the ACAS Code of Practice and note that although some employers do provide formal written notification to employees of disciplinary investigations, this is not required by the Code of Practice, which only requires that there should be a formal written notification to the employee if it is considered, following investigation, that there is a disciplinary case to answer (para 9). Since the Claimant's allegation is not made out on the facts, it follows that there was no discrimination or harassment.

i. On 15 October 2019 did SR dishonestly accuse C of theft or financial irregularities or set her up for such an allegation?

144. This is very nearly the same allegation as h. above and given our conclusions on h. above, it follows that this allegation is also not made out. However, we must add here that as we understand it this allegation relates to the Claimant's contention that Dr Roh had decided he wanted her to leave the Respondent and set her up for allegations of theft/financial irregularities by taking and hiding her receipt books for the relevant period. We have kept the Claimant's case in this respect in mind throughout our deliberations, but we have found no evidence to support it, and it is inconsistent with the evidence that we do have. In particular, the Claimant's contention of course does not begin to explain why she, in January and July 2019 paid herself without authorisation two salary advances of £1,000 or, in April and July 2019, paid herself unauthorised overtime. These cannot have been 'set ups' by Dr Roh

because it is clear from her own emails that she accepts she did not seek authorisation from him in advance for these payments, and each of these payments is potentially an act of serious misconduct in its own right. The same goes for the cashed Rohmir cheques. Regarding the receipts, we have found as a matter of fact that on the balance of probabilities these were not kept by the Claimant for the reasons that we set out at paragraph 90 above. In any event, even if there were receipts, it would not follow that the spending was authorised. For the reasons we have set out at paragraph 111 above we find that Dr Roh only authorised cash expenditure up to the limits set in the budget and not beyond. Finally, given Dr Roh's efforts in his emails of 16-18 September 2019 to make clear to the Claimant that he wanted her to stay, it makes no sense to suggest that he was actually trying to force her out. It follows that we reject the Claimant's case on the facts in this respect too and there was therefore also no act of discrimination or harassment.

Constructive unfair dismissal:

145. For her constructive unfair dismissal claim, the Claimant relies on a number of acts which she alleges individually or cumulatively amounted to a breach of the implied term of trust and confidence. These include most of the allegations that she relied on in respect of her discrimination and harassment claims (and no additional allegations). In each case, we have explained above why we reject the Claimant's allegations on their facts or, where is no dispute of fact, why we consider that Dr Roh acted reasonably in his treatment of the Claimant. In particular, we have already explained above why we reject the Claimant's case that the Respondent's concerns about financial irregularities were raised 'dishonestly' with a view to 'setting her up'. On the contrary, we find that the Respondent had reasonable grounds to investigate the irregularities and acted reasonably in the way that it conducted that investigation with the Claimant. There was no breach of contract by the Respondent and the Claimant's resignation was not a constructive dismissal.

Unlawful deduction of wages / holiday pay

146. The Respondent did not pay the Claimant's wages for 1-14 October 2019, or 1.5 days' accrued holiday pay that she was in principle entitled to on termination, which amounted to a total of £1,238.50. However, the Respondent was entitled under clause 5.2 of the Claimant's contract to withhold or deduct from her salary or other money owed to her "any overpayment of salary, overpayments or unauthorised payments of expenses or any other sum or sums due to the Company by way of a debt or a loan repayment". For the reasons we have set out at paragraphs 108-115 we find that the Claimant had in total received £1,000 overpayments of salary, plus £600 overpayments of transport/telephone expenses, plus £228.67 overtime to which she was not entitled. In addition, she had withdrawn £5,600 cash from the Respondent's bank account without authority and £800 cash from

the bank account of the Respondent's client, Rohmir, again without authority. This far exceeds the amount that the Respondent deducted from her final payslip and we therefore find that the deduction of the Claimant's wages and holiday pay was lawful.

Overall conclusion

147. For the reasons set out above, we have reached the unanimous conclusion that:
    a. The Claimant's claim for constructive unfair dismissal is not well-founded and is dimissed;
    b. The Respondent did not discriminate against or harass the Claimant because of her sex and that claim is dismissed;
    c. The Claimant's claim for unlawful deduction of wages in respect of her salary for the period 1-15 October 2019, and the 1.5 days' holiday pay to which she would otherwise have been entitled on termination of her employment, is not well-founded and is dimissed.

Postscript

148. In the course of our judgment (see paragraphs 26-33) we have found that the Claimant was paid £600 by IL Consultants into her Mauritian bank account each month from around January 2011 to August 2019. We found this was part of the Claimant's wages for her work with the Respondent, paid by IL Consultants as agent for the Respondent. No tax was paid on those wages. Having so concluded, we have considered whether we should seek the parties submissions as to the effect of this illegality on the proceedings, having regard to the decision of the Supreme Court in *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889. However, we have decided that there is no need to seek further submissions, given that we have rejected the Claimant's claim and no party is thereby potentially profiting from any unlawful conduct. Further, we cannot see that our having entertained the claim and determined it as we have poses any threat to the integrity of the legal system.

Employment Judge Stout

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Date: 26/10/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/10/2020..

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FOR THE TRIBUNAL OFFICE