EMPLOYMENT TRIBUNALS

Claimants: **Ms M Erbil**
Mr S Seyhan

Respondent: **Blake – Turner 2 Limited (T/a B – T2 Solicitors)**

Heard at: **East London Hearing Centre**

On: **27, 28, 29, 30 October 2020, 4 and 23 November 2020**
In chambers 24 November 2020 and 16 December 2020

Before: **Employment Judge Burgher**
Members: **Mr P Pendle**
Mrs G McLaughlin

Appearances

For the Claimants: **Mr B Coulter (Counsel)**

For the Respondent: **Ms C Hadfield (Counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing Cloud Video Platform and was hybrid and fully remote on 23 November 2020. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1. **Ms Erbil's claim for unfair dismissal fails and is dismissed.**

2. **Ms Erbil's claim for race discrimination fails and is dismissed.**

3. **Ms Erbil's claim for race harassment fails and is dismissed.**

4. **Ms Erbil's claim for unpaid expenses fails and is dismissed.**

5. **Mr Seyhan's claim for unfair dismissal succeeds.**

6. **Mr Seyhan's claim for race discrimination fails and is dismissed.**

7. Mr Seyhan's claim for race harassment fails and is dismissed.

8. Mr Seyhan was not provided with a written contract of employment. The Tribunal order that the Respondent pays him a sum of 4 weeks pay pursuant to section 38 of the Employment Act 2002.

9. A remedy hearing, if required, will take place on 11 March 2021 in respect of Mr Seyhan's unfair dismissal claim.

REASONS

Issues

1. The first Claimant, Ms M Erbil is referred to as C1. The second Claimant, Mr S Seyhan is referred to as C2. The issues the Employment Tribunal will be asked to decide at the final hearing are as follows.

Unfair Dismissal

2. Has the Respondent established a potentially fair reason for dismissal? The Respondent asserts conduct, namely transferring clients and financial impropriety? *The Claimants maintain that there was no reasonable basis to dismiss them and that their dismissal was premeditated as the Directors wanted to get rid of C1 because of the dispute she was having regarding the separate commercial agreement. C1 will refer to the commercial contract which ran simultaneously with her employment agreement in this regard. C1 also claims that there was a lack of impartiality regarding the decision maker involved in the dismissal and the appeal.*

3. Was the dismissal fair and reasonable in all the circumstances. This involves consideration of the following:

3.1 Did the Respondent form a genuine belief that the Claimants were guilty of gross misconduct?
3.2 Did the Respondent have reasonable grounds for that belief?
3.3 Did the Respondent form that belief based on a reasonable investigation in all the circumstances and whilst taking into consideration all those internal/external factors which the Respondent may have been aware of and which may have, upon reasonable consideration, led the Respondent to the conclusion that the Claimants were in fact not guilty of gross misconduct?
3.4 Was the dismissal in the band of reasonable responses available to the Respondent?

4. Did the Respondent follow a fair procedure when dismissing the Claimants?

5. Did the Respondent follow the ACAS Code when dismissing the Claimants?

6. To what extent, if any, have the Claimants mitigated their losses?

7. If the Claimants dismissal are found to be unfair, did the Claimants conduct cause or substantially contribute to their dismissal? If so, by what proportion would it be just an equitable to reduce the compensatory award?

8. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just an equitable to reduce the compensatory award?

9. Separately, the Respondent will contend that the Claimants would have been fairly dismissed for redundancy in order to limit compensation.

10. If the Respondent failed to comply with the ACAS Code, was its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimants?

11. Has the Claimant complied with the ACAS Code? If not, should any compensatory award made to the Claimants be reduced by to take into account the Claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?

Direct Race Discrimination

12. The Claimants are of Turkish origin.

13. The Claimant relies on the following acts of direct race discrimination.

13.1 In August 2018 Peter Blake sent an email instructing her not to accept any more Turkish clients even if they spoke English. [Following evidence it was apparent that the relevant email was dated 14 February 2019,]

13.2 In December 2018, C1 and C2, were not invited to Christmas meal. It is alleged that 5 others, all English were invited and attended which took place whilst C1 and C2 were working.

13.3 In May 2019 C1 was suspended and subsequently dismissed. Insofar as the cheques allegation is concerned C1 refers to Mr James Barnett, white English, in this regard as a comparator [Following evidence C1 was suspended in April 2019].

C2 Only

13.4 Mr Ferguson made a comment in a statement he gave as part of a grievance investigation in which he referred to the C2 as "a puppy dog".

13.5 This comment was read out to the C2 at his third redundancy meeting. Mr Ferguson laughed, and when the first Claimant d that this was discrimination, Mr Ferguson replied “discrimination? What to puppy dogs?"

13.6 In the third redundancy meeting Mr Ferguson stated that C1 and C2 are Turkish and that they are all related. He went on to say something

like, “father, uncle, cousins or whatever". C2 found this offensive and based on the assumption that because people are Turkish they must be related. C2 reiterated that he and C1 are not related. It is alleged that to lump all Turkish people together in this way is an indication of Mr Ferguson's prejudice.

13.7 C2 was shown Mr Ferguson's statement that he made in relation to the grievance and was therefore made aware that Mr Ferguson had also said that the C2’s opinion was not be taken seriously that it was "a load of ice" and that the C2 would do or say anything the C1 asked him to do so. C2 said that Mr Ferguson was attacking his credibility and he did so because of the C2’s race. Mr Ferguson was contrasting his credibility with that of James Barnett and suggesting that the C2’s opinions did not count. He was not credible and that assumption could be made only on grounds of the C2’s race, that is because he is Turkish.

13.8 Mr Ferguson made an assumption in this grievance statement that C2 had escorted the C1 to her meeting. He did not make that assumption about Mr Barnett and made this assumption because the C2 is Turkish.

13.9 James Barnett was instructed to work from home. The C2 was left in the office as a messenger between the C1 and the Respondent in very difficult circumstances. This treatment, requiring him to attend the office in what he described as a war zone was different from that given to Mr Barnett and was because of his race.

13.10 The Respondent held redundancy consultation meetings with the C1 and C2 together. These were at the Respondent's offices and took place with two directors and were always recorded. Mr Barnett's redundancy meetings were held one director, were not recorded took place in Costa coffee at Waterloo. The difference in treatment was because of the Claimant's race.

14. Did the Respondent treat the Claimants less favourably than it treated or would treat the relevant comparator? The Claimant relies on a hypothetical comparator, in the same or similar circumstances, the attendees of the Christmas meal and James Barnett as her comparators. Who is the comparator for the purposes of the Claimant's claim of direct discrimination?

15. If so, was the less favourable treatment because of/on the grounds of the Claimant's race, contrary to the Equality Act 2010?

Race Harassment

16. Did the Respondent do any of the acts outlined in paragraph 13 above.

16.1 Insofar as any of the acts at paragraph 13 are found to have taken place:

16.2 did the relevant act amount to unwanted conduct?

16.3 was it related to the Claimant’s race?

16.4 did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant?

16.5 was it reasonable in all the circumstances for it to have that effect?

Injury to feelings/Personal injury

17. Any claim for injury to feelings and personal injury in the Employment Tribunal in this matter must arise from the alleged acts of discrimination and harassment outlined above.

18. The Tribunal does not have jurisdiction to consider any unrelated actions as a basis for injury to feelings or personal injury award.

C1 only - other payments

19. The C1 claims for unpaid travel allowance that was not claimed for during her employment.

Procedural matters

20. Although the cases of C1 and C2 were heard together, the Tribunal was mindful and careful of the need to consider them entirely separately in relation to all the relevant factual matters which had to be assessed.

21. At the start of the fifth day of the hearing the Respondent's counsel, Ms Hadfield made at applications for the admission of video evidence said to be of what was found in the search of the 602 Green Lanes office, and in respect of the admission of a birthday card that the Claimant had sent to Mr Ferguson in April 2018.

22. The Tribunal considered the application having regard to the respective relevance of the matters for the fair disposal of the issues and having regard to any prejudice to C1 in admitting the late disclosure and whether any prejudice could be mitigated,

23. In respect of the video evidence, Mr Coulter emphasised that it was not relevant to liability although he conceded that it may arguably be relevant to remedy. He reiterated that the video evidence was not referenced in the disciplinary investigation nor the reasons for dismissal or appeal and it was not highlighted to the Claimant at the relevant time. In respect of the birthday card Mr Coulter submitted that this was a matter of credibility ancillary to the issues.

24. In determining the Respondent's application, we considered that the video was not relevant to liability. The investigation report and the dismissal outcome letter says nothing about any video as part of the dismissal. It may well be relevant to remedy if appropriate and there may be some force in Ms Hadfield's submission that the video goes towards contributory conduct and/or what would have happened had a fair process been followed. However, these are separate matters which may be necessary to address should C1 succeed in her unfair dismissal claim. We therefore did not allow the video evidence to be presented in evidence. However, Mr Coulter was on

notice that the Tribunal may be mindful of admitting the video evidence as part of any separate remedy hearing if necessary.

25. In respect of the birthday card, at most it is an ancillary matter relating to credibility and we did not conclude that it would be in accordance with the overriding objective to recall C1 and relevant Respondent witnesses for that matter to be explored and questions relating to credibility to be put. The birthday card related to events prior to the disagreement between the Claimant and the Respondent's directors in August 2018 and Ms Hadfield had a full and proper opportunity to cross-examine C1 on credibility when she was giving evidence. The Tribunal therefore did not permit the birthday card to be admitted at this late stage.

26. There was no dispute in relation to late disclosure of matters such the retainers, the grievance report and the and the spreadsheets that relate to the accounting for the Erbiller arm of the business. These documents were permitted in evidence and considered.

Without prejudice discussions

27. During the redundancy process there were without prejudice discussions between C1 and the Respondent's directors relating to Erbiller. The Claimant maintained that these discussions resulted in a concluded agreement as to the future transfer of the Erbiller files. The Claimant had a recording of this. The Respondent denied that there was a concluded agreement and asserted that the recording was without prejudice and applied to the County Court proceedings. Mr Coulter did not pursue an application to admit the recordings.

Evidence

28. C1 and C2 gave evidence and their own behalf

29. The Respondent called the following witnesses:

29.1 Ms M de Castro, director.

29.2 Mr T Ferguson, director.

29.3 Mr P Blake-Turner, director.

30. All witnesses gave evidence on oath or affirmation and were subject to cross examination and questions from the Tribunal.

31. The Tribunal was also referred to relevant pages in an agreed hearing bundle. Unfortunately, the bundle pages did not mirror the electronic page numbers and this caused some confusion and delay throughout the hearing.

Facts

32. The Tribunal has found the following facts from the evidence.

33. The Respondent is a solicitors practice specialising in personal injury law. It has three directors namely Mr Blake Turner, Ms de Castro and Mr Ferguson. Ms de Castro and Mr Ferguson are a married couple.

C1

34. C1 is of Turkish origin. In August 2015 she was interviewed by Mr Ferguson and Ms de Castro for the role as paralegal working at the Respondent's Isle of Dogs office. During her interview C1 was enthusiastic and indicated that she may be able to generate a lot of work through Turkish clients given her connections within the Turkish community. C1 commenced employment with the Respondent on 14 September 2015. As a paralegal C1 was not qualified to undertake reserved activities and take clients in her own name. Her contract provided the following clause 1(4):

> (4) You will be directly responsible to Manuela de Castro and will observe all reasonable and lawful directions given to you by the Directors of the Employer. You are required to devote the whole of your time, attention and abilities during working hours to your duties set out in your Terms and Conditions of Employment and the Schedules annexed hereto.

35. The Claimant was paid £21,000 and her employment was subject to a three - month probationary period.

36. In respect of expenses, the Claimant's contract had the following clause 9:

> 9. EXPENSES
>
> Where appropriate, the Employer will pay for your Practising Certificate, membership of the Law Society, local Law Society, Solicitors Benevolent Association and other professional organisation as the Directors may approve together with all professional courses (Directors may approve) you will be required to attend in order to satisfy any training requirements in force from time to time. The Employer will also reimburse all travelling (other than to and from home) and other out-of-pocket expenses incurred by you in the performance of your duties, subject to the production of invoices, vouchers or other reasonable evidence of expenditure.

37. The Respondent's disciplinary procedure referred to as a schedule in the contract states that Ms de Castro would undertake investigations at first instance to establish facts relating to an allegation.

38. In 2016 C1, Mr Ferguson and Ms de Castro discussed furthering the business opportunity securing the flow of Turkish clients of the firm. These discussions were positively progressed and resulted in the decision for the respondent to open an office at 602 Green Lanes London N8 0RY and established "Erbiller solicitors" (Erbiller) as a separate trading name of the Respondent with letterheaded correspondence to reflect this.

39. Despite the Tribunal direction to Mr Coulter, much time was spent throughout the hearing exploring what contractual arrangements and terms, if any, had been agreed between C1, her sister, Mr Ferguson, Ms de Castro and Mr Blake Turner. C1 contends that there was a concluded oral agreement with the directors, in their individual capacity, that she would be a 50% owner with her sister of Erbiller business. Erbiller was derived from surname of C1 which apparently is a recognisable and respected name in the Turkish community.

40. The Respondent directors deny this and assert that the Claimant did not accept written terms that it offered to her and her sister by letter sent on 3 June 2016. Mr Ferguson stated that it was the intention C1 and her sister to take over the Erbiller business arm of the Respondent in future, which he assessed as five years in the event that it was successful and once C1 qualified as a solicitor.

41. Whether or not there was a definite concluded agreement between Claimant, her sister and the individual directors in their individual capacity is a matter for the County Court and we clearly indicated to the parties that we would not be making any findings that would impact upon the ongoing civil litigation between C1 and the directors of the Respondent in their individual capacity. The Tribunal is concerned with C1's employment relationship created by her paralegal employment contract and we only make findings on the matters that were relevant to the issues before us

42. It is was agreed that the lease for the 602 Green Lanes was in the name of the Respondent and that C1 together with her sister paid a deposit of £8000 in respect of the lease. It is also agreed that C1, as a paralegal, would have been unable to enter into a profit share with the Respondent, which was undertaking reserved activities, other than through establishment of an alternative business structure.

43. For present purposes, we find that the clients of Erbiller were for regulatory and liability purposes the clients of the Respondent. Erbiller solicitors was a trading name belonging to the Respondent and understood as such by all. Contrary to C1's consistent expressions, the Erbiller clients were not hers, and could not be because she was not a qualified solicitor able to undertake reserved legal activities for clients. It also follows that the Erbiller clients did not belong to any director acting in an individual capacity.

44. The Green Lanes office opened around June 2016. This coincided with the Respondent closing its Isle of Dogs office and operating a small office in Walton on Thames close to where the directors lived.

45. Initially the Green Lanes office operated with only C1. However, following an incident around 4 August 2016 C1 requested that two other paralegals Mr James Barnett and Ms Amberina Iqbal to relocate to the Green Lanes office. This office therefore was undertaking client work for both of the Respondent's trading names, namely Erbiller Solicitors and B-T2 solicitors (B-T2).

46. In this respect C1 was the Green Lanes office and administrative manager and was responsible for all of the operations of the office. Mr Ferguson attended the office for client file supervision which he invariably did on a weekly basis. The Respondent's directors had a lackadaisical approach to the running of the Green Lanes office and generally left C1 to run it.

47. The Green Lanes office apparently thrived and was not subject to any criticism in regarding its operations prior to July 2018. There was no indication that it was operating other than successfully. Indeed, there was the recruitment of C2 in November 2016 and a further paralegal, Ferihan Alit in May 2018 and pay rises were awarded. The Tribunal was also referred to communication supportive of C1's efforts in generating business.

48. In July 2018 C1 approached Mr Ferguson to discuss the profits generated relating to the Erbiller arm of the business and to discuss the plans for the future. C1 was shown a spreadsheet of figures which she did not accept as an accurate account. She had a spreadsheet that showed that there had been a profit of over £250,000 for the period.

49. Mr Ferguson maintained that the costs far outweighed the fees generated and that C1 had sought to include VAT as part of the figures. The dispute in respect of profitability of Erbiller clients is a matter that the County Court will resolve. For our purposes. We find that there was clearly communicated disagreement regarding the profitability of the Erbiller trading name. We find that this stage this was the first time that the Respondent had actually paid attention to cost of running the Green Lanes office and Erbiller business as opposed to simply reviewing turnover.

50. C1 was upset about the position the Respondent was taking relating to the profitability of Erbiller and by 22 August 2018 considered that the purported agreement she had with the individual director of the Respondent in their individual capacity was at an end. This was communicated to Mr Ferguson. Mr Ferguson responded with the following email.

From: Terry Ferguson
Sent: 22 August 2018 21:49
To: Meral Erbil
Cc: pbt@blaketurner.com; Manuela de Castro; Berna Albay
Subject: RE: Erbiller partnership

ActivityCode: NONE

Good evening Meral
We have had a brief telephone conversation with Peter and discussed the fact that you wish to leave the firm and take what you see as your files, these being the Turkish files. These files are in fact files that belong to Erbiller being a trading name of Blake-Turner 2 Limited, they do not belong to you. It goes without saying that these files are to remain at 602 Green Lanes. Sadly, it is clear that you see the relationship between us as having broken down and that you wish to move on and take with you the work that you have introduced to the firm. In principle, we do not object to your suggestion but at this stage we are not agreeing to it, the fact remains that even if we were to consider your request we could not just hand over those file to you as you are not a solicitor and you are not regulated by the Law Society. To simply hand over the files to you would be a breach of the client's data protection. Having said that and in a genuine attempt to resolve this matter we suggest that you contact another firm of solicitors who may wish to take over the files and ask them to contact us to discuss such a hand over.
Kind regards

Terry Ferguson
Director
B-T 2 solicitors

51. We accept that what Mr Ferguson says in that email about ownership of files is correct. For regulatory and liability purposes it could not have been otherwise. The relationship between the C1 and the individual directors was very tense by this stage. C1 no longer trusted the Respondent's directors but she obviously accepted that she

could not simply just take what she considered to be her clients elsewhere, otherwise she would have done so.

52. In October 2018 C1 instructed Setfords solicitors to commence legal proceedings against the individual directors in respect of her claims arising from the purported agreement. Proceedings are now progressing in the County Court.

53. On 13 December 2018 C1 lodged a grievance alleging sexual harassment and threatening behaviour by Mr Fergusson against her. This was investigated by an independent HR consultant who did concluded that the allegations were unsubstantiated. C1 did not advance such claims before the Tribunal.

C2

54. C1 recommended C2 for employment and C2 interview was interviewed for the role of paralegal by Mr Ferguson and C1. He commenced work with the Respondent on 1 November 2016 at the Green Lanes office. He was not provided with a written statement of terms and conditions of employment.

55. C1 had worked with C2 previous to C2 being employed by the Respondent. Further, C1 stated to Ms Dando, the independent grievance investigator in 2019 that she was in a '*sort of family relationship with C2*'. We accept Mr Ferguson's evidence that he was told by C1 on a number of occasions that '*somewhere down the line'* that she and C2 two were related.

56. C1 was the immediate line manager for all operational purposes in respect of C2. C2 had very limited engagement with the Respondent's directors. We find that C2 could be reasonably expected to take direction from C1 in in respect of client management and duties.

57. C1 and C2 undertook paralegal work for both the Erbiller and the BT-2 solicitors trading name of the Respondent.

58. C1 was the immediate line manager for all operational purposes in respect of C to very limited engagement with the directors. He could reasonably expect to take direction from see one in in respect of client management and duties. In this respect C1 was the office manager and was responsible for all of the operations of the seal of the green lanes office Mr Ferguson only attended for client file supervising supervision which he did verbally on a weekly basis.

James Barnett

59. James Barnett worked as a paralegal at the Green Lanes office working on the B-T2 files.

60. From October 2018 Mr Barnett was permitted to work from home when he requested for personal and health reasons. This coincided with the Respondent removing ending SLS client pipeline of work and relocating some B-T2 files to it's Walton office from Green Lanes.

61. C1 refers to Mr Barnett who was not dismissed following the discovery that he had openly hidden cheques. Sometime in 2017, it transpired that Mr Barnett had

hidden cheques, as many as approximately 30, that dated back to 2015. Given the date of these cheques and the fact that C1 found them under the fridge or hidden inside office furniture it was clear that Mr Barnett had brought the cheques from the Isle of Dogs office before after it closed. Some of the cheques were client monies. C1 mentioned this to Mr Ferguson who gave Mr Barnett a verbal warning. Mr Ferguson did not consider that there could be any loss to the Respondent or gain to Mr Barnett as a result of the hidden cheques the majority of which had been reissued and banked.

Christmas event

62. On 17 December 2020 there was a Christmas event. The claimants maintain was a Christmas party, the respondent's maintain was a private lunch that the directors and guests. Whatever the title of the event was the fact was that all of the respondent's employees attended that event save for C1 and C2 who were working. The claimant's maintain that there not been invited to this was on grounds of their race and referred to James Barnett who worked with them at the green lanes office who attended the event.

63. The Respondent's individual directors somewhat curiously asserted that the event was not Christmas festivities, notwithstanding the fact that there were Christmas parties in previous years but there was no such party on this year. When questioned on this Mr Ferguson stated that it would have been a bit odd to have had a Christmas party with the claimant who had brought a claim against the firm and who had made serious grievance against him. Mr Blake-Turner confirmed this.

64. It is not disputed that the C2 took a day of annual leave on 22 January 2019, the same date that the C1's grievance investigation meeting was held. Mr Ferguson was not aware that C2 had not attended the grievance with C1 and assumed he had done so given his view of the closeness of their working relationship.

65. During the grievance investigation undertaken by Ms Dando, Mr Ferguson made a number of disparaging comments towards C2 aimed at demonstrating that C2 was partisan to C1 and should not be relied on.

Redundancy

66. In late 2018 early 2019 the Respondent's directors discussed the future viability of the Green Lanes office. A number of factors became apparent including future legislative changes to personal injury fixed fee work, succession planning and retirement of directors and the continuing relationship difficulties including the ongoing litigation with C1.

67. C1 and C2 were invited the consultation meetings.

68. The Claimant maintained that she could not be made redundant from Erbiller as she was not an employee and disputed whether there was a genuine redundancy situation. Her position was summarised during a consultation meeting on 8 February 2019.

> I joined the firm in 2015 as a paralegal for BT2. We then went into, and I reiterate, I have said it in my previous recordings and in this recording I will say the same for the purposes of it, I am not employed by Erbiller, the trading name of Erbiller, I am only employed by BT2. So whatever I say throughout this, only applies to BT2, my employment with BT2. I joined the firm as a paralegal in 2015 for BT2 Solicitors.

69. The first meeting invitation was on 8th February 2019, C1 responded to this alleging that this was aimed at her because of the court proceedings that she had initiated and the fact that she had raised a grievance against Mr Ferguson.

70. On 14 February 2019, in the context possible increased costs of translation and the ongoing the redundancy process, Mr Blake-Turner wrote emailed C1 the following:

> Mr Baldwin's view, which is that some courts would require this even though it is outside the CPR, but also that all Medical Reports should be translated. We must now of course reconsider our whole approach to this work as such translation costs will make the claims even more unprofitable than they are now.
>
> Accordingly, and you will be aware that it is our position that the office is not making any money as it stands, we are not in a position to arrange to translate all documents in all cases and therefore you should take on no further work at all. For the avoidance of doubt, this is not simply from non-English speaking clients.
>
> Our primary concern is for our clients' welfare and we will accordingly, unless arrangements have been made with you within the next week, be seeking another firm to whom we can transfer the files.
>
> I have telephoned Mr Tyme this afternoon and told him that.

71. Contrary to the Claimants' initial pleading, this email was sent in February 2019 not August 2018. We find that, in this email, Mr Blake-Turner was clearly informing the C1 that from 14 February 2019 the Respondent was no longer authorising any new work or files for Erbiller business and arrangements would be made for existing Erbiller files to be transferred elsewhere. This was in the context of the Respondents operational review about viability of fixed cost low value personal injury work, including the potential increased translation costs (following the opinion of counsel, Mr Baldwin), the termination of the Green Lanes lease and unwillingness to renew it and the unresolved dispute relating to the profits and ownership of Erbiller files. For our purposes, as employer, the Respondent was entitled to act on its view of the ownership of Erbiller files, namely that they belonged to it.

72. On 19 February 2019 the Claimants were sent letters warning of possible redundancies. The letter also indicated that the Respondent would seek to transfer the Erbiller caseload to another firm at the earliest opportunity and that it intended to talk to other solicitors in the North London area regarding this. The Claimants were invited to provide any other suggestions for firms that they might consider as suitable for this but that the Respondent would consider its position if it was unable to find another firm to take on these files.

73. On 6 March 2019 a second redundancy meeting took place. C1 continued to assert that the redundancy process was not genuine.

74. On 11 March 2019 letters were sent to the Claimants regarding that meeting. Mr Ferguson added that he had decided to work to retirement as he was about to turn 65 and that Ms de Castro had been offered a new job that she was going to accept.

75. A third redundancy meeting was held on 14 March 2019. C2 sought to engage in the process and offered to take a pay cut, work part time, work from home like Mr Barnett as an alternative to redundancy.

76. On 18 March 2019 the Claimants were given notice of termination of employment by reason of redundancy effective from 31 May 2019. Mr Barnet was also given notice of termination of employment by reason of redundancy as at the same date.

77. The Claimants had their redundancy meetings at the Green Lanes office. Mr Barnett, who was working from home requested to meet somewhere more convenient than the Green Lanes office and it was agreed for his redundancy meetings to be held at Costa coffee in Waterloo, a train station convenient to both Mr Ferguson and Mr Barnett.

78. The Claimants appealed against their redundancy. An appeal meeting was held with Mr Blake Turner on 16 April 2019. Their appeals were dismissed on 1 May 2019.

Without prejudice discussions

79. During the redundancy process there were without prejudice discussions between C1 and the Respondent's directors relating to Erbiller. The Claimant maintained that these discussions resulted in a concluded agreement as to the future transfer of the Erbiller files. She stated that the directors of the Respondent had agreed that she would take these files to another firm and that and they also agreed that there would be no audit on these files. The Respondent denied that there was a concluded agreement and refers to its correspondence relating to its expectation of how Erbiller files would be transferred.

80. Whilst C1 may have been confused as to the status of any agreement and the ownership of Erbiller files, the documents we have reviewed do not support the C1's assertion that there was a concluded agreement. The discussions were ongoing. What was clear was that before any transfer of files could take place an undertaking from any new solicitor's firm regarding outstanding disbursements was necessary. It was also clear that all fees paid up to the date of transfer to the new firm would be for the Respondent's benefit and not that of the new firm. Finally, an audit of the files was required. We do not accept the C1's evidence which runs contrary to this.

Transfer of Erbiller files to HGA

81. On Friday 12 April 2019 at 17:43 C1 sent Mr Blake-Turner an email stating that HGA Legal Services Ltd (HGA) was willing to take on all of the Erbiller caseload. C1 further wrote that the main objective in connection to the urgency of transferring the Erbiller caseload was solely in order to protect clients interests namely that the Respondent is currently not in a financial position to fund and thus make progress with any of the Erbiller files. This was not factually correct. The Respondent was in a financial position to continue with the files but had decided that it was unwilling to do so and implemented a redundancy process on this basis.

82. On Monday 15 April 2019 at 10:10 Mr Blake-Turner sent C1 a short email stating that he would reply in full he reached the office but HGA looked ideal. Later that day at 14:19 Mr Blake Turner sent C1 a further email responding to C1's Friday email. He agreed that HGA would be perfectly capable of taking over the work. He stated whether they will do it quickly will be a matter for his discussions with the proprietor of HGA, Mr Ahmed. Mr Blake Turner stated that an undertaking in respect of disbursements and lien thereon would be absolutely vital and he disagreed with the reasons the C1 gave for the Respondent seeking to transfer the files. Mr Blake Turner stated it was very important for C1 and/or C2 to let him know whether they intended to go to HGA as if this was the case then there will be a transfer of undertakings. A link explaining TUPE was included. Mr Blake Turner stated that he was looking forward to hearing from the C1 and would start talking with Mr Ahmed within the next 48 hours.

83. C1 responded by email timed at 14:37 questioning the need for an undertaking or an audit and stated that TUPE was not applicable as Mr Ahmed is not employing her or C2. We heard no evidence of whether C1 conveyed the option to C2 of a transfer to HGA for him to maintain continuity of employment, which was what Mr Blake -Turner was suggesting. In any event, at 14:52 Mr Blake-Turner clearly stating that there would need to be an undertaking for disbursements and an audit needed to be carried out. This was confirmed in an email in a formal letter sent to both C1 and C2.

84. At 15:27 on 15 April 2019 Mr Blake-Turner sent Mr Ahmed an email attaching an introductory letter relating to the transfer of Erbiller files. It stated that until they have concluded negotiations in connection with outstanding disbursements, no files can be transferred and he should be aware that only a director of the Respondent has the authority to make the transfer. It stated that there would be no lien over the files or undertaking in respect of profit costs but clearly where disbursements have been laid out or incurred were required to be paid. Mr Blake-Turner stated he was happy for these to be dealt with by way of undertaking.

85. On 16 April 2019 Mr Blake-Turner wrote to Mr Ahmad confirming the telephone discussion agreeing to transfer of Erbiller files on the basis of an undertaking provided. It was hoped that the transfer of files would be completed by the end of the month.

86. By email dated 16 April 2019 at 16:35 Mr Blake-Turner informed C1 that he had spoken to Mr Ahmed and was confident that arrangements will be made to transfer the files within an urgent timescale mentioned by C1. He stated that this matter should therefore no longer concern her.

87. The Erbiller files were subsequently transferred to HGA on 21 April 2019. Had TUPE been considered C1 and C2's employment was likely to have transferred on that date. However, TUPE was not consistent with C1's County Court claim that she was not an employee for the purposes of Erbiller files.

Disciplinary matters

88. Whilst C1 and C2 were working their notice, during the first two weeks of April 2019, the Respondent had concerns about her conduct. Mr Ferguson noticed that the Respondent had not received any costs cheques in respect of Erbiller clients from

Green Lanes for the first two weeks of April 2019. They had received costs cheques for B-T2 clients. C1 processed cheques received and then gave them to C2 who would usually send them each day by DX to the Walton office. Mr Ferguson called and asked C2 to see if he had any cheques to send but he said no. Mr Ferguson expressed concern that no Erbiller costs cheques had been received.

89. On 15 April 2019, Ms de Castro was checking for something on the Respondent's case management system and found a letter to an Erbiller client referring to transferring his file away from the Respondent to HGA Solicitors. It was subsequently discovered that the same letter had been sent to many other Erbiller clients. Whilst HGA was the firm which the C1 had recommended that all the Erbiller files should eventually be transferred to no agreement had been made between the Respondent and HGA at this stage.

90. At 15:25 on 15 April 2019 Mr Blake-Turner, acting as solicitor for the Respondent wrote to C1 and C2 informing them they that had discovered that they were writing to clients asking them to authorise transfer to another firm. C1 was informed that she must cease doing so and C2 was informed that this amounts to gross misconduct.

91. At 17:07 C1 emailed Mr Blake-Turner stating that she had a conversation with the SRA and explained the situation to them. She proceeded to set out what she had been advised by the SRA in respect of the transfer of the files and stated that clients interests were paramount. C1 maintained that an audit was pointless and if the clients wish to have their cases transferred HGA it is their decision and not the directors decision. C1 stated that in preparing client authority requests she was acting in line with their best interests and complying with the instructions given to her by the SRA who was the ultimate regulator.

92. Mr Ferguson attended the Green Lanes office on the evening of 16 April 2019. His key to the front door did not work and he forced the door open, causing some damage. Mr Ferguson reviewed some files and also looked around the desks of C1 and C2. He discovered a number of cheques totalling £14,582.59 which were made payable to the Respondent. These were all in respect of Erbiller files.

93. Mr Ferguson found 56 Forms of Authority for clients to transfer their files to HGA Solicitors. He was concerned about this and took all the files, IT equipment and phones back to the Respondent's office in Walton on Thames. Numerous forms of authority were dated on 16 and 17 April 2019f, following the instruction given on 15 April 2019 to not do so.

94. TF considered that C1 and C2 were withholding cheques and soliciting clients, as they had not been authorised by any director of the Respondent. He considered that if these concerns were proven they could amount to gross misconduct. Consequently, by letter dated 16 April 2019, C1 and C2 were was suspended, on full pay, pending an investigation. They were informed that of the allegations that had come to light, and that it was necessary for there to be an investigation. They were

informed not to disclose confidential information, set up in competition or solicit customers or undertake any other paid employment.

C1 - Disciplinary

95. C1 was sent a letter dated 23 April 2019, inviting her to attend a disciplinary investigation meeting on 26 April 2019. The allegations that C1 was required to answer, were that she:

a. advised clients to transfer their business away from the Respondent to another firm of solicitors (HGA Solicitors), without authority;

b. deliberately withheld the payment of client monies into client accounts with a view of withholding funds from the Respondent;

c. misused confidential client information in breach of the General Data Protection Regulation; and

d. continued to advise clients to transfer their business away from the Respondent, whilst on suspension.

96. C1 responded to Mr Ferguson's investigation invite letter on 23 April 2019 asserting that the allegations were without substance and that she was unwilling to be interviewed by him because of the sexual and violent misconduct allegations that she had previously made.

97. On 24 April 2019, in response to her email dated 23 April 2019, Mr Ferguson set out a list of questions requiring answers so that he could conclude his investigation.

98. On 25 April 2019 C1 informed Mr Ferguson that she could not be disciplined in respect of actions for Erbiller files as she was not an employee for those purposes. C1 submitted that she had contacted the SRA and ICO prior to taking any action, and that the Respondent's allegations were pre-conceived to dismiss her from her role. In this respect, we note that the Claimant was not a solicitor and we find that the information that she may have conveyed to the SRA or ICO was from her own perspective and was not factual accurate or in accordance with the Respondent's position as to why it was not proceeding with Erbiller work. The reason was an unwillingness to do so and not an inability to do so.

99. C1 did not provide any answers to the list of questions posed by Mr Ferguson.

100. On 2 May 2019, Mr Ferguson wrote to C1 to inform her that another allegation had come to light regarding contacting third party insurers and medical agencies on behalf of HGA Solicitors at a time when she was suspended from work. The Respondent had been forwarded by third parties, correspondence from the C1 indicating that she was writing on behalf of HGA Solicitors. C1 responded to this by email dated 2 May 2019 asserting that she has already been terminated and the Respondent was seeking to avoid paying redundancy pay and that she was not employed by HGA and could prove this.

101. In the absence of further input from C1 Mr Ferguson completed his investigation report on 8 May 2019. The investigation report concluded, amongst other things, that cheques were placed on a table adjacent to the desk. However, in evidence before us Mr Ferguson stated that the cheques were found hidden in the Claimant's laptop bag and that he mentioned this to Ms de Castro the evening he returned on 16 April 2019. Mr Blake-Turner was also informed of the same. No mention of the laptop bag or any CCTV evidence indicating what was recorded was referred to in the investigation report or the subsequent dismissal outcome letter.

102. Before us C1 vehemently maintained that the cheques were not hidden and that she was placed under such tremendous pressure to find a firm and was already suffering physically as a result of everything that was going on that she did not even have the time to bank cheques. For all she knew the cheques could have been B-T2 cheques and she simply would not have noticed. We do not accept this. C1 did not mention this at the time. She date stamped all 7 cheques between 9 April and 15 April 2019 and simply needed to tell C2 to send them, along with B – T2 client cheques in the dx but did not do so. This explanation is also very different to the limited explanation that she was providing before the Respondent at the time of her dismissal namely the cheques that she was accused of having hidden were all Erbiller cheques all relate to commercial matters between her and the directors of the Respondent. The thrust of C1's defence was that the matter could not be considered seriously given the way in which Mr Barnett had been dealt with previously relating to cheques some of which were hidden for years.

103. It is evident that the cheques that C1 was accused of having hidden were all Erbiller cheques and related to settlement fees for the files. Files in respect of such fees should not have been transferred to HGA at all as they were concluded. Further, Erbiller was a trading of the Respondent and as such the cheques belonged to the Respondent.

104. Following review of the investigation report Ms de Castro invited C1 to a disciplinary meeting by letter dated 8 May 2019. C1 provided a 4 page response on 10 May 2019 mainly asserting that the allegations related to the business agreement that she alleged and stated that she would not be attending a disciplinary hearing. C1 also sent an email dated 12 May 2019 stating that she has been caused stress by the Respondent's directors and that she would revert to employment tribunal and courts. She asserted that the decision was preordained and left it to Ms de Castro to decide on the evidence in hand.

105. C1 had not signified any objection to Ms de Castro conducting the disciplinary hearing and she proceeded on the information before her. Ms de Castro concluded that all five allegations against C1 were established and written reasons were sent by letter dated 15 May 2019. C1 was dismissed with immediate effect.

106. C1 appealed on 17 May 2019. She stated that she believed the real reason for her dismissal was in relation to the business arrangement between her and the Respondent's directors. Regarding the cheques she stated that:

> *Even if I was to have hidden cheques, which I confirm I have not, I have already written to you asking why none of these procedures came about when the*

directors discovered that James Barnett had deliberately hidden approximately 30 – 40 cheques for a period not less than 3 years…James knew you well enough to know that his job was never at risk".

107. C1 contended that the Respondent directors were dishonest and indicated that she had no further comments.

108. Mr Blake – Turner considered C1's appeal and by letter dated 29 May 2019 he dismissed her appeal.

C2 - Disciplinary

109. C2 was suspended on 16 April 2019. On 23 April 2019 Mr Fergusson wrote to C2, inviting him to attend an investigatory meeting on 26 April 2019.

110. On 23 April 2019, the C2 sent an email to Mr Ferguson indicating that he was not prepared to be interviewed by him and stated that he would leave the premises if Mr Ferguson attended to conduct the interview.

111. Ms de Castro was not available to conduct an investigation at the time. Mr Blake-Turner was the most experienced lawyer in the Respondent and it was decided that he should undertake any appeal should it become necessary.

112. Consequently, on 24 April 2019, Mr Ferguson sent C2 a list of questions to answer. C2 did not answer the questions. In the absence of further input from C2 Mr Ferguson completed his investigation report on 8 May 2019.

113. Following review of the investigation report Ms de Castro invited C2 to a disciplinary meeting by letter dated 8 May 2019. By email dated 13 May 2019 C2 provided his response to the 16 questions posed by Mr Ferguson in the 24 April 2019 letter. In summary C2 stated that he acted on proper management instructions given by C1 and that he had not acted contrary to any of the directors instructions or conditions of his suspension.

114. C2 had not signified any objection to Ms de Castro conducting the disciplinary hearing and he initially indicated that he would attend disciplinary meeting arranged for 13 May 2019 before stating that he was too unwell to do so and did not want to subject himself to further stress. Ms de Castro invited C2 to a rearranged meeting on 15 May 2019 and C2 stated he would not attend a meeting and would await the outcome.

115. Ms de Castro proceeded on the information before her. She concluded that four of the five allegations against C2 were established and written reasons were sent by letter dated 15 May 2019. Ms de Castro did not consider that the allegations relating to deliberately withholding cheques was established. C2 was summarily dismissed.

116. C2 appealed on 17 May 2019. He stated that he would appreciate it if the decision could be reviewed. Mr Blake – Turner considered C2's appeal and by letter dated 10 June 2019 he dismissed the appeal.

Law

117. Section 13 of the Equality Act 2010 (EqA) defines direct discrimination states:

> *'(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> *(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
> *(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
> *(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
> *(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.*
> *(6)If the protected characteristic is sex—*
> *(a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
> *(b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*
> *(7)Subsection (6)(a) does not apply for the purposes of Part 5 (work)'.*

118. Section 9 EqA defines race as a protected characteristic. The Claimants assert that they are treated less favourably because they are of Turkish origin.

119. Section 26 EqA defines harassment.

> *'(1)A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(2)A also harasses B if—*
> *(a)A engages in unwanted conduct of a sexual nature, and*
> *(b)the conduct has the purpose or effect referred to in subsection (1)(b).*
> *(3)A also harasses B if—*
> *(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
> *(b)the conduct has the purpose or effect referred to in subsection (1)(b), and*
> *(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
> *(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a)the perception of B;*
> *(b)the other circumstances of the case;*
> *(c)whether it is reasonable for the conduct to have that effect.*
> *(5)The relevant protected characteristics are—*
> - *age;*
> - *disability;*
> - *gender reassignment;*
> - *race;*
> - *religion or belief;*

- *sex;*
- *sexual orientation.'*

120. The burden of proof provisions are found at section 136 of the Equality Act 2010. This states:

> *136 Burden of proof*
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
> *(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

121. The burden is on the Claimant to prove, on a balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, at paragraph 56. The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination), confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

122. Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that he treatment was due to the Claimant's colour or race.

123. When considering appropriate comparators of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, HL requires that valid comparators be people where there are not material differences in circumstances.

Unfair dismissal

124. Section 98 of the Employment Rights Act 1996 (ERA) states:

> **98General.**
>
> *(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a)the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2)A reason falls within this subsection if it—*
> *(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
> *(b)relates to the conduct of the employee,*
> *(c)is that the employee was redundant, or*

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3)In subsection (2)(a)—
(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b)shall be determined in accordance with equity and the substantial merits of the case.

Misconduct

125. Following the *Burchell* test, a dismissal for misconduct will be fair if, at the time of dismissal;

a. The employer genuinely believed the employee to be guilty of misconduct,

b. The employer had reasonable grounds for believing that the employee was guilty of misconduct,

c. The employer had carried out as much investigation as is reasonable, and

d. The decision to dismiss is within the range of reasonable responses available to a reasonable employer in the circumstances.

126. The question for the Tribunal is not whether the employee was actually guilty of the misconduct or not. The Tribunal must not substitute its view for that of the employer: *Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 827*

Redundancy

127. Section 139 (ERA) defines redundancy as follows:

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

128. In *Safeway Stores plc v Burrell [1997] ICR 523* the EAT set out the test for establishing whether a dismissal is a redundancy dismissal. It devised a three-stage test.

> *(i) Was the employee dismissed?*
> *(ii) If so, had the requirements of the employer's business for the employee to carry out work of a particular kind ceased or diminished, or was this likely to be so?*
> *(iii) If so, was the dismissal caused wholly or mainly by the cessation or by the diminution of requirements as set out above?*

129. The Tribunal is not able to adjudicate on an employer's decision to make redundancies nor is it open to employees to argue that it was unreasonable to make redundancies either at all or because there were alternatives (*James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386).*

130. When considering the substantive fairness of a redundancy dismissal, the leading case of Williams v Compair Maxam Ltd [1982] IRLR 83 where Mr Justice Browne-Wilkinson (P) giving the judgment of the court set out five principles:

> *"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
> *2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
> *3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
> *4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider the representations the union may make as to such selection.*
> *5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."*

Conclusions

131. Our conclusions below are based on our findings of fact and law set out above.

Unfair dismissal

Has the Respondent established a potentially fair reason for dismissal?

132. We conclude that the Respondent has established that the reason for the Claimant's dismissal relates to conduct, a potentially fair reason for the purposes of section 98 ERA. Specifically, it dismissed the Claimants on grounds relating to transferring clients without authority and financial impropriety. We do not accept the Claimants assertions that the dismissals were to remove them because of the dispute C1 was having regarding the separate commercial agreement. This dispute was ongoing since August 2018, there had been an intervening redundancy situation followed by discovery of matters alleged to amount to gross misconduct.

133. Further, the Respondent, as C1's employer, was entitled to base its decision making process on its understanding of the disputed relationship that it had been clearly communicating to C1 since August 2018.

Was the dismissal fair and reasonable in all circumstances?

C1

134. On the information available to the Respondent at the time of the dismissal, we conclude that it did form a genuine belief that C1 was guilty of gross misconduct. The failure to forward on cheques by C1, which had not happened previously, combined with the desire to transfer files relating to those cheques to another firm without authorisation entitled them to hold that belief.

135. When considering whether there was a fair procedure, C1 had a full opportunity to engage in the investigation, whether by attending a meeting or answering relevant questions. She chose not to and maintained that the process related to Erbiller files and the Respondent was not her employer. Ms de Castro was reasonable in determining the matter of the information available to her.

136. Having said that, it was unfair for Mr Ferguson, Ms de Castro and Mr Blake-Turner to have had knowledge of and be influenced by a video recording on the Green Lanes office search on 16 April 2019 without this being put to C1. However, the failure of C1 to engage with the allegations against her or answer any questions leads us to conclude that the evidence, against her, even without the video recording, was sufficient to sustain a reasonable belief in her misconduct. The explanations that the Claimant advanced during the Tribunal proceedings were not raised during the disciplinary process and the Respondent was entitled to decide on the information available to it.

137. The dismissal of C1 for matters that related to dishonesty and failing to follow management instructions, as far as the Respondent was reasonably concerned, cannot be said to be outside the band of reasonable responses open to a reasonable employer.

138. In these circumstances C1's claim for unfair dismissal fails and is dismissed.

C2

139. We conclude that the Respondent had genuine belief that C2 had committed gross misconduct. They concluded that he acted in consort with C1 in doing so.

140. When considering whether there was a fair procedure, C2 had an opportunity to engage in the investigation, by attending a meeting and answering relevant questions. He answered the questions in an email dated 13 May 2019. Ms de Castro did not take any steps to interrogate what C2 was saying regarding being entitled to follow C1's management instructions or whether he actually disregarded what the directors told him to do.

141. The allegations regarding C2 holding onto cheques were not established. There was no evidence against C2 supporting what he was alleged to have done following being given instructions by the directors. He maintained that once he was told what to do by the directors he complied. In these circumstances we conclude that the Respondent did not undertake a reasonable investigation into what C2 was saying to rebut the allegations against him and what he actually did to found the allegations of misconduct he faced. It seemed that he was dismissed because of the evident close working relationship with C1 and that as such he must have known about C1's misconduct.

142. In these circumstances we conclude that C2 was unfairly dismissed by the Respondent.

Redundancy

143. On the evidence before us, the Respondent would have established a fair dismissal on grounds of redundancy to take effect on 31 May 2021. The Claimants arguments to the contrary were misconceived. The Respondent decided to close the Green Lane office and reduce the need for 3 paralegals (including Mr Barnett). The fact that the Claimant's disagreed with this did not mean that there was not a redundancy situation.

144. The Respondent consulted with the Claimants on the reasons for the redundancies and there was no alternative work. The Claimants argument that the directors should have made themselves redundant to keep them employed was unsustainable and unreasonable. We conclude that the redundancy process was fair and if the Claimants were not dismissed on 15 May 2019 they would have been fairly dismissed on grounds of redundancy on 31 May 2019.

C1 only - other payments

145. The C1 claims for unpaid travel allowance that was not claimed for during her employment. C1 advanced no evidence of claims made in this regard, as such she has failed to establish such claims which are therefore dismissed.

C2 - Written contract of employment

146. C2 was not provided a written contract of employment. In view of his successful unfair dismissal claim we order the Respondent to pay him the sum of 4 weeks pay pursuant to section 38 of the Employment Act 2002. Whilst the Respondent is a small employer, it is an established solicitors firm and should have complied with the minimum mandatory employment provisions.

Race Discrimination and race harasment

147. The Claimants are both of Turkish origin. The context of the Claimants working relationship in the Green Lanes office was related to race. It was opened specifically to gain the benefit of securing Turkish clients following the proposal made by C1 and her standing in the Turkish community. The Claimants were employed by the Respondent and were initially well regarded. They received pay rises, there work was appreciated and they were able to operate in the Green Lanes office relatively untroubled. That changed when the disagreement relating to the profitability and ownership of the Erbiller files occurred in August 2018. This disagreement led to a breakdown in the working relationship which did not recover. The allegations of direct race discrimination and harassment are viewed through this contextual prism.

148. On 17 December 2018, C1 and C2 were not invited to Christmas meal. All other members of staff were invited and attended which took place whilst C1 and C2 were working. Christmas festivities were held in previous years. The reason why C1 was not invited was due to the ongoing litigation and the recent grievance that that C1 had made against Terry Ferguson. The Tribunal accept that it would have been awkward to have had festivities with C1 in these circumstances. C2 was not invited because of the perceived close association and working relationship with C1 given their previous working history and family connection that was mentioned by C1 on occasions. We conclude that it was this demonstrably close working relationship between C1 and C2 that led to C2 not being invited and not his race. C2 was caught up in the crossfire of the dispute between C1 and the Respondent's directors. This was not on grounds of race.

149. On 14 February 2019 (not August 2018) Mr Blake-Turner sent an email instructing C1 not to accept any more Turkish clients even if they spoke English. This email was sent in the context of the redundancy exercise. The Respondent had made it clear that it was to close the Green Lanes office and would seek to transfer the Erbiller files to another firm. C1 did not wish this to happen. However, the email sent to C1 was to cease opening any more Erbiller files as that business was ending. Whilst the majority of Erbiller clients were Turkish the context of the closure was not because they were Turkish but because the Respondent had reviewed its operations and had no intention of perpetuating any arrangements with C1. This was a redundancy situation involving a dispute with C1. We do not conclude that this email was related to race.

150. In April 2019 C1 was suspended and subsequently dismissed. Insofar as the cheques allegation is concerned C1 refers to Mr James Barnett, white English, in this regard as a comparator. Mr Barnett hid cheques in system for up to 3 years and some were issued more than once. These were discovered by C1. Mr Ferguson spoke to Mr Barnett about them and Mr Barnett was given a verbal warning.

151. We do not conclude that Mr Barnett is an appropriate comparator. The context of hiding cheques by Mr Barnett was very different to the context of the hidden cheques by C1. The cheques for Mr Barnett were reissued and there was no possibility for personal gain by him. However, C1 was at all material times stating that the Erbiller clients belonged to her, the cheques were not processed as they should have been and were linked to files that she sought to transfer to another firm without an audit. As such C1's withholding cheques involved considerations of honesty,

whereas Mr Barnett's related solely to competence. We therefore do not conclude that C1 was less favourably treated on grounds of race in relation to this allegation.

C2 Only

152. Mr Ferguson made a comment in a statement he gave as part of a grievance investigation in which he referred to the C2 as a puppy dog. Mr Ferguson was seeking to undermine the credibility of C2 to defend the serious grievance allegations against him and referred to C2 as C1's puppy dog because he believed that C2 had taken the day off work to support C1 at her grievance interview and assumed that C2 was supporting C1 in her grievance. His belief was based on his view of the interaction between C1 and C2, and what C1 had told him. Whilst this was an offensive comment we do not conclude that it was related to race or on grounds of race.

153. Mr Ferguson had been told by C1 that she and C2 were related and C1 confirmed this in her own grievance interview. His comment reflected the matters that he was aware that there was a family connection but did not know exactly what it was. We do not conclude that this factual statement made in the context of the grievance was related to race or on grounds of race.

154. Mr Ferguson, in seeking to undermine the credibility of C2 to defend the serious grievance allegations against him and referred to C2's opinions as a load of ice. Mr Ferguson was attacking C2 credibility and would have sought to attack the credibility of any individual who he believed was supportive of the allegations C1 was making against him. We do not conclude that it was related to race or on grounds of race.

155. Mr Barnett had requested to work from home for personal reasons, and not as a permanent solution to the redundancy situation. Mr Barnett was dismissed for redundancy. Consequently, Mr Ferguson spoke to C2 at times because C1 would not answer the phone to him. This was not on grounds of or related to race but due to the fact that Mr Barnett worked from home and the difficult working relationship between C1 and Mr Ferguson.

156. There were differences between James Barnett's redundancy process and C1 and C2's relating to timing and location. These processes were different because Mr Barnett requested a different venue and C1 and C2 asked to have their meetings together at Green Lanes. There is no suggestion that if C1 or C2 wished to meet elsewhere that this would not have been accommodated. In evidence neither C1 or C2 stated that having meetings in the office which were recorded were uncomfortable. We therefore do not conclude that this was related to race or there was any less favourable treatment on grounds of race.

157. In view of our conclusions C1 and C2 claims for race discrimination and race harassment fail and are dismissed.

Remedy hearing

158. C2's remedy hearing for unfair dismissal, if necessary, will take place on 11 March 2021. In view of the redundancy, C2's loss of earnings is limited to 15 May 2019 to 31 May 2019. He is entitled to a basic award and an award of 4 weeks pay for failing to be given a written contract of employment.

159. The Tribunal does not consider that adjustments to compensation for contributory conduct or ACAS process are appropriate. The Respondent did not have evidence that following being given instructions by the directors on 15 April 2019 he acted contrary to them. Further C2 was given opportunity to attend investigation, disciplinary and appeal meetings and did not do so.

160. C2 is ordered to provide a schedule of loss to the Respondent by 29 January 2021. The Respondent is ordered to provide a counter schedule of loss by 12 February 2021.

161. The parties are to notify the Tribunal as soon as possible if a remedy hearing is no longer necessary.

Employment Judge Burgher
Date: 23 December 2020