Case Number: 3322611/2019 (V)

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms K Cooper	(1) ELO Touch Solutions UK Limited (2) Maarten Bais

Heard at: Watford by CVP

On: 22 March 2021 – 7 April 2021
(6 and 7 April 2021 in chambers)

Before: Employment Judge Manley

Members: Ms S Laurence-Doig
Mr B McSweeney

Appearances

For the Claimant: Ms S Aly, Counsel
For the Respondent: Ms C McCann, Counsel

RESERVED JUDGMENT

1. The claimant's husband, Mr Cooper, was a disabled person and the respondents knew of that disability at the material time.

2. The conversation in the car on 8 May 2019 was not act of harassment related to sex, race or Mr Cooper's disability.

3. The claimant's dismissal was not an act of less favourable treatment because of sex, race or Mr Cooper's disability.

4. The claimant's email of 9 May 2019 was not a protected act for the purposes of the victimisation claim.

5. The claimant's solicitor's email of 24 May 2019 was a protected act and the claimant did not make a false allegation of discrimination in bad faith.

6. The claimant was not subjected to any detrimental treatment because she had done that protected act or the respondents believed that she might do such a protected act.

7. The reason for the claimant's dismissal was that she was redundant.

8. That dismissal was not unfair. Even if there had been procedural defects such as to render the dismissal unfair, the claimant would have been fairly dismissed by the end of May 2019.

9. The remedy hearing which was pencilled in for 14 and 15 July 2021 is vacated.

REASONS

Introduction and Issues

1. By a claim form presented on 20 September 2019, with accompanying particulars of claim, the claimant brought claims of unfair dismissal, race and sex discrimination and associative disability discrimination. The particulars of claim indicated that the claimant was bringing claims of direct discrimination on the grounds of sex and/or race; direct (associative discrimination) on the grounds of disability, harassment related to the same protected characteristics, unfair dismissal and victimisation.

2. Those particulars describe the claimant as a female of '*Indian/Asian'* descent and sets out what the claimant says could be inferences from the treatment of four people, two of Iranian decent, one of Moroccan decent and one of Indian/Asian descent. It was also said that the tribunal could draw inferences from there being '*no applicable equality and diversity policy'.* The particulars of claim include a claim that direct disability discrimination arose from aspects of Mr Cooper's health.

3. The claimant referred to the process for her redundancy, arguing in the particulars of claim, that a conversation in the car on 8 May 2019 violated her dignity and created an intimidating, hostile, degrading or offensive environment under section 26 of the Equality Act 2010 (EQA).

4. For the victimisation claim under section 27 EQA, it was claimed that there were two protected acts, one was an e-mail from the claimant of 9 May 2019. The other was her solicitor's letter of appeal against the dismissal of 24 May 2019. That letter also included an assertion that the treatment was '*tainted by her race, sex and/or the need to take compassionate leave as a consequence of her husband's disability'*. In that letter, the redundancy and the appeal were argued to be a sham and the particulars of alleged breaches of EQA were provided.

5. Following the response to the employment tribunal claim from the respondents, and an application to strike-out or make a deposit order with respect to the discrimination allegations, the claimant provided further particulars on 5 June 2020. Some of those included particulars of the

alleged disability, with others being facts and matters relied upon for the purposes of drawing inferences. These were said to be '*based on matters currently known to her'.*

6. Set out there were 28 matters the claimant relied upon; some of those were arguably included in the particulars of claim as they related to the dismissal but many of them appeared to be new allegations. They are not allegations of additional acts of discrimination or harassment but were referred to for the purposes of suggesting the tribunal could draw inferences for those discrimination complaints already raised.

7. The parties agreed a final list of issues after a preliminary hearing on 7 October 2020. These appear in the bundle at page 151 – 156 and read as follows:

Mr Cooper's Disability

1. The Claimant relies upon her husband ("**Mr Cooper**")'s Meningioma and the associated brain tumour/lesions for the purposes of her associative disability discrimination claim:-

i. The Respondents concede that Mr Cooper was a disabled person at the material time (i.e. May 2019) in that:

(a) He suffered from a physical and/or mental impairment(s), namely a brain tumour surgically removed on 20 November 2018 and/or the physiological, cognitive and/or psychological effects caused by the tumour and/or its removal and/or the medication taken by Mr Cooper in relation to such tumour;
(b) Those impairment(s) had a substantial adverse effect on his ability to carry out normal day-to-day activities; and
(c) The impairment(s) was/were such that, as at May 2019, their effects were "likely" to be long-term, in that this "could well happen" (Boyle v SCA Packaging).

ii. Did the Respondents know that Mr Cooper was a disabled person at the material time?

Harassment

2. The Claimant alleges that the conversation in the car on 8 May 2019 in the manner described at [22]-[24] ET1 constituted an act of harassment contrary to s26 EqA 2010:-

i. Is her account of the conversation well-founded?

ii. Did the incident constitute unwanted conduct?
iii. Did the incident have the purpose or effect of violating her dignity and/or

creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the matters set out in s26(4) EqA 2010?

iv. Was the incident related to the sex or race of the Claimant and/or the disability of Mr Cooper?

Direct Discrimination

3. It is accepted that the Claimant was expressly dismissed.

4. Was the Second Respondent's decision to dismiss the Claimant an act of less favourable treatment because of her race and/or sex and/or because of Mr Cooper's disability? To the extent that a comparator is necessary the Claimant relies upon a hypothetical comparator.

Victimisation

5. Do the following constitute protected acts pursuant to s27 EqA 2010:-

i. The Claimant's email of 9 May 2019? In particular, by that email, did the Claimant make an allegation (whether or not express) that someone had contravened the EqA 2010 or do any other thing for the purposes of or in connection with the Act (per s27(2)(c) and/or (d) EqA 2020)?

ii. The Claimant's appeal against dismissal of 24 May 2019? The Respondent accepts that she raised an allegation of discrimination but, in so doing, did the Claimant make a false allegation of discrimination in bad faith (per s27(3) EqA 2010)?

6. Was the Claimant subjected to the following alleged detrimental treatment?

i. From 8 May to 19 June 2019, did Mr Bais and/or Mr Gilhooly push the Claimant towards without prejudice discussions and a settlement agreement?

ii**.** From 9 May to 13 June 2019, did Mr Bais, Ms Uygur, Mr Gilhooly and/or Mr Sullivan decide to continue with the Claimant's dismissal and/or reject her appeal against dismissal?

iii. From 9 May to 19 June 2019, did Mr Gilhooly and/or Ms Williamson fail to adequately investigate the Claimant's grievances and/or avoid upholding complaints of discrimination?

iv. From 24 May to 19 June 2019, did Ms Uygur, Mr Gilhooly and/or Ms Williamson cause delays in the appeal process?

v. From 15 May to 23 September 2019, did Ms Uygur and/or Mr Gilhooly respond

to the Claimant's Data Subject Access request (which she submitted on 9 May 2019) in an evasive manner?

7. Was the Claimant subjected to the detrimental treatment alleged at [6] above because she had done one or more of the protected acts and/or because the Respondents believed that she may do a protected act?

Unfair Dismissal

8. Was there a potentially fair reason for dismissal? The Respondent relies upon redundancy and/or some other substantial reason.

9. Was the Claimant's dismissal fair in all the circumstances (whether procedurally or substantively)? The Claimant, without prejudice to the assertion that her dismissal was unfair in general terms, cites the following instances of alleges unfairness:

i. The business proposal and/or the removal of her post was predetermined and not open to consultation;

ii. The Claimant was not given an opportunity to engage in consultation at the formative stages of any proposal. It was presented as a fait accompli;

iii The consultation process was hurried and superficial;

iv. The Respondent gave no or no adequate consideration to steps other than the Claimant's dismissal;

v. The Claimant should have been pooled with Inside Sales Director and RSM Sa1es Director;

vi. The Claimant was not afforded access to the consultation paper and/or the job descriptions in good time;

vii. Consideration should have been given to bumping the Claimant into the Channel Manager and/or VP EMEA position;

viii. The Claimant was not afforded the opportunity of a fair or adequate appeal procedure;

ix. The appeal outcome was predetermined and/or reasoned from a desired outcome.

8. It can be seen that there is no reference there to the further particulars (summarised at paragraph 6 above) but the tribunal understood that they needed to be determined for the purposes of deciding whether they were matters from which the tribunal could indeed draw any inferences for the

substantive claims of discrimination. Those further particulars which appear to raise new matters appear on pages 97 and 98 between (i) and (xv) and they read as follows:

i. In September 2016 Mr Sullivan commenting on a photograph of the A-Team saying in actual or equivalent words there's no Baracus (in the office) because there's no space for coloured people;

ii. The treatment of Sakina Dissenberger by Mr Bais in and around November 2016 which prompted her resignation;

iii. In or around March 2017 Mr Bais sending a photograph of Hugh Heffner having told the Claimant that she was the "Bunny in the Playboy Mansion;"

iv. The failure by Messrs Bais and Sullivan in July 2017 to communicate the Claimant's change of responsibility in a company-wide announcement contrary to standard practice;

v. Mr Sullivan describing the Claimant as a "good girl" in a message in September 2017;

vi. Mr Bais' comment in October 2017 during a trip to South Africa (in actual or equivalent words) "look at that lioness – she knows her place to follow the lion otherwise she'll get eaten;"

vii. Mr Bais' description when complaining about the local staff during the same trip as "bloody useless niggers." There followed comments of approval on a WhatsApp Board in which colleagues advanced stereotypical assumptions as to the work ethic of the South African staff. On one such message Mr Roderfield stated "they (the staff) take it pretty easy;"

viii. The treatment of Ms Simone Warland by Mr Bais in or around April 2018;

ix. The Claimant facing a number of questions in January 2018 from Craig Witsoe and Dan Ludwick about the #MeToo movement. They also asked her if she had experienced racism in the office. Despite the fact that she was pursuing "dry January" put pressure on her to drink. They took a video of the incident which they was sent to her husband in support of "Drunkuary;"

x. Mr Bais mentioning to the Claimant during pay discussions in June 2018 that he did not want to continue working with her and that she should look elsewhere for a job. These comments were repeated at a meeting in London in August 2018 during which Mr Bais also stated that he had been told by Roxi Wen (then CFO) and Randi Moran that the Claimant was one of the "stars" and that he had to find a way to work with her;

xi. In September 2018 after the Claimant's Quarterly Business Review Mr Bais

told the Claimant once again that he did not want to work with her and that she should look for a role outside of Elo. This was shortly before the Claimant was due to meet with a lead distributor at a restaurant. She was tearful on arrival and felt humiliated;

xii. In January 2019 Mr Bais stated once again that he did not wish to work for the Claimant and encouraged her to apply for a role at Star Printers;

xiii. The denial of Mr Cooper's disability and/or knowledge of the same in these proceedings;

xiv. Mr Bais notifying the Claimant that he had decided not to invite her to the NRF Conference in January 2019;

xv. Mr Bais notifying the group in February 2019 that he had booked a Quarterly Business Review with Jarltech (one of the pan European Distributors) on the same dates as DSE to prevent the Claimant from attending;

9. In summary, the discrimination claims are brought under sections 13, 26 and 27 of EQA and unfair dismissal under section 98 of Employment Rights Act 1996 (ERA). Putting it as succinctly as possible at this point, the tribunal must ascertain the relevant facts, some of which are disputed and some are not. From those facts, we must determine whether there has been a breach of those sections of EQA and determine the reason for dismissal and its fairness or otherwise in accordance with ERA.

Hearing

10. This matter was listed for a ten-day hearing and it had been agreed that it would be held by CVP. The tribunal judge and non-legal members received various e-mails with attachments on Friday 19 March 2021 in preparation for that hearing. It is right to say that what was received was a substantial amount of material. The bundle for the liability hearing was over 3,400 pages. There was a separate remedy bundle and impact statement and we agreed at the commencement of the hearing we would not look at as it seemed only possible and sensible to have a liability only hearing at this point. There were also copies of some videos, although it was only necessary for the tribunal to look briefly at one or two of those. We had some further limited disclosure as the case progressed.

11. We had a total of nine witness statements and all witnesses attended by CVP and were cross-examined. The claimant's witness statement was relatively lengthy running to 424 paragraphs and 54 pages.

12. For the respondent, we had eight witness statements. The statement of the second respondent, Mr Bais, was some 80 pages long. Mr Bais was the claimant's line manager and took the decision to terminate her employment. Mr Gilhooly, who was a Vice President and General Counsel of the first respondent's parent company, based in the US, was the appeal

officer and his witness statement was 49 pages long. Other relatively lengthy statements were from Mr Sullivan who was the Mr Bais's line manager and Ms Williamson who was the VP of Global Human Resources for the US parent company and who attended the appeal hearing and carried out an investigation into the claimant's grievance. There was also a witness statement from Mr Witsoe who is the CEO of the parent company; Mr Baeb who is the Financial & Operations Director and was present for the discussion in the car on 8 May 2019; Mr Ludwick who is the Chief Product Officer and against whom some allegations contained in the further particulars were made. Finally, we heard from Mr Kardos whose statement was very short. He is the Channel Sales Manager for Eastern Europe and gave evidence about a trip to Israel that he attended in March 2019 when the claimant's husband accompanied them.

13. At the commencement of the hearing on Monday 22 March 2021, we discussed how to progress with the hearing given the substantial amount of material that needed to be read before we could start hearing cross-examination. We agreed a timetable, bearing in mind that some of the witnesses were based in the United States and agreed that we would try and complete the evidence by Wednesday 31 March 2021 so that submissions could be on 1 April, leaving the tribunal sufficient time to deliberate. The tribunal needed to take an extra day on 7 April to deliberate and provide a reserved judgment.

14. It was also agreed that we would consider facts relating to any Polkey arguments that might arise if we decided that there were some defects in the procedure used to dismiss the claimant. We also had the benefit of a chronology and a cast list to help us with the hearing and deliberations.

Facts

Introductory comments

15. As can be understood from what has been said above, this was a particularly fact-heavy case. There was a considerable amount of detail in the witness statements and relatively intensive cross-examination (the employment judge has almost 250 pages of handwritten notes of the cross-examination alone). What was particularly challenging was that the primary case of the claimant, as set out in her particulars of claim, and the list of issues, covered a relatively narrow period of time around the dismissal with some broad generalisations about the make-up of the first respondent and its policies and so on. The further particulars included some very specific allegations of comments made, photographs sent and alleged incidents which were hotly contested and which were said to be background matters.

16. Although they were said to be matters from which we could draw inferences, considerable detail was given about these matters as some of them were relatively serious allegations of what would amount to, if found, discriminatory treatment. Furthermore, although the stated reason for the

claimant's dismissal was redundancy, there was a considerable amount of information and evidence with respect to what might be considered to be performance and/or conduct issues. This was partly because Mr Bais had considered taking steps to exit the claimant for other reasons before the decision taken in May 2019. The extent of the evidence and the many disputes between the witnesses means that our fact-finding is, of necessity, rather lengthy. It is somewhat lengthier than we would normally expect on the basis of the list of issues which is narrower. However, it is important to say that we have not necessarily found each and every matter which was put before us as a fact or a disputed fact if, in our view, it does not assist us either with the list of issues or with the claimant's argument about what we should infer from matters she has raised in the further particulars.

17. Matters were complicated because the claimant had considerably more to say in her witness statement about some of the matters she raised in the further particulars. Her evidence was more detailed and contained what could be considered to be further allegations which the respondents felt they needed to answer. Similarly, Mr Bais had considerable detail in his witness statement about what he considered to be performance issues, many of which were challenged by the claimant. We have had to take a view on what seems to the tribunal to touch directly on what we need to determine that in this matter, and which the parties have agreed in the list of issues.

18. Another matter which it is worth pointing out at this stage, is that a considerable amount of the evidence we heard was disputed and we therefore had to assess the credibility of the witnesses giving evidence. This is always a difficult task when some of the matters complained about refer to things that were alleged to have been said and not necessarily recorded in writing; where they happened some years previously and might be taken out of context. We point out now, and it may be repeated when we are rehearsing our findings of fact, that the fact that the claimant raised none of the matters in paragraph 8 i and xv above during her employment, in her appeal against dismissal or in the claim from, means that the allegations were made somewhat late. There were questions why they were not raised earlier by her, given her seniority and the policies which we come to.

19. We regret to say we have not found the claimant's evidence credible on a number of occasions, particularly in view of contemporaneous messages from her around the time of the alleged poor treatment, which seems to conflict with her evidence. Although we were asked to consider that some of the respondents' witnesses could not recall certain matters, we did form the view that, broadly speaking, the evidence we heard from the respondents' witnesses more closely matched any contemporaneous evidence that we could see**.**

20. On several occasions in her witness statement, the tribunal has formed the view that claimant has over-stated a number of matters and exaggerated

how it affected her at the time. For instance, paragraphs 99-101 of her witness statement read as follows:

> *"99. Sexual harassment was rife across the Respondent's White Male senior management. It was done subtly and through innuendo and usually verbally so as to avoid written evidence. In my opinion, there was knowledge and tolerance of sexual harassment throughout the Respondent. I explain why I say this below.*
>
> *100. Throughout my employment there were regular conversations of sexual nature, with indecent and suggestive remarks. Such remarks have the aim and purpose of violating my dignity and creating an intimidating hostile and degrading environment for me. I felt it really difficult to report the sexual harassment because of the cultural context of stepping into this. I found it heartbreakingly sorrowful and I felt really ashamed.*
>
> *101. The sexual harassment started in my first few months of being employed at the respondent"*

21. When assessing what did or did not happen, we look at what has been said in writing and under cross examination. It does seem that there has been a tendency for the claimant to embellish earlier accounts (see, for instance, what was said about the South Africa trip and the January 2018 New York matters in the further particulars compared to her witness statement). Of course, the tribunal understands that parties involved in litigation are inclined to remember more details when they give evidence to support their own case. However, we have failed to understand why, if the claimant was faced with this level of humiliation and intimidation, she failed to mention until it is referred to in her further particulars. She also included some matters in her witness statement which were contained in no documents before that statement. Where there have been disputed matters, the tribunal regrets it did not find the claimant a credible witness on the majority of those matters.

22. **These then are the relevant facts for our determination**.

23. The claimant had worked with Mr Bais when they both worked at NCR; the claimant was a distribution account director and Mr Bais worked in a sales leadership role. They were on friendly terms but did not work closely together. Mr Bais moved to the respondent in March 2016 as the Europe, Middle Eastern, African (EMEA) Vice President of Sales and General Manager for ELO Touch Solutions Inc, which is a US based company with the first respondent being a subsidiary of that company.

24. Mr Bais decided that he needed someone with a strong track record in the Channel part of sales and he contacted the claimant via LinkedIn to see if she was interested in the role.

25. The first respondent was the inventor of the touch-screen some 40 – 50 years ago. Touch-screens are used all around the world in flat screen

points of sale and self-order terminals etc. It is not a particularly large company, having around 500 employees, covering around 80 countries. The EMEA region has around 20 sales people split into three areas, Channel; Regional Sales Management and Inside Sales. The channel area was the one which Mr Bais took the view the claimant could run. This focuses on distribution partners, in particular for pan European distributors such as Ingram, Bluestar, Scansource and Jarltech. These distributors order stock from the first respondent to sell onwards to end users. The Regional Sales Management focuses on new sales opportunities to larger scale end customers and Inside Sales on smaller deals usually through re-sellers.

26. There were only four people based in the UK and the EMEA office and many of the support networks such as HR, finance and so-on were either based in the US or some of them in Leuven in Belgium.

27. The claimant was interviewed successfully for the post of Channel Director for the EMEA region. She negotiated a high level of remuneration which included a base salary and a bonus target known as SIP. The claimant was to receive a base salary of £150,000 per annum and a 40% SIP, making her on target earnings around £210,000. There was some difficulty about this because Mr Bais had offered this without following the proper process through the HR and finance office but that was what was agreed. Mr Bais's evidence was that it was only slightly lower than his remuneration. In order for the claimant to be appointed, a person carrying out a similar role, the Channel Leader, was dismissed.

28. Mr Bais had some ideas about managing the team structure and sales strategy when he arrived at the first respondent which he sets out in some detail in his witness statement. He hoped that part of the strategy was to try to move business from smaller regional distributors to the pan European distributors referred to above. There was a difference in the price lists for the pan European distributors and the regional distributors and Mr Bais was keen for the claimant to develop the first respondent's relationships with those pan European distributors. In particular, he wanted to concentrate on BlueStar in Europe which is the largest distribution partner globally but the smallest one in Europe.

29. The claimant reported to Mr Bais, who in turn reported to Mr Sullivan, who was based in the US and was the Senior Vice President of Global Sales. In turn, Mr Sullivan reported into Mr Witsoe who is the CEO of the parent company.

30. The claimant said in her claim, and repeated in her witness statement and under cross-examination, that the first respondent had no applicable equality and diversity policy. It is correct that the first respondent did not have a policy with that precise title. What it did have was an "*anti-harassment and non-discrimination policy*" which the claimant signed in July 2016 as having received. That policy has an introduction and identifies the scope of it. It has definitions of sexual harassment as well as other forms of harassment and details how staff can report matters of

concern. The introduction sets out that the company "*strictly prohibits all forms of harassment and discrimination"* on the basis of various matters including age, ancestry, colour, religious creed etc.

31. It goes on to say that:

"The Company prohibits all forms of discrimination, harassment against any applicant or employee and against anyone who does business with the Company. Further, this policy extends to all aspects of the Company's employment practices, including recruiting, hiring, discipline, termination, promotions, transfers, compensation, benefits, training, leaves of absence and other terms and conditions of employment.

The Company expects management level personnel to serve as models of appropriate conduct for other employees and will hold them to a higher standard of accountability".

32. The policy includes a number of examples and other forms of harassment, again with a long list of protected characteristics. Under the heading *"Reporting Discrimination or Harassment*", it provides various routes for reporting, including reporting it to an immediate supervisor or another member of management, general counsel or human resources. It mentions an investigation and makes it clear that no one is ever required to approach the person who is harassing. It states- "*Complaints may be submitted anonymously by any of the following methods*" - then it sets out anonymous reporting through a website with a hotline and various help line numbers. It states specifically at item 7 that retaliation is prohibited, as well as providing for confidentiality.

33. The first respondent also has a business code of conduct which has a section which makes it clear that discrimination and harassment is prohibited, as well as a provision that someone found to have discriminated will be disciplined and may be dismissed.

34. There is also training which encompasses these matters including training on the business code of conduct as well as inclusion and diversity training which included sessions on unconscious bias, making inclusive decisions and improving inclusion. In September 2018 the claimant attended a workshop on "*Unconscious Bias – Making Inclusive Decisions*" and in October 2018 she attended refresher training in the business code of conduct.

35. The claimant's evidence is that she searched the first respondent's internal systems for HR policies and procedures as soon as she returned from New York (which would have been January 2018). She said she wanted to understand its position on "*equality, diversity and discrimination as well as the procedure I could use to make a complaint about the treatment I had suffered*". The tribunal does not understand why she could not find this policy if she looked for it, nor why, having failed to find such a policy, she did not ask questions of HR or one of her colleagues.

36. The claimant has also claimed in these proceedings that the first respondent lacked "diversity". She says that she was the only non-white EMEA Director and one of only two women. It is true that the other woman at director level at that point was Ms Uygur, the Human Resources Director. The first respondent says that there were only four people at that level, two white men and these two women. The claimant specifically talks about treatment of four "*non-White*" employees at paragraph 18 of her witness statement, three of whom were dismissed or resigned. It is difficult for us without hearing from those people to be clear about any reasons for resigning or being dismissed. The respondents point out that Mr Bais appointed the claimant and 3 of the four people she refers to, and promoted non-white employees on her departure. The tribunal makes no findings about whether the first respondent lacked diversity. In common with the vast majority of organisations in the UK, it is likely that the proportion of women and ethnic minorities in more senior positions could and should be improved, but the evidence, such as it is, does not help us with deciding the issues in this case.

37. For completeness, it should be said that the first respondent had neither a redundancy policy nor a grievance policy at the time of the claimant's employment.

38. The claimant was appointed to the post of Channel Director and began work on 4 July 2016. Things seemed to be progressing fairly well in the early months of her employment. Although she raised no issues about the following matters at the time, there are some matters which she refers to either in the further particulars or in her witness statement as taking place later in 2016 for which it is now necessary to make finding of facts.

39. An Inside Sales team was set up towards the end of August 2016 with Ms Dissenbergen as its first Manager. The team was set up in the Leuven office and there were some initial difficulties with the team and with Ms Dissenbergen's management of it. Ms Dissenbergen resigned in June 2017 which the claimant states was in some way related to Mr Bais' treatment of her. There is no other evidence to this effect, Mr Bais disputes that and we have not heard from Ms Dissenbergen. Mr Bais points out Ms Dissenbergen sent him an email when his mother-in-law died and has been in touch with him since she left as recently as February 2020. They were discussing an opportunity with her new employer. The tribunal cannot find any evidence of treatment which prompted Ms Dissenbergen to resign.

40. The claimant has raised an issue with something that she alleged happened at a conference in the Bahamas. These matters do not appear in the claim form or the further particulars and arise from a photograph of Mr Sullivan which the claimant disclosed during these proceedings. The allegation in her witness statement is that Mr Sullivan told her to take a photograph of him sitting on a throne and that he kept adjusting his posture and "*pushing his groin area out to make his groin look more prominent and protruding*". She said that he went on to say "*just so you are clear – I sit on the throne of power*". She says that she was shocked and

horrified by his behaviour. Mr Sullivan denies that he made these comments or made such gestures. The tribunal has seen the photograph in the bundle and it appears to be an innocuous photograph of a holiday snap. Mr Sullivan's evidence was that various people took pictures of other people on the chair and denies saying anything about sitting on the throne of power. The tribunal does not accept that Mr Sullivan made these comments or behaved in this manner, not least because claimant made no mention about them at all either at the time or anywhere before her witness statement.

41. From the same business trip to the Bahamas, the claimant has disclosed a photograph of Mr Sullivan holding some balloons with the first respondent's logo on them. Again, this appears to be a completely innocuous photograph. In her witness statement, the claimant says that this was shared on a WhatsApp group although there is no such evidence before the tribunal. She also says that Mr Sullivan said, "*have you seen the size and power of my balls*". Again, this is denied by Mr Sullivan. The tribunal do not accept that this occurred given that, for no justifiable reason, it was not mentioned by the claimant before her witness statement.

42. One matter that the claimant does raise in her further particulars (8 i) which is also said to have occurred around September 2016 is put in this way:- *"In September 2016 Mr Sullivan commenting on a photograph of the A-Team saying natural or equivalent words there's no Baracus (in the office) because there's no space for coloured people*". The claimant states that the photo was shared on a WhatsApp group but has produced no evidence to that effect. In her witness statement this allegation has been expanded (paragraph 106), now stating that Mr Sullivan had shown her the picture several days before and said, *"Just remember – this company is run by the A-Team – Mr Wistoe is Hannibal, Mr Ludwick is Faceman and I'm (referring to himself) Mad Murdock. There's no space for Baracus."* Although the claimant goes on to say that she believes this comment was making a "*clear racist comment that people of colour are not valued within the respondent and that there is no space for non-white people*", she does not allege that he used these actual words. Mr Sullivan completely denies making any of these comments to the claimant. Indeed, it is the first respondent's case that the picture of the A-Team was a slide produced by Mr Bais and neither Mr Sullivan nor Mr Bais recall any conversation about it. Mr Sullivan denies that he would have said something to this effect to the claimant. The tribunal does not accept that this comment was made. The claimant has given no satisfactory explanation for why she would not complain either directly to Mr Sullivan about such a comment or through the various channels open to her and why it was not raised until the further particulars.

43. As stated earlier, there were some issues with the Inside Sales team which the claimant discussed with Mr Bais. In her further particulars the claimant says that in or around March 2017 Mr Bais sent her a photograph of Hugh Heffner and we have seen such a photographer sent from Mr Bais' phone

to the claimant. It is simply two photographs of Hugh Heffner. The further particulars (8 iii) say that Mr Bais had already made the comment that the claimant was "*the Bunny in the Playboy mansion*". Mr Bais could not recall why he sent those photographs as there is no other context for it but he denied making any comment about the claimant being a bunny in the Playboy mansion. Mr Bais says that the claimant and himself had a good friendly relationship which included sending humorous pictures from time-to-time.

44. Again, in her witness statement, the claimant expands that allegation to something more serious than is suggested in the further particulars. The relevant paragraph (108) reads

> *"Mr Bais told me I needed to remember I was a "Bunny in the Playboy mansion", and that being Asian and Female, I ticked a demographic box and I was there to make the Respondent "look good". This shocked me and made me feel violated and intimidated".*

This is a much more serious allegation and does not appear anywhere before the claimant's witness statement. Again, the tribunal is not satisfied that this was said. The claimant has failed to explain why she would not raise that either directly with Mr Bais himself or with anyone else through more formal channels. We do not accept that Mr Bais would make that comment to the claimant, it being clearly offensive to suggest that somebody had been recruited because they "*ticked a demographic box*".

45. Upon Ms Dissenbergen's resignation it was discussed whether the claimant could take over the management of the Inside Sales team. There was discussion about how her remuneration might be increased to reflect this extra responsibility. It is quite clear from the documents before the tribunal that the agreement was to increase the claimant's SIP from 40% to 50%. At a later point in these proceedings the claimant alleges that Mr Bais promised her a £10,000 increase and/or a 28.75% increase to her base pay. More details of this are discussed below when they were raised by her in 2018.

46. The claimant's new responsibility for Inside Sales team was contained in an announcement and this is one of the matters raised as a background matter in the further particulars (8 iv). It is said to be a "*failure by Messrs Bais and Sullivan to communicate the claimant's change of responsibility in a companywide announcement contrary to standard practice*". The tribunal have seen a copy of the announcement which was made by Ms Uygur in an email on the 16 June 2017 to EMEA (rather than globally). We have also seen a number of other announcements about promotions and people joining the company. Some of those were announced globally but they seem to be for people whose role is a global role. The claimant asked us to consider Mr Baeb's announcement but that was made because he was promoted to joint CFO/COO for EMEA. There is also an announcement about the arrival of a new Senior Chief Accountant which was made only to EMEA by Ms Uygur. The first respondent's witnesses

all said there was no standard practice. The tribunal accept that there was no standard practice and nothing which suggests any differences in the announcement which related to race or gender.

47. At paragraph 8 v of the further particulars the claimant stated that Mr Sullivan described her as "*good girl*" in a message in September 2017. This is a reference to a text message which appears in the bundle at page 373, which reads, "*Good girl. Save it for when you need it*". There are no messages before or after the message so it is difficult to understand what it might mean. It was not raised by the claimant until the further particulars in mid-2020 and Mr Sullivan's witness statement says that he has no recollection of it and could not provide other details. He believed it might have been sent in a friendly playful way. Having given the matter some thought before he gave oral evidence, Mr Sullivan believes that it could be connected to a series of photos and messages sent by the claimant when she was having dinner in London at The Shard with Mr Lamb who was a Marketing Director and Miss Piette another Marketing Manager for EMEA. The claimant believes that the message is sent in the context of her not pursuing an above merit increase in her pay. There is really nothing to support that belief. Mr Sullivan's oral evidence came after the claimant's and he gave some evidence about the photographs and why he might have sent that message relating to Mr Lamb putting bits and pieces in her handbag. Because there are no other messages around it, it is difficult for the tribunal to determine what the message meant or indeed why it was sent. The tribunal cannot draw any inferences from this message which is isolated and has no context.

48. Another matter which is referred to in the claimant's witness statement but not included in the further particulars or anywhere else is another message which the claimant is said to have found on her phone. Again, there is no context for this and no messages before or after which is, in itself, rather strange. The message was sent from Mr Bais' phone on 24 August 2017 and reads, "*this is Chris – FU Kashmir*". Chris is Mr Sullivan's first name. Neither Mr Bais nor Mr Sullivan can explain this message. Indeed, they gave somewhat contradictory evidence about it. Mr Bais seems to recall that it might have been sent by Mr Sullivan as sometimes they would take each other's phones and send messages. Mr Sullivan does not recall that at all. Although in some context it might be an inappropriate message or indeed, again in some circumstances, thought to be offensive, the tribunal cannot make any firm findings on it without its context. It was sent in August 2017 and not mentioned at all during the claimant's employment or in further particulars. In any event, it seems to have no connection to race or sex (except for the use of the word "girl") and has not led the tribunal to draw any inferences.

49. The next series of allegations arise from a business trip to South Africa in October 2017. These are relatively serious allegations contained in the further particulars and considerably expanded in the claimant's witness statement. The details of the allegations are at 8 vi and vii above. Having made reference to the entire quote including the racial epithet quoted

above, the tribunal, parties and witnesses agreed not to use it again but to refer to it as the "*N word*".

50. As to the first allegation about the lioness comment, the claimant provided more detail in her witness statement. Again, it appears to be an expansion of the original complaint. She repeats those words but says that Mr Bais leaned over to her to make the comment, that she was "*shocked and horrified*" and that she felt he was sending her a very clear message that

> "*as a woman, I needed to stay in my place and if I didn't he would destroy me. I felt extremely offended by this comment. The fact that the whole event was attended by White Males added to the message that as an Asian Female I needed to understand and know my place."* (paragraph 119)

51. Mr Bais denied making such a comment saying that he was concentrating on looking at the lions. None of the other witnesses heard him make the comment. The tribunal finds, on a balance of probabilities, that it was not said. Even it was, the perception of the claimant is not reasonable. There is nothing which would lead the tribunal to infer discriminatory behaviour.

52. Even more problematic is the allegation the claimant makes about the use of the N word. The claimant agreed, when cross-examined, that the N word was the most offensive racial epithet and says that she was absolutely shocked. The claimant gave no examples of the comments of approval which were said to have appeared on the WhatsApp group in spite of the whole WhatsApp group apparently being disclosed. There is considerable expansion of this allegation contained within paragraphs 120-123 of the claimant's witness statement. She suggested that the comments were made on a number of occasions and said that "*Mr Bais would start laughing and looking at me as he knew I firmly disapproved of such comments*". She said that she was extremely offended. She said that people responded with "*they take it pretty easy*" and continued at paragraph 122,

> *"On multiple occasions the racist and derogatory comments would be made in the presence of Mr Witsoe and he would just snigger, smile or laugh. At no time did Mr Witsoe challenge the comments being made. This made me feel as if he condoned the racist and sexist comments and of that they were common place in the respondent's organisation. This encouraged Mr Bais to continue with his disgusting sexist and racist behaviour none of the other attendees challenged Mr Bais on his behaviour."*

53. The claimant says that she was sickened that such comments would be made by Mr Roderfield, who was from one of the distributor companies and who was from England. The comment was said to be related to a flood that had happened in the dining area. When the claimant was asked in cross-examination why she had not mentioned this before, she said that going to raise it in her witness statement and pointed out she had no legal representation at an earlier stage.

54. Mr Bais strongly denies making such comments. Mr Witsoe was asked about the allegation that he heard the racial epithet and that he "sniggered, smiled and laughed" when he heard it. He called it a shocking allegation and said that he did not hear anyone use such language. He said that, if he had heard anyone make such an offensive statement, they would no longer be working for the respondent. The tribunal accepts that evidence. He also said, in his witness statement, and we accept, that he would expect and assume that a co-worker would report a colleague if such language was used and it was never raised by the claimant. He denied there was any talk about the South African staff being lazy and said that most people agreed that they had actually done a very good job in dealing with the flood. The tribunal find, on a balance or probabilities, that none of these comments were made. Particularly in relation to the allegation about the "*bloody useless N…"*, this would be a shocking and offensive phrase to use. The claimant suggests that it was used on a number of occasions and that other people laughed when they heard it. The tribunal simply cannot accept that it occurred in the way the claimant has described it or indeed that it was said at all. It is well known internationally to be a word that should never be used and it would be very strange circumstances for it to be used at a work event including distributors and in front of an international group of staff, any one of whom might make a complaint.

55. As stated, the claimant said that she had looked to see how she could complain around January 2018 but had not managed to find anything in the first respondent's policies. This cannot be right. The policies are clear and there is really no explanation why the claimant could not find them. Even if she could not find any policy, she was an experienced manager with line management responsibilities herself and could easily have spoken either to a colleague or to HR about the language she says was used. The tribunal do not accept the claimant's evidence on this.

56. The next matter the claimant raises appears at 8 ix of the further particulars. Again, this is somewhat expanded in the witness statement which we will shortly come to. It is set out above and concerns the allegation that the claimant faced questions about #MeToo, asked if she had experienced racism in the office and the pressure on her to drink during "dry January". This matter relates to attendance of the claimant along with a number of other senior executives at the NRF Conference in New York.

57. There is much more detail about this matter in the claimant's witness statement and we heard evidence from Mr Witsoe and Mr Ludwick about the evening. There was to be a dinner with the leadership team including Mr Witsoe, the CEO and Mr Ludwick (the chief product officer) and the Blue Star and Star Printers leadership teams. The claimant sent an invite to Mr Witsoe and Mr Ludwick to join her for drinks before the arranged dinner. It is not entirely clear what time they went for drinks as some of the evidence was contained on mobile phones which might have the New York time or might still have UK or European time. In any event, they were not

able to access the bar the claimant had said was her favourite bar and they went to another bar in the Trump Tower. The claimant's case is that Mr Witsoe and Mr Ludwick knew that she was doing "dry January" and that they "*coerced and made me feel forced to have a glass of champagne*". Mr Witsoe and Mr Ludwick have no recollection of the claimant resisting taking a drink and the tribunal have seen a photograph of the drinks which appear to have three drinks in it. Further evidence was given about how much those attending had to drink. Mr Ludwick and Mr Witsoe remember that they drank very little, partly because they were about to go to a business dinner with clients. The claimant made a new allegation in her witness statement that photo messages were being sent by Mr Witsoe and Mr Ludwick to other colleagues but these do not appear to be anything to do specifically with the claimant but just showing that they were at the Trump Tower, which prompted comments.

58. Another new allegation with respect to this evening was that, at the dinner, Mr Ludwick made *"multiple inappropriate comments and suggested inuendoes regarding the phallic nature of his dessert*". The claimant said she found it inappropriate and she was intimidated and offended. We have seen a photograph of Mr Ludwick which appears to be a photograph that the claimant took of him. She gave no details of the alleged comments and he denies making any such comments. In the further particulars she makes particular reference to the #MeToo Movement and being asked a number of questions about it. In her witness statement (paragraph 155), it is somewhat extended in the following way. She says: "*Mr Witsoe looked me directly in the eye and sniggered as he asked "What would you do if you faced harassment or discrimination? Would you have the balls to stand up?*". Mr Witsoe denies having used such language, although it was agreed that it is possible that there was discussion of the #MeToo movement as it was current at the time but there was nothing untoward about that discussion. Again, the tribunal does not understand why, if such language was used by Mr Witsoe, and he behaved in the way the claimant alleges in her witness statement, she has not mentioned it before.

59. The claimant then in her witness statement, from paragraph 159, goes on to talk about how the evening progressed with the three of them going to another bar. She says she was "*literally forced to stay in the bar*". At some point a video was made by the claimant (in spite of the allegation being that "*they took a video of the incident*"). It appears to be a short jokey marketing video with Mr Ludwick. It is unclear why the claimant recorded that video and whether indeed she sent it herself or to her husband. It is worth quoting paragraphs 161 and 162 of the claimant's witness statement as it demonstrates her inclination to hyperbole in this litigation;

> *"161 I felt so shocked, humiliated and violated. It was as if the message was being sent home to my husband to make it clear that I was not in control. The Leadership team at the respondent had the power to overpower me and if they could force me to drink alcohol they could force and overpower me as they pleased. In my opinion, they would not*

have sent a similar video to a Male employee's wife nor tried to exert their power over a Male employee and force them to have an alcoholic drink to be part of the club and so they could fit in.

162 I felt so violated and powerless. I had nowhere to turn and nowhere to escape and leave the bar as I didn't know which part of New York City I was in. When the evening finished, I had to share a cab back to the hotel. I went straight to my room grateful that I was due to fly home the next day."

60. In fact, when the claimant did get back to London the next day, she chose to send a message thanking Mr Ludwick for a "*great time in New York*" and enclosing a photo of herself and her husband clinking champagne glasses with the message "*cheers from the Coopers*". This is completely inconsistent with the claimant's evidence. When asked why she would send such a message, she gave an explanation to do with them having talked about art galleries and she and her husband were at an art gallery. Somewhat later, by reference to the NRF show which would take place in January 2019 to which the claimant was not invited, she commented again to Mr Ludwick "*We will have to find another time and place to celebrate life with a glass of bubbles*". Further comments by the claimant which seem to relate to that New York event appeared in late disclosure of materials where the claimant expressed her employment as being in an amazing team and referenced *"having enjoyed our whisky cocktails in the New Year after the NRF this year*". The tribunal finds that the evening cannot have been as described by the claimant if she felt she was able to make these sorts of friendly comments. In short, many of the things complained of either did not happen or did not have the effect the claimant complains about.

61. In November 2017 Ms Simone Warland was appointed to be the Inside Sales manager reporting to the claimant. The claimant alleges at 8 viii that there was some treatment of Ms Warland by Mr Bais but it is unspecified what that treatment was in those further particulars. There is no more detail about that in her witness statement. There is nothing which would lead to the tribunal drawing an inference.

62. The increase in the claimant's SIP was agreed to start in October 2017 but it seems it was not actioned until January 2018 although no complaint is made about that. Mr Bais's evidence was that concerns were being raised by members of Inside Sales staff about the claimant's management style with Ms Uygur and with Mr Bais around February 2018. There were also concerns about Ms Warland's performance in the role. Mr Bais discussed the possibility of the claimant no longer being responsible for Inside Sales with her. He says the reason was the claimant's handling of the team but the claimant recollects that the reason was that so she could grow the channel team. In the organisation and talent (O&T) review there is a reference to that removal. By the time of the final version of that O&T review, after input from Ms Moran who was the Vice President-HR and Mr

Gilhooly, there is a clear reference to that which reads under "*Development Needs*" as follows:

> *"The management of Inside Sales have been taken away from you. As a senior leader in the company you need to recognise that people look up to you to represent the company's views and culture, be watchful of aggressiveness that pushes your agenda to the point of alienating, cornering or misrepresenting priorities to achieve your goals."*

63. Earlier drafts also made reference to these concerns. It is possible that this was not put as clearly as this orally to the claimant and it is true that there was no removal of the SIP increase which had been agreed for the extra responsibility that managing Inside Sales brought. She did however sign that final document in July 2018. We come to that later.

64. On 11 May 2018 the claimant suggested to the first respondent's PR person that consideration be given to submitting nominations to a "*Women in Channel*" Event for herself as "*Role Model/Woman of the year*" and the first respondent as "*Diversity Employer of the year*". The first respondent replied saying it was "*a pass*". The claimant did not really explain why she had suggested the first respondent be nominated as diversity employer of the year, given what she is now alleging.

65. Mr Bais began to have some concerns about the claimant apart from her management of Inside Sales in 2018. To summarise these as best we are able, they were that the claimant was not progressing some of Mr Bais's strategies as he had hoped. First, he had a strategy called "Distribution 2.0" (summarised between paragraphs 77 and 82 in his witness statement) which was, in essence, to move more sales to pan-European distributions. He also had some concerns about the level of the claimant's expenses and stock management.

66. The bigger issue, about which the tribunal heard a considerable amount of evidence, was the claimant's attempt to secure a significant pay rise in the summer of 2018. In each year the first respondent reviews salaries around July and typically awards increases of between 1% and 3%. In 2017 the claimant had secured a 3% merit increase. On 14 May 2018 the claimant asked Mr Bais whether he had managed to speak to Ms Uygur about the July pay rise. He took that to mean she was asking about the merit increase and replied that no details were known "*right now*".

67. On 25 May 2018 the claimant emailed the global HR director, Ms Moran, copying Mr Sullivan and Mr Bais into the email. She said that she was making a request because she was re-mortgaging her house to help support her sister and went on to say:

> "*When I took over the Inside Sales team last May part of the discussion and agreement was that my commission element and base salary would be increased in October as part of the SIP process. When my SIP letter was finalised at the start of this year, only my commission element was*

increased 28.75%. I was told that my base salary would be increased by the same percentage in July as part of my annual pay review"

68. In the claimant's witness statement to the tribunal, she said that she had spoken to Mr Sullivan in January 2018 and that he had told her she would be given a further increase. Mr Sullivan denies that conversation. The tribunal finds that it is highly unlikely that it would have happened.

69. On 28 May 2018 Ms Uygur informed the claimant that she was eligible for a merit increase of 3%. The claimant then emailed Ms Moran, copying Mr Sullivan, Mr Bais and Ms Uygur, stating that the 3% increase did not include an increase on her base package and that she had been "s*et the expectation that my salary would be increased by the same percentage*". The tribunal does not understand the claimant's statement that she had an expectation of an increase of 28.75%. She was not promised an increase in her base pay at all, let alone one at 28.75%. A 3% merit increase is at the top end of the first respondent's range. As explained above the agreement had been for the increase from 40% to 50% of the SIP alone (which is a 25% increase on that part). There was nothing said about either £10,000 or 28.75%. It goes without saying that the claimant was already on a relatively high salary and an increase of 28.75% would be in the tens of thousands of pounds. In communications between the HR directors, Ms Uygur and Ms Moran, Ms Moran said she was totally lost and Ms Uygur replied that "*this is total nonsense*".

70. In an email of 11 June 2018, the claimant wrote to Mr Bais (copying in Mr Sullivan and Ms Uygur) saying she "*trusted you to do the right thing*". This is not consistent with having been promised the pay rise she suggested in her earlier correspondence.

71. This leads us on to one of the matters which is raised in the further particulars as a background allegation at 8 x - the claimant alleges that Mr Bais mentioned that "*he did not want to continue working with her and she should look elsewhere for a job*". That is said to have been repeated in London in August 2018 and again in September 2018 (8 xi). The claimant spoke to Mr Bais on the telephone when he was in the US on 14 June 2018. She says that he made this remark a number of times in the call and that she asked him if she could speak to Mr Witsoe and he said that that was okay. Mr Bais's recollection of that call is that he told her that the only increase on the base salary was the merit increase. He said that she had said she had had multiple offers of work from the market at that level and that he replied to her something to the effect that he did not want her to leave but if she had such offers, she should "*go for it*". He told her the salary decision was final. He does not recall that she asked permission to call Mr Witsoe and his recollection is that he expressly told her that she should not speak to others about this issue. He denies saying that he did not wish to continue working with her. The claimant's evidence to us in cross-examination was that she had had offers at about the level she was asking for, close to £300,000 per annum. The tribunal finds that Mr Bais did not say that he did not wish to continue working with the claimant but

that he did say that if she had had offers in around that area she should consider going to work elsewhere, or words to that effect. Whether or not he told the claimant or she remembered that she should not speak to others, she did ring Mr Witsoe after her call with Mr Bais.

72. Mr Witsoe's evidence was that there was nothing wrong with employees seeking to increase their pay and that they could speak to him about it, although he did express in his witness statement that it was "*an odd thing to do*". He would have expected employees to speak to their line manager, but he did listen to what she said about why her pay should be increased. He said that he would speak to Mr Bais and Ms Moran and does not recall her saying anything about Mr Bais telling her to look for work elsewhere.

73. On the same day the claimant had a call with Ms Moran. In that call the claimant said that she believed she was paid below the market rate and Ms Moran asked Ms Uygur to carry out some salary benchmarking. The documents in the bundle show that that demonstrated that the claimant was paid above the market rate. Having discussed matters further the first respondent took the view that the claimant was already highly paid and there should be no increase. The claimant sought to pursue the matter further and suggested that she would fly out to the west coast of the US for a further discussion but Ms Moran told her in no uncertain terms that her compensation package was fair and there was no need for her to fly out. In spite of that clear message, the claimant emailed Mr Witsoe the next day and he replied saying that everyone agreed the response and she received no increase above the merit increase which was awarded.

74. This incident concerned Mr Bais. First, he was concerned that the claimant had told what he believed to be an untruth about having been promised this substantial increase. Secondly, he believed she had spoken to other senior people in spite of him asking her not to do so. It led to Mr Bais admitting that he had a "*trust issue*" with the claimant and in an email to Mr Sullivan he said "*losing her would not be an issue*".

75. This led to discussion at Mr Bais's level with Ms Uygur about the possibility of devising an exit strategy for the claimant. Mr Bais had started to doubt the claimant's integrity and he sets out some detail of that in his witness statement between paragraphs 136 and 138. In any event, Ms Uygur wrote an email headed "*Rationale for separation*" on 11 July 2018. It raised a number of issues that Mr Bais perceived to be occurring with the claimant. It included the Distribution 2.0 being moved too slowly, the non OSX project being too slow; issues with stock and inventory management with the distributors; report of bullying behaviour from Inside Sales staff and issues with expenses claims. Mr Bais spoke to Ms Moran and Ms Wen, who was the chief financial officer at the time. They informed Mr Bais that he had to work with the performance issues rather than exiting the claimant. As he said in his witness statement, he was not "happy about it" but he had been told that he could not dismiss the claimant. Mr Bais's evidence is quite clear that he would have fired the claimant at this

point but he did not get approval to do that. A document was therefore produced in relation to the performance issues and a performance review document was prepared with Mr Gilhooly having relatively minor input into it.

76. This led to a meeting on 26 July 2018 in London between Mr Bais and the claimant to discuss these concerns. There are different versions of this meeting. It is referred to in the further particulars at 8 x but with the incorrect date of August 2018. The claimant spent some time in her witness statement dealing with this meeting and she was cross-examined about it. In her witness statement (paragraphs 232 to 236) she said that Mr Bais was hostile and aggressive and again said that he did not want to work with the claimant. She said that she was shocked and humiliated and that she felt forced to have to apologise and that she cried. She repeated the allegation that Mr Bais had promised a pay rise to help her support her sister and niece. She stated that she was forced to sign the O&T Review, including the feedback quoted above. It had been changed a number of times. In her witness statement the claimant refers to 18 versions and during her cross-examination she suggested there had been 30 versions. The tribunal cannot quantify the number of versions but there had been changes. In any event, the claimant signed that form.

77. Mr Bais's recollection of the meeting is somewhat different. Although no notes were taken, he recalls that they were both quite nervous but that he was not aggressive. The claimant talked about the issues with her sister and her niece and the possibility of her sister losing her house and they then went through the O&T review. Mr Bais denies saying that she should look elsewhere for a job and he then emailed Mr Sullivan to update him after the meeting. This email appears at page 884-885 of the bundle. It records that the claimant had apologised for the issues and understood there had been poor judgment on her part. He went on to say: "*I am still left with an uncomfortable feeling with her. Not sure it feels like she is not sincere or it is due to my disappointment in her and what she did to get in this situation. Will have to digest that*."

78. What is perhaps more enlightening is that the claimant herself emailed Mr Bais shortly after the meeting and what she says in that email is not consistent with how she now portrays that meeting. The email begins in this way:

> *"I just wanted to thank you for our open candid conversation yesterday. I feel so much happier that things are in a better place between us to move forward.*
>
> *I would like to say again how sorry I am that I caused you so much upset on a personal level – that was never ever my intention. It was also never my intention to create internal challenges to impact and affect my career within ELO – I really hope with your help support and guidance, going forward I can rebuild the bridges."*

79. The claimant then went details of the reasons for her behaviour including her sister's ill health and so on. She stated:

> *"I am happy that we could find a way forward and you have my continued full commitment to you and the focus goals and objectives we have discussed and agreed for this quarter.*
>
> *I wish you and your family and lovely holiday and I look forward to seeing you on your return to catch up on the deliverables we have agreed.*
>
> *My warmest regards, Kashmir"*

80. It is simply inconceivable that, if the meeting had gone the way the claimant described in her witness statement and in her cross-examination, she would have written to Mr Bais in that way. Her summary in the email accords much more closely to Mr Bais's recollection of that meeting and that is what the tribunal finds happened. The claimant was not forced to sign any documents and Mr Bais did not tell her that he did not want to work with her. He might well have said that he had performance concerns but that he had been advised that he should work those through with her.

81. At further particulars 8 xi, the claimant alleges that Mr Bais repeated that he did not want to work with her when they were at a quarterly business review and they were walking to the restaurant. Mr Bais accepted there was some discussion about the possibility of there being an opening at Star Printers and that they discussed the pros and cons of that role. The tribunal does not accept that he told the claimant he did not want to work with her.

82. Mr Bais had continuing concerns about the claimant's performance and, by 10 October 2018, he had ranked her in the bottom tier ("BT") having previously ranked her as top tier. Mr Bias's view was that, although the claimant had achieved the 2018 plan and therefore achieved her full bonus, there were still some targets which were missing. These are summarised in his witness statement and include her not managing to achieve the Quarter 1 stocking orders for pan-European distributors and, in his opinion, not engaging proactively with funded heads or with the more junior people. He also repeated his concerns about executing Distribution 2.0. He had a particular concern about the claimant's ability to manage stock levels. In his view the claimant had advised clients to hold too much stock, an issue which had been raised by Mr Baeb in July 2018. Mr Bais's evidence was that distributors should hold seven to eight weeks of stock but that she had advised distributors to hold 13 weeks, which he says is bad advice. Mr Bais emailed the claimant on 29 August expressing concern about this and the claimant replied giving reasons and suggesting that it was caused by project orders. Mr Bais met with two of the distributors to try and resolve this issue in September 2018. Mr Bais was becoming increasingly concerned by these performance issues but did not raise them directly with the claimant.

83. On 28 October 2018 the claimant's husband, Mr Cooper, had a fall and was admitted to hospital. She called Mr Bais to explain this and was very upset. There were then a series of WhatsApp messages about Mr Cooper's condition which could have been very serious because there were concerns about brain injury or condition. There was regular contact between the claimant and Mr Bais about Mr Cooper's condition from this date and into early November. These are set out in the WhatsApp messages and in Mr Bais's and the claimant's witness statements. They do not need to be repeated here except to say that Mr Cooper had a scan and there was to be surgery to remove a meningioma which is a sort of tumour. There were concerns about what sort of tumour that would be including concern that it might potentially be terminal brain cancer. After the surgery by the end of November the claimant said that the consultant had confirmed that the tumour was benign. Mr Bais replied offering support throughout this period as well as sending a WhatsApp of his daughters singing Happy Birthday to the claimant to which a video was sent back by the claimant.

84. The claimant made regular comments thanking Mr Bais for his support ending with one to the team parts of which read:

> *"I would like to say a heartfelt thank you to you all for the care kindness and support you have shown over the past few weeks…*
>
> *Elo have been incredible, amazing and super supportive…*
>
> *I feel so privileged to work with such an amazing group of people and I wanted to share this update with you and thank you for all your incredible support!"*

85. The claimant also contacted other members of the senior leadership team about her husband's health and the progress. The claimant took leave between 29 October and 9 November and again between 20 and 30 November. At some point there was a conversation about how the leave should be treated and Ms Uygur indicated that would be a limited amount of compassionate leave and thereafter it would be paid holiday or unpaid leave. Three days were paid as compassionate leave and the rest were taken as annual leave. The claimant suggests that Mr Bais told members of her team not to get in touch with her but he denies that that was said. It is possible that he told the team that there was a serious health issue with her husband to explain why she was absent but it did not go further than that.

86. The claimant alleges that various things occurred after Mr Cooper's diagnosis including attempts to exclude her from business operations. Although it is not set out particularly clearly in the further particulars, it is mentioned in the particulars of claim at paragraph 19. In the further particulars she refers to two specific incidences which we will come to in

early January 2019. In the particulars of claim at paragraph 19 she refers to the US sales meeting in early November but the first respondent's evidence, which we accept, was that this was not an event that she would have attended in any event, having not attended in 2016 or 2017 as it was about US sales rather than EMEA sales. The particulars of claim, also at paragraph 19, makes reference to Ms Keleman taking over her analytics responsibilities in November. It is denied that this is the case and the tribunal accepts that all the evidence, particularly from Mr Baeb, is that Ms Keleman had begun employment in February 2018 and had taken those responsibilities to prepare the "*Run Rate Ranking*" from the claimant in the summer of 2018, which is well before Mr Cooper's health issues.

87. On 15 November 2018 Mr Bais informed the claimant that she was not to be invited to the NRF Show in New York in January 2019. He told her that in an email to which she replied "*Totally understand and makes complete sense*". The evidence shows that Mr Bais made the decision not to invite the claimant on 16 October before Mr Cooper's health issues arose. Some other people were also not invited including Jan Schaeffer and the tribunal is quite satisfied that this was a conference that not everyone could go to every year and the claimant had attended in previous years. Although Mr Bais said that Mr Kardos' name should be removed, in the event, he did attend. The tribunal can find nothing that connects the claimant's race or sex or Mr Cooper's health condition to that decision.

88. Sometime in December 2018 Mr Bais started work on a PowerPoint slide deck which was an EMEA sales structure review. His evidence was that this was something that he carried out annually. One of the problems that has arisen in the litigation is that the slide deck was a live document, worked on by him at different times, so that are multiple versions in the bundle of documents. There is a dispute as to which version was the final version agreed before the claimant's redundancy was suggested in April or May 2019. For the respondents, Ms McCann has called them the "Chris version" and the "Boston version" but it remains rather unclear as to which was the final version. It is clear, however, what the process was and what decisions were made. The tribunal finds that Mr Bais began the exercise anticipating exiting the claimant from the business, because of his continuing unhappiness with her in terms of trust and performance, and that he was initially thinking that her role would be "back filled". We come to how this matter progressed somewhat later in our findings.

89. The claimant has made an allegation in the further particulars at 8 xii that there was a conversation with Mr Bais about Star Printers in January 2019 but it seems that the only such conversation was one which we have already set out which occurred in 2018. The tribunal finds that Mr Bais did not encourage the claimant to apply to Star Printers for work in January 2019.

90. Also in the further particulars, the claimant has alleged at 8 xv that Mr Bais notified "the group" in February 2019 that he had booked a Quarterly Business Review with Yarltech to prevent the claimant from attending.

This is denied by Mr Bais. Mr Kardos, who gave evidence at the tribunal, says he did not hear Mr Bais saying that. We heard considerable evidence about arrangements for this Jarltech QBR and the DSE show which we really do not need to go into. The claimant did attend the jarltech QBR, whether or not it clashed with the DSE, that was nothing to do with Mr Bais. The tribunal do not accept that comment was made.

91. What also happened in February 2019 was that Mr Sullivan may have mentioned to the claimant that she seemed quiet. In response, the claimant said that she needed Mr Sullivan's advice and guidance about some things and that she wanted to talk to him. She spoke to him on 11 February 2019 but Mr Sullivan is not able to say precisely what she said. His recollection is that she made complaints about the fact that she felt Mr Bais did not like her, that he was being hard on her and so on. Mr Sullivan said that he encouraged her to speak to Mr Bais and that they should work on the relationship. The claimant sent Mr Cooper a summary raising issues about Mr Bais and her concern that he was damaging her reputation. Mr Sullivan remembered that the claimant raised the issue about not being invited to the NRF Trade Show in New York. He then referred the tribunal to the message he received from the claimant on 27 February. She said she had seen Mr Bais and "*the vibe was very different and he was engaging and friendly*". She thanked Mr Sullivan and concluded: "*For now I would say things are in a better place".* Mr Sullivan replied to this at that he "*had her back*". Mr Sullivan's evidence was that he thought of his role as a mediator and that he had wanted them to speak to each other. He denied that the claimant had ever suggested there was anything discriminatory about Mr Bais's treatment, whether as a result of sex, race or her husband's ill health.

92. The claimant's version of how she came to speak to Mr Sullivan was that she had first spoken to Ms Uygur at a trade show earlier in February and that Ms Uygur "*advised her to escalate her grievances to Mr Sullivan*". The claimant's evidence was that she had told Ms Uygur about Mr Cooper and his health issues and said: *"I shared with her that I couldn't take the continued harassment victimisation discrimination and bullying I was experiencing from Mr Bais"* and that she had told her about his *"continuous demands telling her to leave the respondent and find a job elsewhere".* The claimant refers to what Ms Williamson recorded as Ms Uygur saying later in an interview with her that the claimant had said that Mr Bais *"was bullying her and wanted to fire her".*

93. Although the word "*bullying"* was recorded by Ms Williamson, and it could indicate discriminatory treatment, it can also indicate other forms of more generalised allegations of bullying. The tribunal do not accept that the claimant raised issues of less favourable treatment or harassment related to her sex, race or her husband's ill health with either Ms Uygur or Mr Sullivan at this time. There was really no explanation for Ms Uygur to take no steps given the first respondent's clear policies on this. It is noted that this is the very first time in her witness statement that the claimant alleges she spoke to Ms Uygur about this. The tribunal finds as a fact the claimant

did not raise these issues as potential discriminatory issues when she now says she did. If she had, there is no explanation as to why she would not rely upon those conversations as a protected act for the victimisation claim.

94. In early March there was Channel event with one of the distributors in Israel and the claimant attended with her husband. Mr Kardos was also in attendance and said that he spoke to the claimant's husband who seemed relatively well.

95. On 14 March 2019 the claimant sent an email to Mr Bais about Mr Cooper's health. This is obviously some months since Mr Cooper's initial collapse and surgery. The claimant said:

> *"The reason I'm sharing/mentioning this is because on the inside there is still some way to go with the healing process. The baseline MRI scan shows swelling which is normal post-surgery. Tim needs help and support with his cognitive function and we have asked for a referral for neuro-psychology."*

This was after a meeting with the consultant and the claimant also shared a number of videos with a celebrity talking about his recovery post-surgery. The surgery had been to the frontal lobe.

96. On 4 April 2019 there was a quarterly business review meeting at Bluestar. The claimant attended that in Amsterdam, along with Mr Baeb and Mr Bais. Mr Baeb and Mr Bais's evidence on this meeting was that they were suddenly confronted with a serious issue that they had not expected. It is the respondents' case that the claimant should have understood that there was an issue with stock at Bluestar that they wanted to talk about urgently. Mr Baeb, in his witness statement, sets out the detail on this but, in essence, it was that Bluestar was holding much more stock than its target. Mr Bais's evidence was that Bluestar should be holding stock of 6-8 weeks and it was older than 8 months. This meant they were holding a considerable amount of excess stock which is what they wanted to discuss. Mr Baeb and Mr Bais were caught off guard but had to discuss this. Mr Bais's evidence was that Bluestar had discussed it with the claimant but she had not prewarned them. They therefore felt "ambushed" at the meeting. Mr Bais took notes of the meeting and they sought to find a way to resolve it. The claimant's evidence on this, as we understand it, is that it was not her responsibility but related to project business rather than run-rate. This is denied by the respondents who say it was in her role as Channel Director; that she should have checked that the stock levels were appropriate and dealt with it and, at the very least, have warned Mr Baeb and Mr Bais that there were those issues.

97. On 8 April 2019 Mr Bais sent an email with the revised version of the PowerPoint slide deck to Mr Sullivan (page 1179). This was before a meeting which had been arranged for two days later in Boston with Mr

Witsoe. He said that he wanted to raise a number of issues, including Distribution 2.0 and at item 4, he said this:

> *"Kashmir; although she showed promise on the last Trade Show, it is becoming clear that her hearth (sic) and mind are no longer in ELO. We had a significant issue with Bluestar last week, regarding stock in the channel. This was flagged to her on numerous occasions and during the QBR we (Erik and I) were confronted with serious issues. We will fix this, but this should never have ended up in an issue. Together with other concerns I feel we should replace her."*

98. The bundle of documents before the tribunal contained a number of the PowerPoint slides, including an organisation chart. This is headed EMEA 2020 and showed "*Kashmir Cooper, Sales Director Channel*". Another similar slide shows in the same place "*New headcount, Sales Director Channel"(1346)*

99. On 11 April 2019 there was a meeting in Boston at which Mr Bais presented his PowerPoint slide presentation to Mr Witsoe and Mr Sullivan. There is a dispute about which was the final version but the tribunal believes that it is most likely to be the version that we see between 1324 and 1365.

100. One slide which directly concerned the claimant is headed "*Channel Director*" and reads as follows:

> *"We keep struggling on performance with Kashmir.*
>
> *In 2018 we had Kashmir run Inside Sales too she failed*
>
> *Q2 2018/Q3 2018 we had several issues regarding performance and focus*
>
> *During Trade Shows in Q2 2019 she showed some progress, but only when I was around*
>
> *Last week we had a massive issue with Bluestar*
>
> *Challenges are on focus, communication and commitment*
>
> ***Request** Move her out of the company. Via restructure cost impact is manageable, only downside is we cannot backfill for six months (but we can handle this)."*

101. Several slides go into a number of other matters affecting EMEA for which Mr Bais had responsibility and which did not directly affect the claimant.

102. The tribunal heard evidence from those attending the Boston meeting from which there were neither notes nor a clear written outcome. That is somewhat regrettable in the circumstances as it led to the claimant's

termination (and indeed to that of another employee, Jan Schaeffer) but the tribunal accepts that it is common practice in this business not to keep notes of such discussions.

103. Neither Mr Sullivan nor Mr Witsoe were completely clear which of the PowerPoint slide decks out of those in the bundle they saw in Boston. It is accepted that Mr Bais went into that meeting thinking that the position of Channel Director would remain but that he wished to exit the claimant and replace her. His evidence was that, as the three individuals began to discuss that idea, it emerged that the Channel Director role might be one that the business could manage without and that the people who reported to the claimant could report directly to Mr Bais. There was no Channel Director in the US. There was discussion about how removing that role would impact on the business. Mr Witsoe and Mr Sullivan agreed to the proposal to remove that role. There was some difference between them as to whether Mr Bais was given the "green light" to proceed with the redundancy. The tribunal accepts that it was suggested that he could proceed but that he needed to check with HR and legal about the position with respect to the removal of that role. Mr Bais's evidence was that he considered what other structural changes would need to be made and he outlined the various movements for a number of individuals at the sales level. Some were to have their roles expanded.

104. Mr Schaeffer was to be removed for performance. Various authorities needed to be granted in relation to the proposal to remove that role including approval for any payments that needed to be made.

105. These included consideration of pay rises for three of the individuals affected by the restructure. Mr Bais's primary communication was with Ms Uygur but it is understood that she and Mr Bais also got UK based legal advice and there was some relatively limited communication with Mr Gilhooly as internal counsel based in the US. He had been told by Mr Bais that there was an intention to review the structure of the team and he heard in May that Mr Bais wished to terminate Mr Schaeffer. Mr Gilhooly understood that part of Mr Bais's strategy was to change the Regional Sales Managers' focus so that they focussed on higher value deals and there would be a change in the reporting lines and some responsibilities. Mr Gilhooly was also aware that the strategy included removing the Channel Director role so that people would report direct to Mr Bais which was in line with the arrangement in the US. There was to be a promotion of Arianne Cediel and Yurlia Byesyedina.

106. The claimant was on annual leave between 17 and 26 April 2019. On 7 May 2019 the claimant and Mr Bais were in London for a meeting. Mr Bais's evidence was that it was not until he was about to leave London for the airport that he spoke to Ms Uygur about the process for discussing potential redundancy with the claimant. His evidence was that he was told that he should speak to the claimant as he was due to see her in person in Munich the next day to give her a "*heads up*" that there was to be a formal consultation process about her possible redundancy.

107. Unfortunately, he did not manage to speak to the claimant during that day until they were in a car while he was driving the hire car back to the airport on 8 May 2019. He was driving whilst Mr Baeb was in the front seat and the claimant was in the back seat. There is some dispute about what exactly was said in the car but Mr Bais and Mr Baeb recollect that Mr Bais told the claimant there was to be a restructure and that he did not see a role for her within that new structure. Mr Bais told the claimant that there were to be further meetings and may have said something to the effect that she could think about it the next day. He may even have said that she did not need to attend work the next day. He did not tell the claimant not to return to work at all.

108. In the claimant's witness statement, she said that Mr Bais explained his future vision included her dismissal and that it was expressed in those terms. She maintained that under cross-examination. However, that is not consistent with the account she gave in her email the next day. Mr Baeb and Mr Bais are quite clear that Mr Bais did not say that she was dismissed. The claimant sent the email to Mr Witsoe, the CEO, to the newly appointed Head of Global HR, Ms Williamson, and to the Legal Counsel, Mr Gilhooly copying it to a number of others including Mr Bais, Mr Baeb and Mr Sullivan. It begins in this way:

> *"During the return car journey back to the airport yesterday, Maarten shared his vision for the ELO FY2020 strategy. He shared the changes to the RSM's moving into "Whalehunters" and his vision for the future of the Channel organisation.*
>
> *He acknowledged the hard work value and contribution I have made to bring the EMEA Channel to the place it is but then went on to share that he did not see a role for me in his future organisation.*
>
> *Maarten shared that he had discussed and agreed the decision to remove me from his organisation during his recent meeting with you, Craig and Chris in Boston. Maarten then went on to share that you had looked into alternative roles before me within ELO and couldn't see a fit or a future for me within ELO.*
>
> *This conversation was conducted whilst Maarten was driving and I was sat in the back of the car.*
>
> *I was dropped off at the airport terminal and told not to work on Thursday 9 May think about what Maarten had shared with me and to wait for Maarten to schedule a call on Friday 10 May to discuss my thoughts."*

109. The claimant enclosed a chronology with that email which does not disclose any allegations of discriminatory treatment. She went on to say that she felt she had no option but to write formally and says: *"I understand and respect that sometimes changes are required, but there is a formal*

process that needs to be followed. For ease and reference I am sharing a link to the UK Government website." She asked for clear guidelines and a rationale for the decision and reminded the people she was writing to of the value and contribution she had brought to the organisation and said: "*Please can you confirm the next steps and the commercials of the proposed "exit" strategy that Maarten communicated to me yesterday. Please can I confirm whether I am now on garden leave*." She made a request for GDPR documents which was a subject access request (SAR). The tribunal understands that the first respondent referred these requests to a specialist external provider.

110. The contents of this email are not consistent with what the claimant has said in her witness statement. There she said that Mr Bais had said that he had agreed a decision to dismiss her and that she was directed not to return to work until further notice. She said that it was intimidating, demeaning and overwhelming that there were two white men in the car and she was in the back. She went on to say that she had been dropped off at a secluded part of the terminal. Mr Bais and Mr Baeb said that she was dropped off at the usual place which was one side of an airport hotel. The tribunal does not accept it was secluded. The claimant said she was upset and that there was an intention to violate her dignity and create an offensive and intimidating environment.

111. The tribunal find that what was said at this point was not a notification of the claimant's dismissal. The tribunal understands that sometimes that is what might be heard and it is submitted, on the claimant's behalf, that there is really no difference between a dismissal and removing somebody's role from the organisation. Whilst that is often the end result, it is also true that removing a role or post does not necessarily lead to the termination of the individual in that post. The claimant's email which she sent the next day does not suggest that she believed she had actually been dismissed. She asked about the process moving forward and for some further particulars and seems to understand the processes involved. What was said was not a dismissal. Nor could the conversation be said to relate to any of the protected characteristics the claimant relies upon. There is no evidence whatsoever that that conversation related to the claimant's race, sex or her husband's disability.

112. It is not entirely clear to the tribunal whether the claimant joined the monthly inventory review meeting on 9 May but it does accept that it was usually Mr Baeb's role to present that in any event. Mr Bais responded to the claimant's email above on the same day and apologised to her for speaking to her in the car about the proposals. He said in that email: "*This situation has arisen because we perceive your position as potentially redundant and that is no reflection on you personally or on your performance.*" Because the claimant had asked for "*commercials*" he said he would look into this.

113. The claimant appeared to understand that and said in her reply to that, also on 9 May: "*Thank you for confirming we are in this situation because*

you perceive my position to be potentially redundant." She asked for a number of documents and Ms Uygur replied saying that there were none that were relevant. When the claimant asked for an agenda for the call which was to take place on 10 May, an agenda was sent by Mr Bais and reads:

"1 Rationale for the proposed redundancy,
2 Any viable alternatives to avoid proposed redundancy,
3 Any suitable alternative employment within ELO's business,
4 The composition of the redundancy package (if KC's role is redundant)".

114. This was for the meeting which was to be held on 10 May but was later rescheduled to 13 May. The first consultation meeting took place on 13 May by phone with the claimant attending and Ms Uygur and Mr Bais.

115. There is a note of this meeting (page 1441) where, in particular, the business rationale was explained. It reads as follows:

> *"For FY20, there will be changes: ISR will handle projects up to 20K Euro, the role of Channel Sales Manager will expand to be distributor and reseller focussed and the RSM will move to a much more hunter role. Maarten stressed the fact that this year there is a need for much bigger projects. In order to have this happen, we just need to make some tweaks and look for the best set up. One leverage is how the staff is structured. The proposal is that there will be no change to Channel Sales Manager and Inside Sales role but align the role of RSM into more of a hunter profile. Some of the staff will be relabelled into Channel Sales Manager. By doing that the organisation is realigned and more in sync with the US sales structure as well. Alex will focus on the RSM Team and the Channel Team will be reporting directly to Maarten. This entails that there is no room for a Channel Director and that the role is becoming obsolete."*

116. The claimant was then asked if she had any questions and she did not. There was then discussion of other viable options and Mr Bais expressed the view that there were none with respect to the claimant at her level. He said that this was the first step in the consultation process and the claimant said that she would have liked that in an email before the call. The claimant was told that she could have time to reflect and for matters to be discussed again at the next meeting which was due to be held on 15 May.

117. Before that meeting took place the claimant asked for some clarification and for the meeting to be moved to 16 May which Mr Bais agreed to. She had asked about the redundancy policy and in his email at 14:54 he said that ELO did not have a redundancy policy and they were looking to comply with the ACAS Guidance which he provided a link to. He also repeated the information about the restructure in a paragraph of that email.

118. The claimant's second consultation meeting did therefore take place on 16 May. Again, it was held by phone. The claimant asked for a copy of the

business case but she was told there was nothing in writing save for what Mr Bais had already told her. The meeting notes at page 1457 show that Mr Bais detailed the business rationale again and then the discussion focussed on alternative roles. These had been mentioned briefly in the previous meeting when Mr Bais had said they were not at her level. Mr Bais set out his rationale for why the claimant was not suitable for those roles. When the claimant was asked if she had any suggestions for avoiding redundancy the notes record that she said: "*No*". During the meeting the claimant was told that her role was to be made redundant. She was told of her right to appeal within seven days which would start the next day and formal notice was given to her by letter. The letter offered the claimant an "ex-gratia" sum on condition she signed a settlement agreement.

119. On 21 May the claimant asked for a further seven days to appeal. Ms Uygur dealt with that and said that there could be an extension to 28 May. Ms Uygur added that, the claimant having said that her husband had been hospitalised, she should revert to Ms Uygur if she needed more time which the claimant did not.

120. The claimant's appeal came in the form of a letter from a firm of solicitors. It is extensive and detailed. It starts at page 1505 of the bundle of documents. It led to an exchange of correspondence between lawyers and the first respondent who was also taking legal advice. It is difficult to summarise this correspondence and it involves considerable legal jostling. The letter of appeal does raise allegations of discrimination but those allegations are limited to the dismissal itself. For reasons which are not entirely clear to the tribunal, the claimant's legal advisers did not agree to the suggestion that there should be two processes, an appeal with respect to redundancy and a separate grievance process with respect to the complaints of sex, race and associative disability discrimination which she had raised. The first respondent also suggested extending her employment until the appeal hearing but this was objected to and her employment therefore ended on 31 May 2019.

121. The respondent appointed their new HR Director, Ms Williamson, to carry out an investigation into the grievance matters and informed the claimant that Mr Gilhooly would conduct the appeal hearing. This was partly because the claimant had objected to Mr Sullivan being the appeal manager because of his previous involvement. The claimant raised no issues about Mr Gilhooly's appointment although it does seem she was somewhat confused throughout the proceedings as she later raised complaints that he played an active role in the proceedings even though she was aware he was to chair the hearing. The claimant's solicitors refused for the claimant to be interviewed with respect to the alleged discrimination she had raised stating that all the necessary allegations were contained within their letter of 24 May. That letter did not, of course, include a lot of the matters which then appeared in the further particulars and later in the witness statement.

122. Ms Williamson carried out a fairly limited investigation into the allegations of discrimination. She spoke to Ms Uygur, Mr Baeb, Mr Bais and Mr Sullivan and the short notes of those meetings appear in the bundle between 1595 and 1604. As indicated, the claimant had decided not to meet with Ms Williamson, nor did she supply any further information about the allegations. The notes show that allegations of sex, race or disability discrimination were not raised by the claimant with the possible exception of the "bullying" being mentioned in the notes of the interview with Ms Uygur, which the tribunal finds does not refer to any allegation related to race or sex.

123. The appeal/grievance meeting was arranged for 19 June 2019. Around 10 June 2019 the claimant's solicitor objected to this "delay" suggesting the meeting could be earlier. The arrangements had involved checking the diaries of four senior people flying in from the United States and the Netherlands and this was explained to the claimant's solicitors. By the time her solicitor suggested a conference call hearing, the arrangements had been made and the flights and hotels booked. It was also felt it would be better to have the hearing in person. The tribunal finds that that is not a delay of any consequence given the seriousness of the meeting and the reasonable desire to have an in-person hearing.

124. The tribunal has seen notes of the appeal hearing. It was a slightly unusual meeting in that the claimant rather took control of it stating that: "*This is the agenda. There is an order of conversation*". This comes after Mr Gilhooly's introductions where he says they were there to "*address your concerns, hear your side to some extent this is your meeting*". He made reference to the lawyers' letters and that Mr Sullivan would be joining them. Mr Baeb was also present but he was asked to leave by the claimant. It was indicated that someone was there to take notes. The claimant said she had questions for both Mr Bais and Mr Sullivan.

125. An earlier letter from the respondent had suggested that the meeting would be between 11.00 and 3.00 and early in the meeting Mr Gilhooly asked the claimant: "*What is your timing*?" to which the claimant replied: "*However long we need*". There was no suggestion, at that time, that she needed to leave before 3pm. The claimant continued to say that this was her appeal hearing which was agreed by Mr Gilhooly who also said that Ms Williamson was conducting an investigation.

126. Ms Williamson repeated that she wanted to hear from the claimant because she had started the investigation but not spoken to her. The claimant said that she was challenging the decision to make her redundant. She said: "*First and foremost I want the chance to raise my questions re my redundancy dismissal*." The claimant asked Ms Williamson and Mr Gilhooly about the process, particularly in relation to the deadline for her to appeal and the alleged delay in holding the appeal meeting. The claimant, for the most part, complained about the process. She also pointed out that her lawyers had requested documents and there

were no board meeting minutes. She was told that there were no such minutes.

127. The PowerPoint slide deck had been sent to the claimant's solicitors showing a date of 27 May 2019. This was almost certainly because that was the date when Ms Uygur combined it with another document and sent it to her solicitors along with job descriptions for the Inside Sales and RSM roles. A number of questions were raised about those roles. The claimant also said:- "*At risk letter was only received on Monday 13 May but on 16 May I was told I was redundant. It was a two-day process*." She said that the process was predetermined. The tribunal notes that it is clear from that comment that she did not believe she was dismissed on 8 May. That is something which she has said later in these proceedings.

128. Because Mr Sullivan's plane was delayed, he did not attend until 1:40 and then he was asked a number of questions about his involvement, his knowledge of the ISE Conference, etc. He was asked when he first saw the slide deck presentation but could not remember and there was some discussion about the date of its presentation and questions asked about the GDPR issue which Mr Sullivan was not able to answer. Questions were asked about the Channel Director position (or lack of it in the US and who reports to who) and he was asked whether they had considered replacing Mr Bais with the claimant. The claimant concluded that she thought there was no real justification for her dismissal. She asked Mr Bais some questions after that in relation to whether he had been put at risk of redundancy, about the slide presentation and the Boston meeting. She also asked questions about Ms Keleman's role. Mr Bais gave an explanation about starting the slide deck and it being an ongoing process. The claimant commented that she had been hounded out of the business but Mr Bais disagreed with that.

129. After a short break, they reconvened at 2:50. The claimant was invited to share allegations for Ms Williamson to investigate. The claimant then responded: "*I have a hard stop at three, can you provide this detail by email?"* Ms Williamson said that she wanted to hear what the claimant had to say and she wanted to do it face to face but the claimant responded that her lawyers had advised her otherwise. Mr Cooper said: "*We could use skype*" the claimant then said "*Via lawyers please, please respect that*". The first respondent thought that that meant that she would not give any more information except through lawyers. Mr Gilhooly asked the claimant is she wanted to have a "without prejudice" discussion, stating that he wanted matters resolved "amicably". The claimant made no response. Mr Gilhooly's evidence, which the tribunal entirely accepts, is that it is common practice to offer enhanced terms on redundancy.

130. A detailed appeal outcome letter was sent on 15 July. There was an apology made for the delay in the outcome but this was said to be because further matters had to be covered including Mr Gilhooly talking to some other individuals. He spoke to Mr Bais, Ms Uygur and Mr Sullivan but took only short notes (or none in the case of Mr Bais)

131. The appeal outcome letter is very detailed and thorough. It first set out what happened at the appeal meeting as Mr Gilhooly saw it. He said that he had reviewed all the information and gave his decision. He provided reasons under the eight headings of her grounds of appeal, rejecting them, as follows:

    1 Whether there was a long-standing vindictive campaign against Kashmir;
    2 Kashmir's redundancy was targeted with no justification;
    3 Suitability of alternative roles
    4 The Company has little (if any diversity) and the senior management is composed solely of white males
    5 Kashmir's redundancy was targeted because of husband's ill health
    6 No documentation or evidence has been provided of the review of the business which resulted in Kashmir's redundancy
    7 Kashmir's redundancy was predetermined and "targeted" due to the timing of the consultation
    8 Kashmir's redundancy was the only one planned and no other cost saving measures were implemented.

132. The summary of Mr Gilhooly's decision appears on page 2264 which it is worth quoting here:-

> *"For the reasons set out above I have not upheld your appeal. I am mindful that this was a difficult process for you and I acknowledge that there are aspects of the redundancy consultation process that could have been handled better (such as the first meeting with Maarten taking place at a fixed location). However, I do not consider there would have been any change to the outcome, (ie your redundancy dismissal) had the company handled your process in a different manner.*
>
> *My decision is final and this process is therefore now concluded. There will be no further steps taken in relation to your Appeal and as confirmed above your grievance is being treated as forming part of your Appeal (at your request) and it is therefore concluded as part of this process given you are refusing to allow me to address your grievance at the appeal as you had originally requested.*
>
> *May I take this opportunity to thank you for your service to the company and to wish you all the best for the future."*

Law and submissions

133. Although, as has been indicated, the evidence and detail on this case has been substantial, the legal tests to be applied are not particularly contentious. Both representatives sent detailed and lengthy written submissions and added to them orally. These included reference to cases which might assist the tribunal but we do not refer to all them here. The principles from leading cases are mentioned below. The submissions were

of great assistance to the tribunal but we do not set out all their arguments here because the facts and the legal tests are so clear. We summarise those legal tests now.

134. One claim is for unfair dismissal under s94 and 98 ERA. To put it succinctly, the first respondent bears the initial burden of proving the reason for dismissal. Its case is that it was as for the potentially fair reason of redundancy or, in the alternative, a dismissal for some other substantial reason.

135. Most of the evidence points towards it being a dismissal for redundancy and we therefore look to the definition for redundancy set out at s.139(i)(b) of the Employment Rights Act 1996 (ERA). The question is whether the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or were expected to cease or diminish. If that is shown, was that the reason for the claimant's dismissal (see Safeway Stores plc v Burrell [1997] ICR 523)

136. If the first respondent satisfies the tribunal that there is such a fair reason as set out in s.98(1) and (2), we therefore move to the question of whether the respondent acted reasonably under s.98(4) which states;-

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the 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"

137. Leading cases on redundancy dismissals are Williams & ors v Compair Maxam Ltd [1982] IRLR 83 and Polkey v AE Dayton Services Ltd [1987] IRLR 503 (Polkey).

138. We must look for what warning and consultation there was and consider whether the consultation is genuine. Those principles were set out in Williams v Compair Maxam but some are not as relevant here where there is a single redundancy and no trade union involvement. The claimant asked us to consider cases on the employer's responsibility to consider pooling employees (Taymech Ltd v Ryan UKEAT/663/94) and Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255 on "bumping". These remind the tribunal that much will depend on the facts and circumstances of the case.

139. The respondents asked the tribunal to consider the unreported case of Rogers v Slimma plc UK EAT/0168/06 which suggested that 7 days is likely to amount to the "bare minimum" consultation periods. In this case questions also arise about whether there should be a pool from which

redundant employees might be selected. The claimant suggests other people might have been considered for redundancy (instead of her post) which is sometimes described as "bumping". The respondents suggest the case of Samels v University of Creative Arts [2012] EWCA Civ 1152) assists with this argument as it states there is no obligation on an employer to consider this.

140. We also need to consider the process used for dismissal, whether the meetings appear fair on the basis of information given to the affected employee; whether she had opportunity to ask questions and propose alternatives and whether all other elements of good industrial relations practice are followed, bearing in mind the ACAS Guidance. Although the ACAS Guidance was referred to by the first respondent and the claimant understood that this was what must be followed, we have not been taken to any part of it during the hearing of this case or directed to any particular part in submissions. We have therefore taken the view that it is not for us to look at it now but consider whether, in accordance with good industrial relations, the redundancy appears fair in all the circumstances as required by s98(4) ERA. We assess the evidence and make our findings on a balance of probabilities.

141. The case of Polkey may be relevant where there are defects in the procedure used which render the dismissal unfair but, if the tribunal finds a fair dismissal would have occurred in any event, compensation would be assessed accordingly.

142. There are also claims under Equality Act 2010 (EQA). These are for Direct Discrimination under s.13; Harassment under s.26 and Victimisation under s.27. The relevant parts of those sections are set out here:-

13 Direct discrimination

(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) -

26 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) -

(3) -

(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.

27 Victimisation

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

(a) B does a protected act, or

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

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

(a)bringing proceedings under this Act;

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

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

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

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

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

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

143. Other relevant sections are those that provide for time limits and the burden of proof:-

123 Time limits

(1)Proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2) -

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

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) -

(5) -

(6)A reference to the court includes a reference to—

(a)an employment tribunal;

144. The tribunal must make findings of fact and apply the legal tests to those facts. The tests for direct discrimination were discussed in Igen v Wong [2005] ICR 931 and it is clear that all evidence before the tribunal can be taken into account, not just that put forward by the claimant. The tribunal is mindful that it is unusual for there to be clear, overt evidence of direct discrimination and that it should consider matters in accordance with section 136 EQA. When making findings of fact, we may determine whether those show less favourable treatment and a difference in one or more of the protected characteristics. The claimant relies on a hypothetical comparator. The test is: are we satisfied, on the balance of probabilities that these respondents treated this claimant less favourably than they

treated or would have treated a male, white employee or one without a relative with a disability. We are guided by the decision of Madarassy v Nomura International plc [2007] IRLR 246 reminding us that unfair treatment and a difference in a protected characteristic, does not, on its own, necessarily show discriminatory treatment.

145. If we are satisfied that the primary facts show a difference in sex or race, (or are connected to Mr Cooper's disability), we proceed to the second stage. At this stage, we look to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of the claimant's sex, race, and/or Mr Cooper's disability. The tribunal may need to consider each protected characteristic separately.

146. For the claim of harassment, the claimant does not need to identify a comparator but does need to show that the conduct complained of related to one or more of the protected characteristics. She also needs to show that the claimed effect (or purpose) of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment is one which meets the test in s26 (4) EQA. That is; in taking into account her perception and other circumstances, is it reasonable for the conduct to have that effect?

147. The claimant also brings a claim for victimisation under section 27 EQA. The burden of proof provisions apply here too. In this case, the respondents have accepted that the claimant's appeal letter contains allegations of breaches of EQA but submit that they were false allegations made in bad faith under s27 (3) EQA and was not therefore a protected act. The issues for the tribunal are first, whether there were one or two protected acts and, if there were, whether the claimant was subjected to a detriment because of those protected acts.

148. The tribunal may draw inferences to assist them when assessing the evidence. The claimant's representative reminded us of the case of Qureshi v Victoria University Manchester [2001] ICR 863 where guidance was given on the drawing of inferences. We are reminded in that case that it is a matter of applying common sense and judgment to the facts and assessing probabilities to decide whether the protected characteristic was an effective cause of the acts complained of or not.

Conclusions

149. We provide our conclusions in line with the agreed list of issues which cover all matters. Some of them will be obvious from our findings of fact but some might need further elaboration.

150. The first issue is whether the claimant's husband was a disabled person at the material time. That matter is conceded by the respondent and the

tribunal agree that Mr Cooper met that definition. The next issue at 1ii is whether the respondent knew that Mr Cooper was a disabled person at the material time. There is a dispute about this. The claimant says that she provided sufficient information to the respondents on an ongoing basis about the seriousness of Mr Cooper's condition and its potential long-lasting effects. The tribunal has read all that correspondence and has concluded that the first respondent did have knowledge of the disability at the material time. In particular, we consider that the message from the claimant to Mr Bais on 14 March 2019 quoted above at paragraph 95 indicates some relatively serious ongoing issues. Although the first respondent submits that that is insufficient to mean that it had knowledge of Mr Cooper having a disability, the tribunal finds that it was sufficient knowledge particularly with respect to what was to Mr Bais at that time. It is clear that there were ongoing issues and that they were likely to continue.

151. In accordance with the list of issues we therefore turn to the first allegation which is one that there was harassment of the claimant contrary to s.26 arising from the conversation in the car on 8 May 2019. The first issue is under 2 i – "*Is her account of the conversation well founded?*" The claimant's account has shifted over time. The tribunal has found that her account of the conversation contained in her witness statement and her cross-examination is not well founded. It does of course contain some accurate recollection but it also has some fairly significant inaccuracies. As set out in our findings of fact, we have found that the claimant was not told that she was dismissed in that conversation, nor did she understand it to be so and her recollection in her email of 9 May is much more accurate. Whilst the conversation is one which would upset anybody because it is a warning of a potential redundancy, it has nothing to do with the claimant's race, sex or her husband's disability.

152. Turning then to 2 ii – "*did the incident constitute unwanted conduct*?" The tribunal finds that it did constitute unwanted conduct. It would be rare for an employee to find news of a potential redundancy to be welcome (although it may be on some occasions that employees do wish to be made redundant). We accept that, in this case, the claimant did not wish to hear this news.

153. The next question under 2 iii – "*whether the incident had the purpose or effect of violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment having regard to s.26?"* This must also include the objective test about her perception set out in s26 (4). The tribunal does not accept that there was any such purpose. The question therefore is whether it had the effect of violating her dignity or creating an intimidating etc environment. On balance, the tribunal does believe that a combination of the situation in which the claimant was given this news and it being sudden and without any warning means that it did amount to the effect of being intimidating and humiliating. Her own email quoted above at paragraph 108 does not suggest such an effect.

154. Under 2 iv the question is whether the incident "*related to sex or race or Mr Cooper's disability"*. The answer to that is plainly, No. There is absolutely nothing to suggest, either directly or indirectly, the incident had anything to do with those protected characteristics. The claimant certainly never raised it as such at the time. Plainly she appears to have been upset about the fact that she was told this in the car, but that upset seems to have increased over time rather than being obvious at the time as witnessed by her email of 9 May. That claim must fail as it had no connection to those protected characteristics.

155. The next question is whether there was direct discrimination. Under issue 3, it is accepted that the claimant was dismissed. The question which arises under issue 4 is whether the second respondent's decision was an act of less favourable treatment because of her race and/or sex and/or because of Mr Cooper's disability. The claimant relies on a hypothetical comparator. Here we have to consider whether the claimant has shifted the burden of proof to the respondents to explain the decision to dismiss her. For that she needs to show a difference in her treatment and a difference in race or sex or someone without a relative with Mr Cooper's disability.

156. As indicated above, the case of Madarassy reminds us that the tribunal needs to have more than just a difference in race, sex or disability and a difference in treatment. The question is therefore what facts there are which would indicate the claimant was treated any differently from a white man or someone who did not have a relative with Mr Cooper's disability. There is no such evidence. The claimant purports to rely on a number of background matters as referred to in her particulars of claim, her further particulars and her witness statement. From those matters, she says we can infer discriminatory motive. As is clear from our findings of fact, the claimant has not been able to prove that the vast majority of those matters alleged did in fact happen. Her perception about the lack of diversity is not accepted nor is her interpretation of some of the matters which have been shown to have occurred.

157. There are no facts which would lead us to infer discriminatory conduct and the claimant is not able to shift the burden of proof to the respondents to provide non-discriminatory reasons. It is quite clear to the tribunal that Mr Bais had already begun to be less impressed with the claimant's performance well before Mr Cooper's ill health. In particular, she had been placed on the bottom tier in early October and there had been consideration of a dismissal in 2018 which had not proceeded. Even if there was sufficient evidence for the burden of proof to shift to the respondents, they have provided sufficient non-discriminatory reasons for the decision they took to dismiss the claimant which we will come to under the unfair dismissal heading. The tribunal finds that the claimant's sex and race and Mr Cooper's disability had no impact on the respondents' decision making.

158. We now move to the final matter under EQA claims set out between issues 5 and 7. The first question is whether at 5 i the claimant's email of 9 May 2019 contained an allegation of a contravention of EQA. The tribunal concludes that there is no such allegation contained in that email at all. Most of it is quoted above and there is nothing to suggest either in that or indeed the accompanying chronology that relates to race, sex or Mr Cooper's disability. Generalised concerns and complaints are not matters which fall under the Equality Act without more. That was not a protected act.

159. Under issue 5 ii the question is whether the claimant's solicitor's letter of appeal of 24 May 2019 makes an allegation of contravention of EQA. The respondents have conceded that such an allegation is made with respect to sex, race and disability discrimination. The respondents argue that the claimant made a false allegation of discrimination in bad faith and therefore it does not amount to a protected act. The tribunal has considered this with some care. Our findings of fact make it clear that we have found a number of the matters raised by the claimant in the further particulars to be inaccurate or untrue. Indeed, many of them were further embellished in her witness statement. However, that is not the question here. Here we must concentrate on what the solicitors said on her behalf between pages 1505 and 1509 of the bundle. Some of the matters there could potentially be said to be *"false allegations*" because they are not entirely accurate. However, the tribunal bears in mind that this is a solicitor's letter and that it is perhaps written in contemplation of litigation and therefore might well put the claimant's perceived strongest points forward. In large part the allegations of discrimination raised in that letter pertain to the dismissal and the alleged matters are very close in time to that dismissal. The tribunal cannot go so far as to say that that amounts to a false allegation of discrimination. The tribunal does not find that it was made in bad faith at that point (although that cannot be said of what is raised later). It therefore is a protected act under s.27 EQA and the tribunal needs to consider items raised under issue 6 to see whether the claimant was subjected to the alleged detrimental treatment.

160. The first issue under 6 i is whether from 8 May to 19 June 2019 Mr Bais and/or Mr Gilhooly "pushed" the claimant towards without prejudice discussions of a settlement agreement. This is a very surprising suggestion. First, there can be no detriment before the protected act on 24 May 2019 and there is nothing to suggest that the respondents believed the claimant would raise any allegations of discrimination before that date as she had never mentioned them at any point before. The question is whether there was any "*push*" to the claimant between 24 May 2019 and the outcome of her appeal. The tribunal bears in mind it was the claimant herself who raised the question of "*commercials*". The tribunal cannot and does not believe that the claimant was not well aware that it was very common, particularly for senior people at this level, to discuss settlement when their employment is coming to an end. There is absolutely no "pushing" of the claimant. A simple offer of without prejudice discussions

cannot amount to a detriment. It is not detrimental treatment and it is mis-naming the process that was followed.

161. Turning then to issue 6 ii, whether various people decided to continue with her dismissal and reject her appeal. This of course did take place and the tribunal accept that it is detrimental treatment.

162. Turning then to issue 6 iii, whether they failed to adequate investigate her grievance and avoid upholding the complaints of discrimination. The tribunal does not accept that there was a failure to adequately investigate the claimant's grievances. Although the tribunal can see that there are some gaps in the grievance investigation, this is almost entirely because the claimant failed to engage with that process. The tribunal has not had an adequate explanation why the claimant did not mention the matters to the investigator she later put in her further particulars and expanded upon in her witness statement. If those things had occurred, there is really no explanation why the claimant would not tell Ms Williamson, herself a black woman, about the race and sex discrimination allegations which she now seeks to bring to the tribunal. Ms Williamson did the best she could with the limited information that she had and that was the reason for it. As for the claim that the respondents "avoided" upholding the complaints of discrimination, it is true to say that they were not upheld. That was because no evidence was found, not because of the claimant's race, sex or her husband's disability.

163. As far as issue 6 iv is concerned, the question is whether Ms Uygur, Mr Gilhooly and Ms Williamson caused delays in the appeal process. The tribunal do not find that this happened. It does not constitute a delay between getting a long and detailed appeal letter with completely new allegations on 24 May to an appeal date with people attending in person from abroad at a very senior level, to 19 June. Much of the delay was caused by the extra information contained within that letter and, in any event, it was not a detriment even if the claimant perceived it to be a delay.

164. As far as 6 v is concerned, we do not find that there was any evasive manner in relation to the claimant's data subject access request. If there were any problems with provision of data, the tribunal has no evidence that there was any "evasive manner" particularly as the first respondent used an external organisation to provide data. It appears to the tribunal that the claimant received all relevant information and documentation.

165. We therefore need to consider under issue 7 whether any of the detrimental treatment that we have found was because she had done a protected act. The only detrimental treatment that we have found is the decision to continue with her dismissal and reject her appeal and the failure to uphold her complaints of discrimination. There is no other detrimental treatment.

166. The tribunal has to consider whether that detrimental treatment is because of the solicitor's letter of 24 May 2019. The tribunal finds that is not the

case. The appeal process was carried out because the claimant appealed and the allegations of discrimination were considered because she had herself raised them. It cannot amount to detrimental treatment to investigate and provide a reasoned and reasonable outcome.

167. The claimant's claims under the Equality Act must all fail and are dismissed.

168. We therefore turn to the claim for unfair dismissal as set out in the list of issues. The first question is whether the first respondent can show a potentially fair reason for dismissal. The first respondent relies upon redundancy and/or some other substantial reason. The burden of proof rests on the first respondent. In some cases where there is a business reorganisation, the reasons might be for some other substantial reason for dismissal rather than redundancy.

169. We must therefore consider the definition of redundancy as set out above. The tribunal have concluded that the first respondent has shown sufficient evidence to satisfy that test. Its business case is one which is credible and was set out clearly in the witness statements and to the claimant in correspondence and at her meetings. The first respondent's decision to delete her post may well have started with concerns about her performance and conduct of the previous year, but that does not mean that it did not amount to a reasonable business decision when looking at how the restructure could occur. The tribunal also takes into account that other posts were affected with some people leaving and some people getting increased responsibility. There was no such post in the United States. No-one else has done that role since the claimant left. The people who are carrying out the functions who reported to the claimant are reporting to Mr Bais and have done since her dismissal almost two years ago. The first respondent has shown that its requirements for someone carrying out the work of the claimant had ceased or diminished or were expected to cease or diminish. The reason for the claimant's dismissal was redundancy.

170. We turn then to the question of fairness or otherwise under issue 9. There are there set out a number of suggested aspects of unfairness between i to ix which we deal with before we deal with the general principles. The first is said to be "*The business proposal and/or the removal of a post was predetermined and not open to consultation*". The tribunal have considered this and can understand why the claimant has that view. It is often the case that when senior managers meet and decide matters and come to a conclusion such as this one, it is difficult to see whether another proposal could have changed their minds. However, there is insufficient evidence for us to say that it was predetermined. Clearly consultation meetings were set up and the claimant made no suggestions about the business proposal in spite of the invitation to do so. Nor did she suggest any alternative to the removal of her post. That decision had been made but in the absence of the claimant making any other proposals the tribunal do not accept that it was predetermined.

171. We then turn to 9 ii which is that "*the claimant was not given an opportunity to engage in consultation at the formative stages of the proposal. It was presented as a fait accompli*". This is connected to the previous issue. The tribunal accepts that the claimant was not given an opportunity to engage when Mr Bais was considering what to do about her post but that is not unusual and would not generally happen. Discussions about restructuring of the business, particularly if they relate to an individual or an individual's post, would be unlikely to include that individual.

172. We turn then to the question of 9 iii, the consultation process was "*hurried and superficial*". The tribunal entirely accepts that the consultation process was fairly quick. It is true that it could be described as "hurried". The tribunal does not agree that it was superficial. The meetings were open, business reasons were given and when the claimant asked to discuss matters such as the other two posts, that was allowed to happen. The consultation process was quick but we do not agree that it was superficial.

173. Turning then to 9 iv – "*the respondent gave no or no adequate consideration to steps other than her dismissal*", the tribunal agrees, that to some extent no alternatives were genuinely considered. That was because there were really none, the decision having been taken that that post could be deleted and the work carried out under that role done by a range of other individuals.

174. Turning then to 9 v, which is whether the claimant should have been pooled with Inside Sales Director and RSM Sales Director. This is a matter which was discussed at the consultation meetings and at the appeal. The tribunal do not accept that this is necessarily an aspect of unfairness. It would be unusual to pool people at such different levels. There is nothing to suggest to the tribunal that such a pool should have been created when the claimant was carrying out such a distinct role.The Inside Sales Director and the RSM Sales Director had significantly lower salaries, worked out of different locations and indeed carried out different roles than the Channel Director role which the claimant was carrying out. The tribunal does not accept that it was unreasonable for the respondent not to have pooled the claimant's role with those roles.

175. Turning to 9 vi, which is that "*the claimant was not afforded access to the consultation paper or the job descriptions in good time*". We have already found, as a fact, that the claimant was given the documents she requested where they existed when she requested them. She was given a copy of the slide deck presentation and the job descriptions after her own solicitors asked for it in the letter of appeal. It is true that the first respondent could have considered other documents to provide to her, but Mr Bais gave a relatively accurate summary of the decision and there were no other significant documents which could have been handed to the claimant which provided any more information than she got at the time. It would have made little or no difference if she had had that information earlier.

176. Turning then to 9 vii, this is whether "*consideration should have been given to bumping the claimant"* into what was, in effect, Mr Bais's position. This is a matter which was only suggested by the claimant at the appeal stage. There is nothing to suggest that the claimant could have carried out Mr Bais's role although she has given evidence that he was failing, that is not the evidence we have heard from any of the first respondent's witnesses. He had extensive general management experience over the whole area which the claimant did not have. There was no need for the first respondent to consider that bumping or indeed any other bumping which would have been necessary of the Inside Sales Director or the RSM Sales Director.

177. As far as 9 viii, this is that "*the claimant was not afforded the opportunity of a fair or adequate appeal procedure*". The tribunal does not accept that that was the case. The claimant was afforded that opportunity. She was provided with whatever information she asked for. The process was followed in the way in which she asked it to be and she was well aware who was chairing the meeting and so on. She had had legal advice by the time she attended and there had been extensive correspondence with solicitors. With hindsight Mr Gilhooly accepted that he might not have been the ideal person to hear the appeal because he had given some limited legal advice in relation to the process, but that did not really affect his consideration of the claimant's wide-ranging allegations which he dealt with, the tribunal finds, thoroughly and fairly.

178. Finally, 9 x is that "the appeal outcome was predetermined and/or reasoned from a desired outcome". The tribunal cannot find that the appeal outcome was predetermined. Of course, the tribunal is well aware that it is rare for decisions of termination to be overturned on appeal and can be difficult to achieve, particularly with somebody of this seniority where her immediate line manager had taken the decision to remove that layer of the business. However, the claimant was given the opportunity to discuss the matter and had, at least initially, understood as she said in her email of 9 May, that these are the sorts of decisions that sometimes have to be taken. The appeal outcome was incredibly well thought out. It is long and provides a considered and reasonable answer to the issues raised by the claimant.

179. We therefore turn to consider whether in general terms we find that the dismissal was fair or unfair in all the circumstances. We need to consider whether there was adequate warning of a potential redundancy situation. Our view is, although the first discussion was unfortunately carried out in the car which caused the claimant some understandable concern, that was, as a matter of fact, warning of a consultation process about to commence. We did have some concerns about the speed with which matters proceeded but we can also see that the claimant was very well engaged with the process. The questions she asked were answered and she had plenty of information in order to engage properly with that consultation process. The tribunal does not accept that she was at any disadvantage in the consultation proceeding because of the speed and,

indeed, she had legal advice before the second consultation meeting. Taking all that into account, with the appeal, the tribunal cannot find that that is an unfair dismissal.

180. The claimant's representative particularly asked the tribunal to consider the respondent's hesitancy in granting an extension for the claimant to put in her appeal. However, the tribunal does not accept that there is anything particularly unfair about the first respondent's response to that. A short extension was agreed and Ms Uygur made it clear that the claimant could go back to her if necessary if she needed further time. The time which was granted allowed a long and detailed letter to be sent in by solicitors covering the appeal points the claimant wished to make and there is nothing unfair about that part of the process. As for whether it followed the ACAS Redundancy Guidance, we have not been taken to any such breaches. There was no redundancy process or grievance process with the first respondent but they followed a normal process in line with the cases set out above.

181. Taking all these matters into account, the tribunal finds that the dismissal was by reason of redundancy and it was not, in the circumstances of this case, unfair. That means that the claimant's claims all fail and must be dismissed.

182. For completeness, we think it is wise to add something here. If we are wrong about the fairness or otherwise of the dismissal, we would have found, in accordance with Polkey, that any defects in the procedure relating to the shortness of the consultation period and the appeal which go to make the dismissal unfair, the claimant would have been dismissed fairly shortly after that in any event. If the consultation process had taken another week or two, the tribunal cannot see anything that the claimant did not raise at the time that she could have raised later. It is clear to the tribunal she would have been dismissed in any event.

183. Likewise, if any unfairness arises from the refusal to allow more time for the appeal or the alleged delay before the appeal hearing, the tribunal cannot see that anything else could have been said. There had been a detailed letter from the solicitors, the claimant had an opportunity to say everything that she had to say at a meeting. Her dismissal would have occurred in any event within a very short period of time after this dismissal. The first respondent extended her dismissal to 31 May and it would have been likely to have occurred by then.

184. There is therefore no need for the remedy hearing which has been pencilled in for 14 and 15 July and the claim is dismissed.

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Employment Judge Manley

Date: ……2 June 2021……..

Sent to the parties on: ...4 June 2021

.....THY.....
For the Tribunal Office