EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Massengo**

Respondent: **CPL Aromas Ltd**

Heard at: **East London Hearing Centre**

On: **12, 13, 14 & 18 January 2022 and (in chambers) on 1 March 2022**

Before: **Employment Judge C Lewis**
Members: **L O'Callaghan**
P Quinn

Interpreter: **Ms R Campbell**

Representation
Claimant: **In person**
Respondent: **Mr M Humphreys (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Claimant's claim of direct age discrimination contrary to section 13 of the Equality Act 2010, fails and is dismissed.

(2) The Claimant's claim for unfair dismissal contrary to section 94 of the Employment Rights Act 1996 fails and is dismissed.

(3) The Claimant's claim for wrongful dismissal, dismissal in breach of contract, fails and is dismissed.

REASONS

The format of the hearing

1. The hearing was conducted in a hybrid format with the agreement of the parties. The Claimant and Ms Campbell, the interpreter, were present at the Tribunal, Mr

Humphreys and the Respondent's witnesses attended remotely on the first two days of the hearing, on the third and fourth days, Mr Humphreys and his pupil attended the Tribunal. Ms Campbell was present throughout and sat with the Claimant to interpret between French and English as necessary, on occasion the Tribunal reminded Ms Campbell that her role was to interpret for the Tribunal rather than to assist the Claimant. The Tribunal was provided with an agreed chronology. The first morning was spent reading the witness statements and relevant documents, a timetable was agreed in order to ensure the hearing was concluded in the time allocated. Tribunal heard evidence from the Respondent's witnesses Alexandra Kosinski on the afternoon of the first day, then from Ms Joanna Lambert, Ms Nazli Roskin, Ketan Soni , Mr Whiteley followed by Charlotte Purcell on day two and from the Claimant on day three. Mr Soni, was recalled on day three to clarify his evidence in respect of the IT investigation and the reports produced. Submissions were heard on day four.

2. The Claimant had put in a detailed written submission prepared with the assistance of a Citizens Advice Bureau. The written document consisted of 49 pages and had been drafted before the evidence had been heard. Mr Humphreys chose not to respond to those written submissions in detail but made oral submissions on the Respondent's case. Unfortunately there was insufficient time left on the last day for the Tribunal to conclude its deliberation and we met again in chambers on 1 March 2022, being the first date on which we were all available.

ISSUES

3. The issues that the Tribunal had to decide were identified at a preliminary hearing before Employment Judge Gardiner on 12 June 2020. Employment Judge Gardiner allowed the Claimant's application to amend her claim to bring claims of wrongful dismissal and direct age discrimination. He refused her application to amend to include claims for direct and indirect race discrimination, based on her French nationality. At the time of the relevant events, the Claimant was aged 39. She specifically compares the way she was treated to the way that four other employees were treated, who the Claimant alleges were all under 30.

4. A final list of issues, understood to have been agreed by the Claimant in accordance with the case management orders, was prepared by the Respondent and sent to the Tribunal by 18 December 2020. The Claimant had sent in an updated witness statement on 6 January 2022 and then a further revision on 8 January 2022. It was confirmed at the start of the hearing that the issues the tribunal had to decide were as follows:

5. **Jurisdiction – Time Limits**

5.1 In respect of any alleged acts of discrimination which occurred on or before 23 August 2019, does the Tribunal have jurisdiction to hear those claims?

5.2 In respect of any alleged acts of discrimination which occurred on or before 23 August 2019, do they form part of a continuing act under section 123(3)(a) Equality Act 2010 ("EqA") and/or a failure to do something under sections 123(3)(b) and 123(4) EqA?

5.3 In respect of any alleged acts of discrimination which are out of time, would it be just and equitable for the Tribunal to extend time pursuant to section 123(1)(b) EqA?

6. **Direct Age Discrimination (section 13 EqA)**

6.1 Was the Claimant subjected to the following alleged less favourable treatment:

(a) The Respondent's decision not to appoint the Claimant to the role of Junior Perfumer;

(b) The Respondent's monitoring of the Claimant's computer use;

(c) The Respondent's decision to subject the Claimant to disciplinary action on 6 August 2019, 16 August 2019, 9 September 2019 and 5 November 2019;

(d) The Respondent's decision to dismiss the Claimant on 9 September 2019;

(e) The Respondent's decision to dismiss the Claimant without notice or PILON on 9 September 2019?

6.2 The Claimant relies on a hypothetical comparator with the following circumstances: "*someone who was deemed not to have met the requirements of the Trainee Perfumer Programme after reaching the end of that programme and who did not qualify as a Perfumer Assistant and facing the disciplinary issues faced by the Claimant at the time of each of the alleged acts of unfavourable treatment, including the Claimant herself, at a younger age, say age 30 and under.*" The Claimant relies on the age information at page 579.

6.3 Were there any material differences between the circumstances of the hypothetical comparator (including the age information at page 579) to the circumstances of the Claimant, pursuant to section 23(1) EqA?

6.4 If not, was the Claimant treated less favourably than the hypothetical comparator set out at 4.2?

6.5 If the Tribunal finds that the Claimant was treated less favourably, was this less favourable treatment because of the Claimant's age?

6.6 If the Tribunal finds that the Claimant has suffered less favourable treatment, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim, pursuant to paragraph 1 Schedule 9 EqA?

7. **Unfair Dismissal (Section 94 Employment Rights Act 1996 ("ERA")**

7.1 Was the Claimant dismissed for a potentially fair reason under Section 98 ERA?

7.1.1 The Respondent alleges that the reason for the Claimant's dismissal was gross misconduct and therefore fair under Section 98(2)(b) ERA.

7.1.2 The Claimant considers that the reason or the principal reason for her dismissal was one or more of the below unfair reasons:

(a) Because she did not accept the Respondent's offer of a position as a QC Technician;

(b) Because the Respondent allegedly wanted to give the role of Junior Perfumer to another French national instead of her; and/or

(c) Because the Respondent had allegedly decided that the Claimant's face did not fit the organisation, as evidenced by the bullying that the Claimant alleges she experienced from Alexandra Kosinski, Jo Lambert and Nazli Roskin.

7.2 If the Tribunal finds that there was a potentially fair reason, did the Respondent act reasonably in treating misconduct as a sufficient reason for dismissing the Claimant, in particular applying Section 98(4) ERA and the *British Home Stores Ltd v Burchell* [1978] test? The test is as follows:

7.2.1 As at 9 September 2019, did the Respondent have an honest belief that the Claimant was guilty of that misconduct?

7.2.2 If so, was this belief based on reasonable grounds?

7.2.3 If so, had the Respondent conducted a reasonable investigation into the allegations of misconduct, such that it was reasonable in the circumstances to reach its findings?

7.2.4 The Claimant considers that the Respondent did not conduct a reasonable investigation for the following reasons:

(a) An alleged failure of the Respondent to have a valid reason before monitoring the Claimant's emails;

(i) The Respondent alleges that the Claimant's emails were monitored due to reasonable suspicions that the Claimant was forwarding confidential information to her personal email address;

(ii) The Claimant alleges that her emails were monitored because the Respondent was looking for a reason to dismiss her; and

(b) An alleged failure of the Respondent to conclude the investigation into the allegations of misconduct before the Claimant's dismissal.

7.2.5 The Claimant considers that the Respondent did not conduct a reasonable procedure for the following reasons:

(a) An alleged failure of the Respondent to provide the Claimant with the following documents:

(i) The IT reports and login spreadsheets (pages 412-426, 429-434, 435-438 and 439-440) until 9 September 2019 and 23 March 2020 respectively;

(ii) The information pack relied upon by the Respondent at the disciplinary hearing on 6 August 2019, the Claimant alleges that she was not provided with this until during that hearing;

(iii) The Employee Handbook (pages 126-203), the Claimant alleges that she was not provided with this until 2 October 2019;

(iv) The investigation report (pages 379-382) and accompanying documentation, the Claimant alleges that she was not provided with this until 5 November 2019;

(b) An alleged failure of the dismissing officer to take into account the contents of the Azure Login Spreadsheets (pages 429-434), which showed who was logging onto the computer system, the Claimant alleges that those were not considered until 14 November 2019;

(c) An alleged failure of the Respondent to provide sufficient notice of the disciplinary hearing on 6 August 2019 and to give the Claimant sufficient time to prepare for that hearing, the Claimant alleges that she was only told about the disciplinary hearing on 5 August 2019; and

(d) An alleged failure of the appeal officer to take into account the following:

(i) The Claimant's alleged presented evidence and assertions at the appeal hearing on 5 November 2019 to show that she did not state at the beginning of her meeting with Nazli Roskin on 31 July 2019 that she had not received a meeting invitation;

(e) An alleged failure of the Respondent to have a valid reason before monitoring the Claimant's emails (as outlined above at issue 5.2.4(a); and

(f) An alleged failure of the Respondent to conclude the investigation into the allegations of misconduct before the Claimant's dismissal (as outlined above at issue 5.2.4(b)).

7.3 Was the Respondent's decision to dismiss the Claimant within the range of reasonable responses that a reasonable employer would take?

7.3.1 The Claimant considers that the decision to dismiss her fell outside the band of reasonable responses for the following reasons:

(a) The Claimant had previously witnessed Mike Parrott, Coach to the Trainees, send information to her from his personal email address;

(b) The Claimant allegedly thought that it was therefore acceptable to send information to her personal email address;

(i) The Respondent alleges that any information sent from Mike Parrott's personal email address to the Claimant was not confidential information whereas the emails that the Claimant sent to her personal email address was confidential information;

(ii) The Respondent further alleges that the Claimant would have known that this was confidential information;

(iii) The Claimant alleges that the information sent from Mike Parrott's personal email address was confidential information;

(iv) The Claimant further alleges that at the time that the Claimant sent emails to her personal email address she was not aware of the provisions and policies in the Employee Handbook (see issue 5.2.5(a)(iii));

(c) An alleged failure on the Respondent to take disciplinary action against Mike Parrott for sending information from his personal email address; and

(d) An alleged failure on the Respondent to provide the Claimant with the Employee Handbook, in advance of initiating the disciplinary process and/or in advance of that process concluding.

8. **Wrongful Dismissal**

8.1 Is the Claimant owed one month's notice or was the Claimant lawfully summarily dismissed without notice?

9. **Remedy**

9.1 If the Claimant succeeds in any of her claims, is she entitled to any remedy from the Respondent and at what level, including:

(a) Compensation for financial loss from any discrimination;

(b) An award of compensation for unfair dismissal including any basic award and/or compensatory award;

(c) An award of injury to feelings and/or health;

(d) An award for wrongful dismissal;

(e) An award of loss of statutory rights; and/or

(f) Interest on any of the above?

9.2 Should any compensation awarded to the Claimant be reduced to reflect:

(a) The allegation that the Claimant's employment would have been terminated in any event (in reliance on *Polkey v AE Dayton Services Ltd* [1987]);

(b) Any contributory conduct on the part of the Claimant; and/or

(c) Any failure by the Claimant to mitigate her losses;

9.3 Does Section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992, apply in this case?

9.4 Did the Respondent fail to follow the ACAS Code of Practice 1? Specifically, the Claimant relies on the following conduct:

(a) An alleged failure of the Respondent to provide sufficient notice of the disciplinary hearing on 6 August 2019 and to give the Claimant sufficient time to prepare for that hearing;

(b) An alleged failure of the Respondent to provide the Claimant with copies of the documents relied on by the Respondent prior to the disciplinary hearings on 6 August and 9 September 2019 and the appeal hearing on 5 November 2019, with copies of the documents as outlined at issue 5.2.5(a)(i)-(iv)) above;

(c) An alleged failure of the Respondent to provide the Claimant with the Employee Handbook until 2 October 2019; and

(d) An alleged failure of the Respondent to conclude the investigation into the allegations of misconduct before the Claimant's dismissal, as outline above at issue 5.2.4(b).

9.5 If so, is the Claimant entitled to a percentage uplift to her compensation, and if so, by what amount?

FINDINGS OF FACT

10. The Tribunal made the following findings of fact from the evidence before us.

11. The Respondent is a world leading fragrance house with headquarters in the UK. It is independent and family owned and creates fragrances for use in fine fragrance, personal care and household products. The Respondent is part of a very competitive market. With any fragrance house its only real intellectual property is its formulas for its fragrances and its costings of those formulas and fragrances. These are the main

commercially valuable points of difference between the Respondent and its competitors. Formulas contain the raw materials or ingredients that make up the fragrance along with the percentage of each of the raw materials that are included in the fragrance. This information is highly confidential and is tightly safeguarded by the Respondent. If a competitor got hold of this formula information they would be able to replicate the Respondent's perfume.

12. Each fragrance house has an analytical department that is continually monitoring market products. They look at products from different competitors, assess how well those products work and try to work out what materials have been used in these products. This is a difficult task, fragrances often contain about 40 to 50 different raw materials.

13. The Respondent has very strict specification guidelines on the natural oils that it uses in its fragrances which may not be easy for competitors to identify. If a competitor was provided with a formula of a fragrance that would be a very valuable matter for them: it would disclose the Respondent's trade secrets. Pricing information is also very tightly safeguarded by the Respondent. If a competitor got hold of this pricing information, they would know the costs that the Respondent pay for each of the raw materials and could then calculate the profit the Respondent makes on these fragrances. The competitor would then be able to undercut the Respondent on price for the fragrance which would give them a significant competitive advantage. As a result, information relating to formulas and costings is tightly safeguarded by the Respondent. This information is held on the Respondent's secure developmental IT system, Product Vision ("PV"). Employees are not automatically granted access to this system but instead access is given on a need to know basis. Any employee who requires access to the PV system has to get specific security approvals, including an approval from the IT department and their line manager or a Director of the business. The employee would be assigned log-in details and would have to use these details each time they wanted to access the system. The employee would not usually be given access to all of the information held on the system, it would usually just be the specific information they are required to see in their job role. If an employee then needed access to further information, they would have to go through the same approval process again. As a trainee perfumer the Claimant would have had to change her access to the system each time she moved departments and would only have been granted access to those specific projects that she was working on at that time.

14. Once you are in the system and have accessed it there were still tight controls in place. Employees are able to download very little information from the system and are required to view the majority of the information online. The system is also monitored, with the Respondent knowing who has accessed the system and when. The reason for this tightly safeguarding is to make sure that the Respondent always has control of its confidential information.

15. The Respondent has policies relating to confidentiality in its Employee Handbook (pgs.126-206) at 144 the handbook states:

> "*To protect the business of CPL Aromas you are expressly forbidden… to disclose any confidential information relating to CPL Aromas… or make use of any such information… copies of programme or data must not be taken or removed from*

the company's premises without the express permission of your manager."

16. The handbook also contains the Respondent's computer, email and internet policy which states,

> "*Under no circumstances should copies of… data be removed or transmitted from the Company premises... CPL Aromas regards computer system security to be of paramount importance. Any individual action or inaction, which compromises this security, will be considered to be a disciplinary matter"* (pg. 180).

17. The Respondent's disciplinary procedure is also contained in the handbook; it lists acts of gross miscount which may usually amount to or lead to summary dismissal, including the following, "*communicating confidential information outside the Company*" and "*actions (or inactions) that compromise the security of the computer system*" (page 177). All the Respondent's employees are required to adhere to the disciplinary procedure.

18. None of the above was disputed by the Claimant.

19. The Claimant was appointed as a trainee perfumer on the 3rd April 2017. Her employment agreement was in the bundle at pages 208-211 and her signature appears at page 211. Underneath the declaration which reads as follows:

> "*I have read and understood the terms and conditions within this document and accept that these form the basis of my Employment Agreement with CPL Aromas Limited"*.
>
> "*The contents of this agreement in conjunction with the terms and conditions of the sections of the Employee Handbook provide information required under the Employment Rights Act 1996".*

20. The first paragraph of the Employment Agreement provides as follows:

> "*This Employment Agreement sets out the main terms and conditions between CPL Aromas Limited… and its employees. CPL Aromas also provides an Employee Handbook, which should be read in conjunction with this Agreement. The Handbook provides further information regarding the terms of employment, background to the Company, current procedures and general standards. You will be required to sign your acceptance of the terms and conditions section of the Handbook.*"

On the third page of the Employment Agreement (page 210 of the bundle) is a section headed: "*Protecting the Interests of CPL*" which reads as follows:

> "*You should read and continue to observe throughout your employment the confidentiality provisions and restrictions that the Company has in place regarding placing information in the public domain. These are set out in the Employee's Handbook. In addition to this, you are bound during your employment and for a period of six months following termination.*"

Three restrictive covenants are then set out.

In a section headed: "*Disciplinary & Grievance Procedures*", reference is made to the disciplinary procedure in the Employee Handbook, stating that it is not contractual. Underneath is a section headed: "*Company Policies*" which reads as follows:

> "*The Company's policies relating to Equal Opportunities, Business Ethics & Anti Bribery, Health and Safety, Computer Use, Raising Concerns and other essential information relating to conduct at work are set out in the Employee Handbook. You are required to read these policies. If there is anything in the Handbook that you feel requires further explanation or clarification, you should raise this with your Manager.*"

21. Each year the Respondent had taken two trainee perfumers to take part in the perfumery training programme. The programme was designed to take approximately 26 months to complete, depending on the background of the trainee perfumer. The trainee perfumers worked in different departments of the business to acquire a range of skills and experience. The departments included: formulation management (12 months), quality control (4 months), regulatory (2 months), evaluation (2 months) and analytical (6 months). Quality control taught the trainee perfumer how to check the quality of raw materials; regulatory taught the trainee about regulatory requirements and how to check and modify formulas against those requirements. In evaluation, the trainee perfumers learnt about how to respond to customers briefs; whilst in analytical, the trainee perfumers learnt how to analyse formulas of market products. Throughout the programme, Mike Parrott, Coach for the Trainees and a retired perfumer and former employee of the Respondent, also met the trainee perfumers approximately once a week to teach them about raw materials and how to formulate and create fragrances.

22. The trainee perfumer had a mentor in each of the departments and throughout the trainee perfumer's time in the department, the mentor would give feedback and a score of the trainees experiential learning against key objectives, (see pages 212-221 for example). The scores were accumulated at the end of the programme. Ms Kosinski told us that whilst these scores were useful, in her mind, whether the trainee perfumer qualified from the programme into a permanent perfumer role depended on their knowledge of formulating with raw material and also the willingness to learn and their attitude towards the team. Ms Kosinski also told the Tribunal, and we accept, that since the Claimant's employment, the Respondent had not run the training programme as they had not needed any new trainee perfumers to add to the team.

23. If a trainee perfumer successfully completed or "qualified" from the programme into one of the perfumery team, they would normally compound their own formulas and work on small customer projects supervised by the perfumery team. This means that in order to qualify from the programme, a trainee perfumer needs to have enough knowledge on how to create basic formulas and already need to have proved their ability to work on small projects. Once they have worked on a perfumery team, and demonstrated that they have the required capability, the individual will start to progress into more senior positions within the perfumery team, this normally takes a number of years.

24. All perfumers work on different projects which involve them creating fragrance out of raw materials in line with the customer's brief. Trainee perfumers work on small customer briefs always supervised by another perfumer or their mentor. The evaluation team will then smell the fragrances that the perfumer has created and submit them to the customer. Evaluators will reject the submission if they decide that they are not answering the customer's brief. If a trainee perfumer submission was rejected, the mentors will help the trainee perfumers re-work their submission. The customer will then be offered the choice, they can choose their smell from the CPL submissions or their competitors' submissions and if their fragrance was chosen, this is known as a win. Perfumers on each project are therefore effectively all in competition with one another and this meant that the Respondent considered it was vital that there was harmony across the perfumer team, and everyone supported one another.

25. Ms Kosinski started her employment with the Respondent on the 1 October 2018, when she moved to England. She was originally employed as a Senior Perfumer and took some time to familiarise herself with the Respondent and its way of working. She was later appointed as Director of Perfumery and in this role, she manages approximately six perfumers. She is also responsible for mentoring the perfumers, assisting them on any perfumery issues and ensuring that there is a general harmony across the team. When she started her employment with the Respondent, the Claimant was already part way through her perfumery training programme. Ms Kosinski started attended a perfumery conference with the Claimant soon after starting her employment, and she believed that they got on well. She was informed that Burkhard Juergens, the then General Manager of CPL, had offered the Claimant a permanent role in the perfumery team, subject to her qualifying from the programme.

The Respondent's decision not to appoint the Claimant to the role of Junior Perfumer

26. In early 2019, Mr Burkhard asked Ms Kosinski where the Claimant was standing in her programme and so she started to assess the Claimant's skills from a bespoke perfumery perspective. She was shocked at what she discovered about the level the Claimant was at and it became evident to her that the Claimant was not ready to qualify from the programme. She was concerned that the Claimant had very little knowledge of raw materials and of creating fragrance out of these materials.

27. Towards the end of the programme Ms Kosinski tried to get the Claimant involved in relatively easy projects to help her gain more knowledge and experience of raw materials. Her experience was that the Claimant carried out very little work on these projects, did not seem to be interested in them and made no effort to engage and ask questions. She gave the Tribunal an example of a project she involved the Claimant in, where formula had already been prepared but needed to be reworked for legislation purposes, as part of the reworking she asked the Claimant to compound the formula herself but the Claimant refused to do so. The Claimant assured Ms Kosinski that she knew how to modify the formula in order to make it safe for regulation purposes and it was agreed that she would do this prior to sending it to the Respondent's factory in Brixworth. Once a formula has been developed, it is often sent to the factory in Brixworth which would compound the formula and prepare the fragrance. The factory often took a day to prepare the fragrance, sometimes if the team did not have time to wait for this to be done, more junior members of the perfumery team could compound the fragrance

themselves. On this occasion when Ms Kosinski checked the formula that the Claimant had prepared, it was wrong, but it was too late to send it to the factory to receive it by the following day. She asked the Claimant if she could compound the formula herself to save time. This would also have allowed the Claimant to smell her reworked fragrance sooner and for the Respondent to be on time to meet the customer's deadline. Ms Kosinski thought this was a great way of learning the raw materials and would have given the Claimant experience of what a permanent role would be like in the perfumery team. The Claimant did not want to compound the formula herself and Ms Kosinski discovered that she had sent an urgent request to the factory asking them to do so instead.

28. Ms Kosinski told us that she also gave, or tried to give, the Claimant the opportunity to work with different perfumers to help develop her skills. The Claimant did not take this opportunity and refused to work with the perfumers in the team saying they were not senior enough for her.

29. On the 14 June 2019, Ms Kosinski attended a meeting with the Claimant, Joanna Lambert, who is the UK Director for Development and Nazli Roskin, the Senior HR Manager for the Respondent, (minutes of the meeting are at pages 253-262, typed version is at 754-757). The purpose of the meeting was to discuss the Claimant's performance and to advise her that in Ms Kosinski opinion, she was not ready to qualify from the programme and would not be ready in July 2019 when the programme was due to finish. Ms Kosinski told us that unfortunately in her view, the Claimant was still a long way from being ready to qualify from the programme and the issues that had been identified could not be rectified in time for her to qualify in July 2019. Ms Kosinski's evidence as to the detailed reasons for her decision are set out in her witness statement, the Claimant challenged Ms Kosinski's evidence suggesting to her that she perceived the Claimant as inflexible or likely to stand up for herself and argue and be less likely to listen or find it harder to learn all because of her age. Ms Kosinski refuted that the criticism that she had of the Claimant was anything to do with her age and relied on the specific examples set out in her witness statement as being the basis for her belief that the Claimant had not, by that point in time, demonstrated that she had the requisite skills in order to successfully complete the trainee perfumery programme. Ms Kosinski was concerned as to what she had seen of the Claimant's response to feedback: when there had been any negative feedback, the Claimant refused to accept any criticism and expressed the view that she already had all the skills that she needed. This led Ms Kosinski to have concerns about the Claimant's attitude. We were provided with the notes of the meeting on 14 June which record that Ms Kosinski tried to explain to the Claimant why she had decided that she would not be ready to qualify from the programme. She asked the Claimant how to make a cologne, which she told the Tribunal is a basic exercise given to the trainee perfumers. Ms Kosinski told us that a cologne is made out of a citrus note and is fresh and light, she believed this is well known and any perfumer working in the industry would have been aware of this. However the Claimant said that she would have included either 5 or 10% of rose in her cologne. Ms Kosinski explained to the Claimant that rose was a very strong, powerful and expensive raw material at around £7000 per kilogram and was rarely used in cologne fragrances. Ms Kosinski explained to the Claimant that rose oil or rose were only used at 0.1% due to its strength, not the % that the Claimant had suggested. She explained that the final fragrance would cost a fortune to make, it would be too expensive to sell and would not smell like a cologne. Instead of acknowledging Ms Kosinski's feedback, the Claimant continued to say that she would make a cologne in this way, Ms Kosinski believed that

this showed not only the Claimant's lack of knowledge in creating the formula but also her inability to receive criticism and feedback. The Claimant was asked whether she had been given guidance by Mike (Parrott) about quantities, but avoided answering this question; she was also asked about other perfume formulations that she had suggested which did not fit with the clients' brief, including where she had suggested a scent of bamboo for a south American tribe, a log fire and pine fragrance for a spring /summer scent and a story idea which included a description of dirty water, she disputed that she had meant 'dirty water' and maintained that she had intended the description to include algae instead.

30. On the 24 July 2019, Ms Kosinski attended a final assessment meeting with the Claimant and Ms Roskin, with Ms Roskin taking notes, (page 265). The Claimant was provided with a copy of her overall assessment scores, (pages 212-221) and Ms Kosinski explained that unfortunately she had not met the requisite objectives of the programme to become a qualified perfumer and, therefore could not take the permanent role that had been offered in the perfumery team. She went on to offer the Claimant a role in Quality Control and explained that the Respondent would continue to train the Claimant so that she could eventually qualify from the programme and join the perfumery team. She offered to personally mentor the Claimant to help her with the required skills. The Claimant declined the role in Quality Control.

31. The Claimant had identified four comparators in respect of her age discrimination claim. Ms Kosinski was unable to comment in respect of comparator D as she was employed with the Respondent after D's employment had terminated. In respect of the other three comparators, she told us that it her view they were all in completely different circumstances to the Claimant and gave the following examples of why that was.

32. Comparator A: Ms Kosinski was aware that Comparator A had a Masters in Perfumery from ISICPA. To Ms Kosinki's knowledge A had, throughout their career, assisted on more customer products than the Claimant; she also had more knowledge and experience of working with raw materials and compound formulas. Another difference in Ms Kosinski's view was that A was keen to learn and had a very helpful attitude with the team. Ms Kosinski denied that her favourable assessment of A or less favourable assessment of the Claimant had anything to do with their respective ages. She told the Tribunal that she had not known and had not sought to find out how old the Claimant was, it was simply not a relevant consideration for her. She denied basing her assessment on assumptions about the Claimant being less biddable, or more likely to stand up for herself, because of her age. She maintained that she based her assessment of the Claimant on her observation of the Claimant's work, her answers to questions about formulating fragrances and her interactions with her colleagues.

33. Comparator B: B did not have an ISICPA qualification, but they did have an ICATS Diploma in Aroma Trade. The diploma taught them about the chemistry of raw materials and how they interact with one another. B had been a trainee perfumer at another company and Ms Kosinski understood that B had been closely trained and monitored by perfumers for around 6 years. From her observations Ms Kosinski considered that this individual had more knowledge and experience than the Claimant about raw materials and how to use them and they also had a keen attitude to learning.

34. Comparator C: C had the ISICPA perfumery qualification. During their career they had achieved a significant number of “wins” and had an impressive knowledge of raw materials.

35. The Claimant challenged Ms Kosinski’s evidence in respect of her own and the respective qualifications of the comparators. Ms Kosinski accepted that she was not aware that the Claimant had a Masters Degree in Chemistry, Engineering, Aromatics and Perfumery, nor was she familiar with that qualification. She was not aware that it was a recognised qualification. The Claimant suggested that it was comparable to a Diploma in Aroma Trade. Ms Kosinski did not think that the Claimant’s Masters was equivalent to the ISICPA qualification, as far as she was aware there is no equivalent qualification to that, the ISCIPA is the only school in the world doing that training and it is a very small industry. In any event Ms Kosinski was clear that for her it was more the result that was important rather than the qualification, or the number of years that the individual had worked specifically in a perfumery department. The relevant or important factor for Ms Kosinski was the skill, the level of knowledge, which she described as the result, and she could not see that the Claimant had those skills. She did not see the evidence in the Claimant’s work of the training that the Claimant said that she had. She asked the Claimant to show her what she had done, and she did not provide the evidence of it, or provide satisfactory work, apart from the example of a leather shower gel which did not show her that she had the skill.

36. The Claimant asked Ms Kosinski about a specific presentation that the Claimant said that she had prepared for her. Ms Kosinski did not remember the Claimant preparing that presentation. Ms Kosinski told the Tribunal that she could not afford to have the disruption to her team of having the Claimant employed as a junior perfumer when she was not trained correctly and did not have the required knowledge; it would take up a lot of time and they were already busy and they did not have time to do that. The team had to work closely together in an open environment and the Claimant had already demonstrated that she did not want to take guidance from other junior perfumers and that was a concern.

37. At her appeal the Claimant had made a number of allegations of bullying and Ms Kosinski dealt with those in her witness statements, at paragraphs 24- 25. We accept Ms Kosinski was giving an honest account of her recollection of events and we find that her account is in large part supported by the notes of the relevant meetings. We have accepted the evidence Ms Kosinski gave as to the basis of her assessment of the Claimant, which is consistent with the assessment she recorded at the time in the documents.

38. Ms Lambert also gave evidence about the Claimant’s time with the Respondent. Ms Lambert had worked for the Respondent for approximately 25 years, she had joined as an Evaluator and worked as a Senior Evaluator and then as an Account Manager. At the time of these proceedings Ms Lambert was UK Director for Development which meant that she was responsible for managing 12 people in the Evaluation Department, the Product Development Department and the Applications lab. She was also a member of the UK management team.

39. Ms Lambert told us that she got to know the Claimant well during early 2019 when she spent some time in the Evaluation department as part of her perfumery training

programme. She became aware that the Claimant had been offered a permanent role in the perfumery department subject to qualifying from the programme. In early 2019, before the end of the programme, the Claimant still had training to do in the Evaluation and Perfumery departments and given there was limited time for her to do these remaining departments and to avoid any delay in her qualifying, it was decided to merge her training in the departments. This meant that subject to her meeting the required objectives, she would be able to transition to her permanent role in the Perfumery department more quickly. The plan was initially to train the Claimant with more evaluation work with a few perfumery tasks and this would then progress into carrying out more perfumery task and less evaluation work. It was considered important for the Claimant's training that she spent some time in evaluation to make sure that she understood the process as a whole and evaluators and perfumers often work closely on various products.

40. When the Claimant joined the team Ms Lambert asked her to assist on various projects and provided her with either a mood board or an analysis that the marketing team had prepared. She asked the Claimant to review the information provided and come back to her with ideas about the smell of the products and the ingredients that would form the basis of that smell. It soon became apparent to Ms Lambert that the Claimant had very different interpretations to other people's and made what she considered to be quite basic mistakes. One example was that it is a basic concept of chemistry that water and oil cannot mix in a fragrance, however, the Claimant often made suggestions that involved them both. Ms Lambert considered this to be a basic rule of perfumery and known to everyone working in the perfumery industry and to anyone that has a basic knowledge of chemistry.

41. For training purposes the Claimant worked alongside other evaluators. However, Ms Lambert started to receive feedback from the evaluators that they were quite unsettled whilst working with the Claimant. For example, the Claimant worked with one evaluator on an important customer project for the owners of the Respondent in May 2019. Before the project was completed and without running it past the Evaluator, the Claimant set up a meeting with an owner of CPL. The meeting went ahead but the Evaluator had concerns that they were ill prepared, given that the project had not yet been completed and this therefore could have reflected badly on their performance. Following this incident, Ms Lambert decided to take the Claimant off customer projects, she wanted to focus the Claimant's training on smaller projects to give her more time to build up her experience. She wanted to give the Claimant more experience of the skills involved in interpreting mood boards and deciding on fragrances., Ms Lambert gave the Claimant one project at a time as she felt this was necessary in order to ensure that she was able to focus on that particular project, whereas with the other trainee perfumers she was able to give them work on multiple projects at once.

42. Ms Lambert set out in her statement examples of a project she asked the Claimant to work on in May 2019, (paragraphs 14-17), she corrected the reference in evidence that the Claimant had suggested bamboo and not green tea as written in her statement, she told us that she did not consider that to be a material difference, as the Claimant had still suggested a South American theme for the project but was describing using a scent associated with Asia. Ms Lambert also explained her experience of the Claimant's response to being required to arrange access rights to the computer PV system. (paragraphs 18 and 19), in which she found that the Claimant did not take responsibility

for doing this and later sought to suggest it was Ms Lambert's responsibility, whereas she recalled the Claimant saying at the time that she had not requested the access rights because she would be leaving the [Evaluation] team soon.

43. Ms Lambert denied perceiving the Claimant as less flexible and more set in her ways that a younger person, or less easy to control. We find Ms Lambert's evidence to be consistent with the feedback given to the Claimant at the time and recorded in the documents. We found her to be a straightforward witness and have no hesitation in accepting her evidence.

44. Ms Lambert told us that her impression of the Claimant was that she was not willing to accept feedback or to use it to improve. Ms Lambert felt that the Claimant did not accept the feedback she received, she often argued against the feedback given to her by her more experienced colleagues, including her managers. Ms Lambert had advised the Claimant that the best thing she could do was follow the advice of her colleagues and managers who already had years of experience in the industry, she had told the Claimant that this would help give her more knowledge and skills and would help in preventing her repeating mistakes. Ms Lambert felt the Claimant saw her time in evaluation as simply a box ticking exercise and that the Claimant was not willing to learn whilst she was in the team. Ms Lambert completed the feedback documents against the Claimant's objectives at the end of the Claimant's time in the Evaluation team.

45. The other trainee on the training programme at the same time as the Claimant was also not appointed as a junior perfumer and was not successful in completing the programme. She had not been interviewed for the role of Junior Perfumer. We were not told this persons' age although the Claimant made reference in her claim to the trainees or Junior Perfumers all being under 30. Ms Lambert, Ms Kosinski and Ms Roskin, each denied knowing the Claimant's age, or whether she was over or under 30.

46. In respect of the comparators identified by the Claimant, Ms Lambert told us that she believed the circumstances of comparator D were very different to the Claimant. Comparator D was a predecessor on the programme of the Claimant and worked in similar departments, she was also mentored by Mike Parrott, coach to the trainees. Comparator D met the required objectives of the programme and successfully qualified from the programme. Ms Lambert assessed that they were at a very different level to the Claimant in terms of their skills and knowledge; their performance during the programme was strong and they had a very strong work ethic. The decision to appoint comparator D was made by the Managing Director at the time and the Perfumery Director who had worked alongside comparator D, both of whom are now retired; Ms Lambert was not involved in that decision.

Ms Roskin

47. Ms Roskin started working for the Respondent on the 9 September 2018 as a HR Business Partner, after a year became Senior HR Manager. When Ms Roskin commenced her employment with the Respondent, the Claimant was already part way through her perfumery training programme. In her handover from Ms Reddington, Ms Roskin was informed that the Claimant and another trainee were carrying out the programme and she was told that the Claimant had been offered a permanent role in the perfumery team by Burkhard Juergens, General Manager, subject to her qualifying from

the programme.

48. Ms Roskin told the Tribunal that at the start of every employee's employment, they are given a copy of their employment agreement along with their offer letter and a copy of the Employee's Handbook. The handbook contains all CPL's policies. She believed that her predecessor, Hailey Reddington, had sent all those documents in the post to the Claimant. The Claimant had signed her employment agreement on the 12 April 2017, confirming receipt of the handbook (a copy of the signed document is at page 211). The handbook was also available on the SharePoint web page, although this was taken down temporarily in early 2019 in order to be updated. The Claimant did not mention to Ms Roskin before the disciplinary hearing that she had not received a copy of the handbook or that she was unaware of the handbook's content, if she had Ms Roskin would have made sure that she was sent a copy.

49. Ms Roskin did not know the Claimant well and did not meet her until she approached the end of the training programme. Towards the end of the programme, Ms Roskin prepared a feedback document that was used for the final assessment for the Claimant, (pages 212-220). It listed the key objectives and capabilities that trainee perfumers had to meet in each of the different departments. Several key objectives were the same for each department, but other objectives were specific to the department in question. In order to prepare this document Ms Roskin spoke to the mentor in each department. The same objectives were also set out in the Claimant's trainee bespoke training plan which was provided to her when she started the programme, (at pages 204-206).

50. At the end of the programme, a mentor from each department provided a score from one to five for the Claimant's performance against each of the key objectives. A score of one would be unacceptable, indicating that further training would be needed whilst a score of five would be excellent and would mean that the individual was displaying exceptional performance. The scores were combined into an overall total. It was then up to the Director of Perfumery, Alexandra Kosinski, to make the decision whether the trainee perfumer had qualified from the programme.

51. In July/August 2018 both trainee perfumers were interviewed for a permanent role in perfumery. The Claimant was offered this role, we are satisfied that the offer was subject to successful completion of the programme. The other trainee perfumer was not successful in the interview and was told that at the end of their training they would move into formulation management. They accepted this offer but resigned shortly afterwards.

52. Ms Roskin attended the Claimant's performance review meeting on the 14 June 2019 and also further meetings to discuss performance and feedback. She conducted an informal meeting with the Claimant on the 17 June 2019, (pages 263-264) to ensure that the Claimant understood the feedback that she had been given and to discuss any concerns. The Claimant did not accept the feedback that she had been given and argued that she was ready to qualify from the programme. Ms Roskin therefore arranged a further meeting between the Claimant and Ms Kosinski on the 24 July 2019. In the course of these meetings, the Claimant referred to a letter she had received on the 6 April 2019 confirming an annual salary review, (page 239). The letter stated that her salary would be reviewed during June 2019 and when she took on her permanent role as trainee

perfumer. The Claimant maintained that this letter meant that she had qualified from the programme. Ms Roskin explained to her that this was not the case and it was simply an issue of a standard salary increase letter and not a confirmation of any role. She told us that when she sends a letter to an individual confirming their appointment to a role, it would contain an offer letter confirming the terms and conditions of that particular role and that this information had not been sent to the Claimant in respect of the trainee perfumer role. Mrs Roskin reiterated to the Claimant that moving to a permanent role in the perfumery team was contingent on her successfully completing the programme. After being given this explanation on the 17 June 2019, the Claimant contacted Burkhard Juergens to ask him to confirm the letter of the 6 April was confirmation that she had qualified from the programme. Mr Juergens responded on the 9 August and sent a copy of this letter to Ms Roskin on 29 October 2019 (page 377). He stated that any offer he had made to the Claimant was subject to her qualifying from the programme and that if Ms Kosinski found that the Claimant was not ready, he would support that decision.

53. The final assessment meeting was on the 24 July 2019. Ms Roskin again took notes. It was confirmed that the Claimant was to be offered a permanent role as a quality control technician and that Ms Kosinski had agreed that she would continue to train the Claimant so that she could eventually qualify from the programme. The Claimant declined the role in quality control. Ms Roskin wanted to make sure that the Claimant understood what she was doing and went through the formal process of offering her role in writing. The offer letter was sent on the 29 July 2019, (page 267) and the Claimant formally declined the role by email on the 30 July, (page 282).

54. Ms Roskin was concerned about this response and thought it may have been an uninformed decision by the Claimant. She thought it would be a good idea to discuss this with her again. On Wednesday the 31 July, Ms Roskin noticed the Claimant sitting on her own at lunch and she approached her and suggested that they had a meeting that afternoon to discuss the role. Ms Roskin did not send a meeting invitation to the Claimant as it was an impromptu meeting that was intended to be informal. She asked the Claimant to rethink her decision about the quality control role, she told the Claimant that she wanted to make her feel supported and assured her that the Respondent wanted to continue to invest in her future.

55. Ms Roskin's recollection of the meeting was that the Claimant did not accept that she was not ready to qualify from the programme. She wanted to continue to develop and train as a permanent member of the perfumery team rather than having to work as a quality control technician. Ms Roskin explained that this was not possible unless she had successfully qualified from the programme. Ms Roskin informed the Claimant that the role of quality control technician did not have any less favourable terms and conditions and she would be given access to a senior member of the perfumery team to be able to work towards qualifying from the programme. Ms Roskin subsequently made a statement confirming the contents of this discussion, (page 287). She felt it necessary to make this statement as the meeting did not go as she had expected. The Claimant continued to insist that she had already been given a permanent role in the perfumery team and was not willing to discuss the quality control role. Ms Roskin was at pains to explain to the Claimant that the only role available was the quality control technician and that if she declined this role, her employment with the Respondent could terminate if no suitable role was available.

The Respondent's monitoring of the Claimant's computer use

56. Before the informal meeting on 31 July 2019 Ms Roskin had been automatically informed by the Respondent's email system that two of her meeting invites sent to the Claimant had been forwarded on to an external email address. Ms Roskin queried this with the Claimant and pointed out that this was in breach of the Company email policy. After the meeting on the 31 July Ms Roskin started to feel concerned about the Claimant forwarding work emails to her personal email account and decided to carry out an investigation. The reasons she gave for this concern was a remark or comment allegedly made by the Claimant during their conversation, referencing the lack of a formal meeting invite for their discussion on 31 July. Ms Roskin approached the IT Director and explained her concerns and they agreed to check what other emails the Claimant had sent to her personal email address. The IT Director then sent over all the emails the Claimant had forwarded to herself and Ms Roskin reviewed these emails. The emails were quite varied, some emails were just generic announcements of individuals joining and leaving CPL, however, other emails were in Ms Roskin's view suspicious, in that they contained perfume formulas and pricing information. Ms Roskin shared these emails with Ms Lambert to get her thoughts on them and Ms Lambert agreed that they contained sensitive, confidential information.

57. The Claimant disputes asking in the course of the 31 July meeting why she had not received a meeting invitation. The Claimant recorded the meeting on her phone. We have been provided with a transcript of that recording, there is no reference in the transcript to the Claimant asking why she had not been sent a formal meeting request. We accept, however, that as a result of the Claimant's conduct in that meeting, which was described by Ms Roskin as hostile and rude, Ms Roskin became concerned and her suspicions were aroused as to whether the Claimant had forwarded the meeting invites to her private email as the result of an innocent error, as suggested by the Claimant, or for some other purpose. We are satisfied that Ms Roskin's description of the Claimant being hostile and rude is consistent with the transcript of the meeting. We are also satisfied that even if direct reference was not made to the absence of a formal meeting request, the Claimant's conduct and tone in the meeting together with Ms Roskin's knowledge that the Claimant had forwarded two internal emails to her private email address provided reasonable grounds for instigating an investigation into the Claimant's email use and forwarding of internal emails to her personal i.e. external email address.

58. Ms Roskin decided that given the nature of the investigation the Claimant should be suspended pending a full investigation, she informed the Respondent's Global Technical Director and COO and they approved the suspension. Tim Whiteley then communicated the decision to the Claimant.

59. We are satisfied that the investigation into the Claimant's emails was conducted on 31 July: there was no evidence that the Respondent had monitored the Claimant's emails before that date. We find that the Claimant's access to her emails was blocked in the evening of 31 July when the IT department changed her password and after that date the Claimant no longer had access to her work emails. We find that any log-in using the credentials 'Madly Massengo' and the Claimant's password before 31 July was by the Claimant. We reject the Claimant's contention that the Respondent, or an unknown third-party, had accessed her emails before that date. The Claimant told us she did not have access to her work emails outside of work; she did have a phone and a laptop but

that her laptop was a Mac. In the course of both the Claimant's and Mr Soni's evidence there were discussions as to the log-ins via IOS, which is known to be an Apple operating system, and Android which is an commonly used on Samsung phones. We do not find the Claimant's evidence to be credible when she denied being able to access her emails off-site or outside of work. She did not dispute having an Apple Mac computer and also an Android phone. She was unable to explain why, if she had been unable to access her emails as she suggested, she had not contacted the IT department for assistance. In evidence the Claimant gave a new explanation for sending documents to her own Gmail account: namely, because she knew she was going to have to leave because of the atmosphere at work and she wanted the documents to show she had good relationships and to show her work. We are satisfied that this is closer to the truth.

60. The Claimant has not at any time disputed that she had sent the emails identified by the Respondent from her work account to her home account. We are satisfied that there is no credible basis for suggesting that a third-party was accessing her email, or that the Respondent was monitoring her emails before 31 July 2019, other than by automated alerts applied across its system to all users.

61. Ms Roskin organised a meeting to take place between Tim Whiteley and the Claimant on 1 August 2019 to discuss the emails that had been found and for Mr Whiteley to formally suspend the Claimant pending a disciplinary investigation. On the morning of the meeting, instead of attending the meeting as instructed, the Claimant spent time seeking to contact the IT department on the phone in an attempt to regain access to her laptop. She was informed by IT that they were unable to restore her access and they directed her to Ms Roskin. The Claimant then went to meet with Mr Whiteley but stated that she needed to speak to Ms Roskin first. She went to Ms Roskin and asked why her access to her computer had been removed. Ms Roskin explained that it would become clear when she met with Mr Whiteley. Ms Roskin considered this behaviour to be strange and thought that the Claimant seemed to be panicked that she could not get into her CPL account. At the meeting with Tim Whiteley the Claimant got out her phone, went through the emails and offered to delete them in front of him. Following the meeting on 1 August 2019, Ms Roskin sent the Claimant a letter confirming her suspension and setting out the allegation, which was that she had misused email and company information, (page 295).

The Respondent's decision to subject the Claimant to disciplinary action on 6 August

62. On 2 August 2019 Ms Roskin sent a letter to the Claimant inviting her to a disciplinary hearing (pgs. 297-298). She again set out the allegation and informed the Claimant that if the allegation was proved it was possible she could be dismissed. The letter was sent by post, the Claimant says she did not receive it until 5 August. It was also sent by email but to the Claimant's work email and was re-sent on 5 August to the Claimant's personal email address.

63. The Claimant was notified on 2 August 2019 of the decision to conduct disciplinary proceedings (pages 297 to 298) based on the evidence of the investigation, showing that she had sent 22 emails from her work account to her home Gmail or her private Gmail account: eight of those emails were of concern. The emails were set out in the investigation document (pgs.451-452). As found, the emails contained a variety of

different information. For instance, on 30 July 2019, the Claimant forwarded the email from Nazli Raskin about CPL's policy on the use of email to her personal account. On the same date, the Claimant sent a company announcement to her personal email account setting out details of employees joining and leaving CPL. It was not clear to the Respondent why the Claimant was sending these types of emails to her personal email account, but these were not the emails the Respondent was concerned about, due to the nature of the information they contained. Mr Whiteley told the Tribunal that it had just been these emails, given that they had already reminded the Claimant of the policy, the Respondent would have considered a formal verbal warning and reminded her again about CPL's policy and the use of email.

64. There were, however, a number of emails which were a major cause of concern for the Respondent. These were as follows:

(a) On 20 February 2019, the Claimant sent to her personal email account a copy of a presentation that had been prepared by Alexandra Kosinski, UK Director of Perfumery. This presentation included information about perfumes that Ms Kosinski had prepared, including the raw materials in these perfumes and the prices that the Respondent had paid for these raw materials;

(b) On 10 July 2019, the Claimant emailed to her personal email account an Excel spreadsheet containing fragrance, formulas and prices;

(c) On 24 July 2019, the Claimant sent an email to her personal email account attaching a full list of all the raw materials that the Respondent used in all of its fragrances;

(d) On 31 July 2019, the Claimant sent six emails to her personal email account, all containing screenshots which she had taken by "printing" the screen of CPL's PV system, specifically of perfumes, formulas and pricing.

65. The investigation also revealed that the Claimant routinely deleted all the items from her Sent and Deleted folders in her work email account. On the afternoon of 31 July, however, the Claimant had not deleted all of the sent items and instead had only deleted some of the emails sent to her personal email account, leaving two emails remaining in her Sent folder. This was before the Claimant's access to her email account had been blocked by the IT department.

66. The Claimant did not request a change of time for the meeting on 6 August. She confirmed in email correspondence with Ms Roskin that she would be attending and that she had also managed to secure the attendance of Mike Parrott as a companion.

67. The Claimant was provided with the documents from the Respondent's investigation on 6 August, half an hour before the meeting started. At the start of the hearing the Claimant was offered the opportunity to reschedule to give her an opportunity to consider the documents; she declined that opportunity. She and Mr Parrott both confirmed that they had had an opportunity to read the information before the meeting started and that it made sense. The disciplinary meeting was not concluded on 6 August however; as a result of matters raised by the Claimant, the meeting was adjourned so

that further investigations could be carried out: there were two further disciplinary hearings on 16 August and 9 September 2019.

68. We considered the Respondent's explanation for its treatment of the Claimant. We are satisfied that they commenced the investigation due to the suspicions Ms Roskin had raised, the investigation led to the discovery of a number of emails being sent to the Claimant's personal email address, as identified above, and that in the circumstances the Respondent decided to conduct a disciplinary process and invited the Claimant to a disciplinary meeting on 6 August [the disciplinary action about which the Claimant complains].

The investigation

69. The Claimant criticised the investigation and said the procedure followed was unfair in a number of respects set out in the list of issues, including alleged failure to provide the Claimant with a number of documents. Unfortunately in the list of issues those documents are not referred to in chronological order.

70. Tim Whiteley authorised the removal of the Claimant's access to the CPL PV system in the evening of 31 July as a result of Joanna Lambert informing him about Ms Nazli's suspicion that the Claimant had been sending confidential information to her personal email account. He made the decision due to what he perceived to be a potential security threat to the system and the security of the Respondent. Mr Whiteley agreed to meet the Claimant the following morning to suspend her pending a disciplinary investigation.

71. On the morning of 1 August, Mr Whiteley went to meet the Claimant as had been agreed. However, the Claimant did not come to meet him at the time she had been asked. She arrived late and said that she had had to speak to Ms Roskin first. Mr Whiteley told the Claimant that was okay and agreed he would step out of the room to allow the Claimant to call Ms Roskin. He later became aware however that the Claimant did not speak to Ms Roskin and in fact she had spoken to IT in an attempt to regain access to the Respondent's PV system. When Mr Whiteley was able to get the meeting underway he explained that the Respondent had become aware of the emails been sent to her personal email account and this needed to be investigated, he informed the Claimant she was being suspended during the investigation. This was later confirmed in writing.

72. During the meeting on 1 August Mr Whiteley asked the Claimant to sign a sworn statement stating that she would destroy all company information saved on her personal email or personal devices (p.294). The Claimant showed Mr Whiteley her phone, showed him the emails in her personal email account and deleted all the ones that she had sent from her work email account in his presence.

73. We are satisfied that the Respondent was concerned that this was confidential information which had been sent outside the Respondent's systems and over which they had now lost control; the information could now be sent elsewhere without them knowing, and this could have serious repercussions for the business.

74. The disciplinary hearing was arranged for the 6 August, however the hearing was not concluded on that date and was reconvened on the 15 August and the final hearing was held on the 9 September.

75. The Claimant complained that she only received the information pack on the 6 August. The Claimant was accompanied by Mike Parrott, who had been her mentor appointed by the company. Ms Roskin met with the Claimant and Mike Parrott at 11am to hand over the information pack and time was provided for the review of the documentations before the meeting started. The meeting commenced at 11.30am. The notes of the disciplinary hearing are in the bundle (pages 307-318). At the beginning of the meeting Mr Whiteley confirmed the purpose of the meeting was to open up the conversation about the incident and to hear the Claimant's response. The Claimant was asked whether she had any information to present other than the information pack given to her. She replied that she did not. She was asked whether she had reviewed the pack, and whether it made sense; the Claimant and Mr Parrott both confirmed that they had read the pack and that it made sense. Mr Whiteley proceeded to review the information in the pack, he confirmed that there may need to be a break to deliberate and there could potentially be a need to call on witnesses and that the Claimant would have the opportunity to cross examine witnesses. He indicated that the decision would be reached that day, although in the event it was not reached until September.

76. The Claimant was asked about each of the emails that she had forwarded to her personal account. Mr Whiteley stated the Respondent's position which was that the information in question should not leave CPL, and that once it reached her personal email CPL lost all control over that information and could not be sure how the information would be used or processed. The Claimant was asked about the screenshots of the PV system, (page 310) and about the content of the information she had sent.

77. Mr Whiteley summarised the Claimant explanations in his witness statement, she had given several explanations as to why she had sent the emails to her personal account. Initially the Claimant had said that she wanted to keep records of everything and referred to recent events that had taken place on the programme. She also said she wanted to do some work from home and she could not access the PV system from her work laptop at home. Mr Whiteley found this strange as normally employees would have access to the system from home by logging on with their password and credentials and, if she had not been able to access this system from home, he would have expected her to make a request to her line manager and to the IT department for access, which does not appear to have happened. The Claimant later said that she sent some of the information to herself for training reasons. Mr Whiteley felt that many of her reasons did not seem logical and seemed to contradict one another. He discussed the specific emails and gave her the opportunity to explain why they had been sent. Mr Whiteley did not accept that the explanations excused the Claimant's actions. He concluded that there was no need for the Claimant to send the attachments to herself containing valuable CPL information, which was their intellectual property.

78. Mr Whiteley raised with the Claimant that she had been reminded by Ms Roskin about the policy on the use of email on the 30 July but despite this had continued to send emails to her personal email account. The Claimant told him that she thought that it just applied to meeting invitations and did not realise that it was relevant for all emails. Mr Whiteley asked the Claimant why on the 31 July she had deleted from her sent folders

specific emails sent to her personal email account and not deleted other emails. She told him she usually deleted all unimportant information. Mr Whiteley then went on to ask the Claimant about the meeting on the 1 August and why he had been waiting for her to attend. The Claimant denied that she had known about the meeting. The Claimant's account was contradicted by Nazli Roskin and by Joanna Lambert. The Claimant admitted that she had been concerned that she had not been able to log on to the system and that she was trying to sort out her access to the PV system.

79. New documents came into existence in between the first disciplinary meeting on 6 August and the decision on 9 September, some as a result of the Respondent's investigations into points raised by the Claimant, including emails in respect of the IT spreadsheets. After the hearing on the 15 August, the Claimant sent an email to Ms Roskin complaining that the notes of the hearing were not accurate. The Claimant had been asked to review the notes and had confirmed she was happy for Mr Parrott to do so on her behalf. He had agreed them. The Claimant sent her corrected version of the notes which were provided to the reconvened meeting on the 16 August. The notes of that meeting are at page 323- 346; the purpose of the hearing was to discuss the IT spreadsheets, which had been created by Ketan Soni as a result of the investigation, showing when and where the Claimant signed into her account on CPL's server (at page 407- 450). The Claimant was given an opportunity to make any points she wished to make about those spreadsheets. The Claimant had disputed that the logins were all her, she said that some of the timings looked strange and that someone else must have been logging in on the server as her. Mr Whiteley was not immediately persuaded by this argument as the spreadsheet confirmed that it was her login details which were used, however he decided to investigate it further with Mr Soni.

80. Mr Whiteley called Mr Soni to ask him about what the Claimant had said. Mr Soni confirmed that there was no reason why before 31 July the Claimant would be unable to access her CPL account from home. He also told Mr Whiteley that the logins had to be the Claimant unless she had given her login details to someone else, which she denied doing, because the logins were using her credentials and only she had them. If she had provided them to somebody else then that would have been a breach of the confidentiality provisions. Mr Soni was asked about the timings and asked if he could re-run the spreadsheets. Mr Soni explained that he could not do this because Microsoft only held the data for a certain amount of time. Mr Soni was called to give evidence to the Tribunal and confirmed the contents of his statement, he was asked further questions and confirmed what Mr Whiteley had understood at the time of the hearing in August 2019 was correct as far as he was concerned. Mr Whiteley told the Tribunal that he was satisfied that the IT spreadsheets were not going to go change the rationale for his eventual decision.

The Respondent's decision to dismiss the Claimant on 9 September 2019

81. On 9 September there was a third and final disciplinary hearing, Ms Roskin attended and took notes (page 355-358). The Claimant continued to raise issues with the IT spreadsheet and maintained that someone else must have accessed the system using her login details. Mr Whiteley did not find this argument very convincing for the reasons already given. He informed the Claimant of his decision during the hearing and it was later confirmed in writing, (pages 365-367). We find that the Mr Whiteley decided

to dismiss the Claimant on the basis of his genuine belief that the Claimant had forwarded confidential information to her personal email account in breach of the Respondent's Computer, E-mail and Internet Policy and that this amounted to gross misconduct under the Respondent's Disciplinary Procedure.

82. After being informed of the decision, the Claimant asked further questions about the IT spreadsheets, specifically in relation to the timing of her alleged access to the system. Mr Whiteley called Mr Soni and confirmed that Mr Soni would look into it for her. On 10 September Mr Soni sent an email (at 362-364) with the result of his investigation. Mr Whiteley had already made his decision, however, and he did not think that the matters raised by the Claimant would change the rationale of his decision. As far as he was concerned the fact remained that the Claimant had admitted to sending the emails to her personal email account; further explanations in respect of the timings on the IT spreadsheet would not have altered that and therefore would not affect the reason for his decision. He was therefore comfortable in continuing to uphold his decision is advance of the reply from Mr Soni.

83. We accept Mr Whiteley's evidence that ultimately the matters being raised by the Claimant in respect of the IT spreadsheet would not have made a difference to the conclusion that had already been communicated.

84. We are satisfied that the Respondent did conclude the investigation into the allegations of misconduct before reaching the decision to dismiss the Claimant. The Respondent continued to look into further queries raised by the Claimant relation to the IT data, and to provide her with the responses to those queries. We also find that the Claimant was provided with the IT report and login spreadsheet in advance of each hearing at which they were considered. They were not provided at the first hearing because they did not exist at that point; they were considered at the adjourned hearings on 16 August and 9 September. Further IT data was provided on 9 September, the Claimant had been provided with this in advance of that hearing. The Claimant raised further points in her appeal, which we will come to in due course.

85. The Claimant alleges that she was not provided with the Employee Handbook until 5 November, and, as a result, she claims not to have known that what she was doing was wrong, or a breach of the Respondent's policies. The Claimant accepted that she had been provided with and signed a contract. Her contract specifically makes reference to the Handbook and states that the Claimant is bound by the policies and is required to read them. The contract also makes clear that the Claimant is obliged to maintain confidentiality of the Respondent's information. We are satisfied that the policy was clear and the Claimant's attention was drawn to the fact that she was required to read the Handbook. The Claimant requested the computer policy and the employee handbook on the 27 September 2019 in response to receiving the decision letter, in order to prepare for appeal and this was sent to her on the 2 October 2019 (see page 373). We are satisfied that this was the first time that she made a request for the handbook. We find it was more likely than not that the Claimant received the Handbook when she received her contract and that it was sent also sent to her on 2 October, in response to her request, in advance of the appeal hearing.

86. The Claimant was reminded of the email confidentiality policy by Ms Roskin. We are satisfied that the Claimant was aware, or ought to have been aware, of the existence

of policy; we are also satisfied that she was aware that if she did not have a copy of it, she could have requested it. In evidence the Claimant accepted that the information that she had sent to her personal account was 'obviously' confidential information. The Claimant deleted six emails from her sent folder before the investigation, leaving two emails, knowing as she did that Ms Roskin was already aware of two emails having been sent from her work account to her home account.

87. The Claimant has also raised a complaint that the complete set of data behind the IT spreadsheets was not provided until the 23 March, we are satisfied that this refers to documents provided in disclosure in these proceedings which included the print outs of the underlying data from which the IT reports were produced. We find that after the initial investigation on 31 July further IT reports were prepared as a result of matters raised by the Claimant and in order to address the points that she raised; the reports were created during the course for the investigation and disciplinary process and were provided to the Claimant contemporaneously, that is, shortly after their creation.

The appeal

88. The Claimant's appeal was heard by Charlotte Purcell, who was the only Board member available to hear the Claimant's appeal at that time. Ms Purcell was sent a file of documents by Ms Roskin, it contained the documents relating to the investigation and disciplinary including the notes of the disciplinary hearing (pages 307-318, 322-347 and, 355-358); Mr Whiteley's disciplinary outcome letter (page 365-367): the IT spreadsheets that had been discussed during the disciplinary hearings, (pages 407-450); and the Claimant's appeal, (page 368-372 and 378). The Claimant was provided with a copy of the documents on the same day as her hearing and given time to review the documents at the outset of the hearing. We note that those were all documents that Claimant had already received and were not new to her on the morning of the appeal.

89. In her appeal, the Claimant raised that she had experienced bullying from Alexander Kosinski and Joanna Lambert. She set out examples of alleged bullying. Ms Purcell considered these to be serious allegations and wanted them investigated properly before hearing the appeal. Ms Roskin conducted an investigation and a report was prepared (pages 379-382); statements were taken from Ms Kosinksi (pages 385-387) and from Ms Lambert, (pages 374-376). Ms Purcell reviewed the reports and statements and carried out her own investigation by speaking to Ms Kosinski and Ms Lambert before the appeal hearing. Ms Purcell wanted to discuss the information in the hearing with the Claimant as well as the other grounds of appeal that she had raised.

90. The Claimant attended the appeal hearing on 5 November 2019 with her trade union representative, Mr Knowles-Oluwu. At the start of the hearing, Ms Roskin queried whether the Claimant was entitled to union representation from the union as she understood that you had to have been a union member for 6 months before representation would be provided. We find that this was rather an unfortunate and ill-advised intervention about a matter that was between the Claimant and her union. The hearing was adjourned to allow the Claimant and her rep to review the investigation reports and documentation and to allow for Ms Roskin's query to be raised with the union. There was a further break between 11:55 and 13:10 at the Claimant and her rep's request. The hearing got under way at 13:10. Ms Purcell that she told the tribunal that she had no objection to Mr Knowles-Olowu representing the Claimant at the hearing.

She told us that she wanted the hearing to be constructive and for the Claimant to be able to raise all the issues that she wanted. We are satisfied that Ms Purcell ensured that the Claimant and Mr Knowles-Olowu had every opportunity to raise any points they wished to make. The hearing concluded at 14:50. During the hearing the Claimant's union rep played some of the recording of her meeting on the 31 July with Ms Roskin. It was the first time the Respondent become aware that a recording existed.

91. Ms Purcell asked the Claimant whether she admitted sending the emails to herself. The Claimant accepted that she had, however the Claimant argued she did not realise that she was doing anything wrong. The Claimant was referred to the policies in the handbook, she argued it was not a contractual document and she was not aware of the policies. When it was asked why she did not raise the issues of bullying before, she did not respond. She was asked whether she was spoken to any of her colleagues about the bullying, she confirmed that she had not. A number of the incidents that had been raised were discussed and Ms Purcell explored them with the Claimant together with the statements from Ms Kosinski and Ms Lambert. The Claimant also complained that of the training programme had been carried out unfairly.

92. Towards the end of the hearing, the Claimant argued the IT spreadsheets, 407-450 used at the disciplinary hearing were inaccurate, showing she had logged in on the 27 July when she could not have done so because she was away in London and that somebody else could have been able to access her account. Ms Purcell agreed to carry out further investigations with the IT department. She adjourned the hearing to do so. The IT department looked into the queries and found that there was no login attempt on the 27 July, pages 397-400 and no evidence that anyone else had access to her account. In reaching her decision on the appeal, Ms Purcell took into account the matters the Claimant had raised but considered that the Claimant had admitted to sending the emails containing the confidential information to her personal account and, so the logins on the IT spreadsheets would not have altered the decision in any event.

93. Ms Purcell told the tribunal, and we accept, that she spent a considerable amount of time considering her decision: she considered the Claimant's representations, including the issues with the programme, the investigation into the allegations of bullying, and the disciplinary investigation and process. Ms Purcell concluded that Mr Whiteley had reached the correct decision. Ms Purcell appreciated that at the time of the emails, the Claimant had been going through a difficult time, coming to the end of the programme unsuccessfully, but she did not believe that this in any way justified the Claimant's conduct of sending confidential information to her personal email address. Ms Purcell addressed each of the grounds of appeal and she came to her own decisions on the bullying allegations. For the reasons set out in the appeal outcome letter, (page 402-406), and in her witness statement, paragraph 32 she rejected the appeal.

94. Ms Purcell told us that her decision was based on the Claimant's conduct and had nothing to do with the Claimant's age: she would have treated any other individual of any age in exactly the same way. Ms Purcell was satisfied that, as set out in the disciplinary procedure, the Claimant was guilty of gross misconduct and given the seriousness of the actions that it warranted summary dismissal. There was no evidence presented during the appeal that changed her decision. Ms Purcell found that the Claimant had broken the Respondent's trust and they could not allow her to continue with her employment with them due to their security concerns. Additionally, Ms Purcell considered if the covert

recording had been brought to the Respondent's attention before the dismissal, this in itself would have led to a disciplinary process.

95. We are satisfied that Ms Purcell gave an honest explanation for her decision and that the reasons she gave in her letter dated 18 November 2019 (pgs 402-406) were her genuine reasons for reaching her decision.

APPLICABLE LAW

Direct discrimination

96. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

97. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (age in this case), A treats B less favourably than A treats or would treat others. Where the claim is one of direct age discrimination, sub-section 13(2) allows for a defence of justification, however justification was not raised as a defence by the Respondent in this case: it simply denied there was any less favourable treatment because of age.

Causation

98. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. The council's motive, which had been benign, was besides the point. In that case the council had applied a criterion, though on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

99. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

Comparators

100. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the

purposes of section 13, the protected characteristic is disability.

101. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see, Ahsan v Watt [2007] UKHL 51.

102. Whether there is a factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

The burden of proof

103. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

104. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

105. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

106. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

107. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see

Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

108. If the Claimant does not prove such facts, his or her claim will fail.

109. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

110. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

> *"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'*

Guidance in the case law

111. In the case of London Borough of Islington v Ladele [2009] IRLR 154 at paragraph 40 the EAT gave further guidance on the question of comparison and the application of the burden of proof extracted from the relevant authorities, as follows:

> "(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572, 575 - 'this is the crucial question'. He also observed

that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial …

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the section 136 of the Equality Act 2010. These are set out in Igen. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

> 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the prohibited ground, then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in Zafar v Glasgow City Council [1997] IRLR 229:

> 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl v Law Society [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test … The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377 …

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in … *Ahsan* … a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):

> The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in *Shamoon* … Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:
>
> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
>
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …
>
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated … This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.
>
> 37. It is probably uncommon to find a real person who qualifies … as a statutory comparator. … At any rate, the question of whether the differences between the circumstances of the complainant and those of the

> putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.' "

Unfair dismissal

112. The Respondent relies on a reason related to the Claimant's conduct as a potentially fair reason for dismissal. The Tribunal must apply section 98(4) Employment Rights Act 1996, which provides: "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. "

113. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

114. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

115. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

a. The employer must show that he believed the employee was guilty of misconduct;
b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

116. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

117. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

118. In A v B [2003] IRLR 405, the Employment Appeal Tribunal said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. See also: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal held that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

119. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

120. In London Ambulance Service NHS Trust v Small [2009] IRLR 563 it was observed that "It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

121. Inconsistency of treatment between employees accused of the same offence is a factor Tribunals will take into account, although the respective roles each employee played in the incident, their past records, and their level of contrition may justify different treatment. The guiding principle is whether the distinction made by the employer was within the band of reasonable responses open to it; see Walpole v Vauxhall Motors Ltd 1998 EWCA Civ 706 CA. Consistency must mean consistency as between all employees of the employer; see Cain v Western Health Authority [1990] IRLR 168. However, the emphasis in section 98(4) is on the particular circumstances of the individual employee's case and the crucial question is whether the decision to dismiss fell within the range of

reasonable responses. An argument by a dismissed employee that the treatment he received was not on par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances:

(1) if there is evidence that employees have been led to believe by their employer that certain categories of conduct will be overlooked or not dealt with by the sanction of dismissal;
(2) where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for the dismissal
(3) evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate in the circumstances.

122. In Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, it was stated that it is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate. See also Paul v East Surrey District Health Authority [1995] IRLR 305 in which Beldam LJ stated that "ultimately the question for the employer is whether, in a particular case, dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct it would not be fair to change that policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified".

123. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

124. Defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly it procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.

Wrongful dismissal

125. Where the employee has been summarily dismissed and the issue raised is simply whether he was in fundamental breach of contract, the employment tribunal has to decide that question for itself, making its own findings of fact, based on its appreciation of the evidence before it, and, as necessary, its own evaluation of the conduct in question, and correctly applying the law to it.

126. It is well established that the nature and character of the implied duty of trust and confidence is that, if a breach of it is established, then such breach will inherently be fundamental – see **Morrow & Safeway Stores plc [2002] IRLR 9** and the earlier authorities to which it refers.

CONCLUSIONS

Less favourable treatment

127. We considered the complaints of discrimination before going on to consider the claims for unfair and wrongful dismissal: we did so in order to understand whether the decision to dismiss was tainted by discrimination in any way. We looked at the evidence in the round as well as focussing on each act of alleged less favourable treatment. The specific acts relied on as less favourable treatment because of age were:

(a) The Respondent's decision not to appoint the Claimant to the role of Junior Perfumer;

(b) The Respondent's monitoring of the Claimant's computer use;

(c) The Respondent's decision to subject the Claimant to disciplinary action on 6 August 2019, 16 August 2019, 9 September 2019 and 5 November 2019;

(d) The Respondent's decision to dismiss the Claimant on 9 September 2019;

(e) The Respondent's decision to dismiss the Claimant without notice or PILON on 9 September 2019

128. The hypothetical comparator relied upon had the following characteristics: "*someone who was deemed not to have met the requirements of the Trainee Perfumer Programme after reaching the end of that programme and who did not qualify as a Perfumer Assistant and facing the disciplinary issues faced by the Claimant at the time of each of the alleged acts of unfavourable treatment, including the Claimant herself, at a younger age, say age 30 and under.*"

129. We were unable to find any credible evidence to suggest, or from which we could infer, that someone who was younger than 30 would have been treated any differently in the same circumstances. There was no basis for alleging any less favourable treatment. We went on to consider the Respondent's explanation for its treatment of the Claimant and are satisfied that it has nothing to do with the Claimant's age.

130. We have found that the reason that the Claimant was not offered the role of junior perfumer was because she had not performed well enough over the course of the training programme. We have found that Ms Kosinski and Ms Lambert formed their assessment of the Claimant's performance based on their observations of her and the comments and feedback from her respective mentors, we have not found any credible evidence from which we could infer that their assessments were influenced in any way by her age.

131. We have found that the Respondent's decision to monitor, or rather investigate, the Claimant's computer use, was based on Ms Roskin's suspicion that all was not well based on her conversation with the Claimant on 31 July in which the Claimant was combative and obviously unhappy with the Respondent together with her knowledge that the Claimant had recently forwarded two internal work-related emails to her private email address. We are satisfied that the decision to investigate was not in any way influenced by the Claimant's age.

132. We are satisfied that the decision to subject the Claimant to the disciplinary process, which included holding disciplinary hearings on 6 August 2019, 16 August 2019, and 9 September 2019 and an appeal hearing 5 November 2019 was as a result of the information brought to light by the investigation on 31 July 2019 into the Claimant's work email account.

133. We note that Mr Parrott does not share the characteristics of the comparator identified by the Claimant in the list of issues agreed at the outset of the hearing, however the Claimant also compares her treatment to his. We have not found Mr Parrott to be an appropriate comparator, we find that his circumstances were materially different to those of the Claimant for the reasons set out below.

134. We are satisfied that Mr Whitelely had a genuine belief that the Claimant was guilty of gross misconduct and that is why he decided to dismiss her and to do so without notice on 9 September 2019. We considered whether the Claimant's age could have been a factor in the decision to pursue disciplinary action and the outcome, that is the decision to dismiss: we have rejected that suggestion, there is simply no cogent evidence from which we could reach that conclusion.

135. Having reached the conclusion that the Claimant's age did not have any bearing on the Respondent's treatment of her we turn to the complaints of unfair and wrongful dismissal

Unfair dismissal

The investigation and disciplinary process

136. The Claimant alleges that the Respondent did not have a valid reason before monitoring the Claimant's emails; we have found that the Respondent monitored the Claimant's emails due to reasonable suspicions that the Claimant was forwarding confidential information to her personal email address. We have not found that her emails were monitored because the Respondent was looking for a reason to dismiss her.

137. We have set out our findings in respect of the investigation and disciplinary process above. We are satisfied that the matters raised as criticism in the list of issues by the Claimant are not well founded. Further documents were provided to the Claimant, through the course of the disciplinary and the appeal; these were created in response to matters that she herself had raised. The Claimant was given the opportunity to consider those new documents and to respond at further hearings. We are satisfied that the material evidence upon which Mr Whiteley reached his decision was available to the Claimant.

138. The Claimant had an opportunity to raise any matters she saw fit throughout the disciplinary process and did so. We are also satisfied that the points raised by the Claimant were considered at the appeal, as was the Claimant's allegation that she had been bullied. In respect of the Claimant's evidence (the recording) that she did not state at the beginning of her meeting with Ms Roskin on 31 July 2019 that she had not received a meeting invitation, Ms Purcell accepted Ms Roskin's account: we are satisfied that this was within the range of reasonable responses open to her. As set out above, we are satisfied in any event that whether the remark was made or not, following the meeting on 31 July Ms Roskin had reasonable grounds for deciding to investigate the Claimant's email use.

139. The Claimant was given an opportunity to consider the statements produced as a result of the investigation into bullying before the appeal hearing and was taken through the responses and allowed to respond again in the appeal hearing. We note that when the Claimant asked for adjournments during the appeal, she was provided with them. She was represented by her union at that hearing. We are satisfied that she was given a reasonable opportunity to respond to the new material – which had been produced specifically in response to the allegations made by the Claimant in her appeal. We are satisfied the Claimant was given the opportunity to set out her case.

140. We find that the Respondent had carried out a thorough investigation, giving the Claimant multiple opportunities to make submissions and to put her account. Every time the Claimant had raised a point, the Respondent had taken time to investigate it. We are satisfied that the investigation was commensurate with the gravity of the charges and the potential effect on the employee and fell within the range of reasonable responses.

Decision to dismiss

141. We have not found the failure to provide the Handbook to mean that the Claimant ought not to have been aware that what she was doing was misconduct. We are satisfied that the Respondent had reasonable grounds for believing that she was aware of that what she was doing was wrong and that she had the policy drawn to her attention by Ms Roskin very shortly before sending an email containing confidential proprietary information to her private email on 31 July 2019.

142. The Claimant alleges that the decision to dismiss fell outside the range of reasonable responses, she compared her treatment to that of Mike Parrott who sent what she described as confidential information to her from his personal email address. Mr Parrot was a former employee of the Respondent who was engaged as a consultant; he sent emails to the Claimant in his capacity as coach to a trainee, some of the emails had a list of raw materials attached which the Claimant was to familiarise herself with

before their next training session. The Respondent points to the fact that, unlike the Claimant, he did not attach a complete list of all the raw materials used by the Respondent, nor did he attach pricing information alongside the raw materials, nor information in respect of quantities used in specific formula. We do not find that these are the same circumstances. We are satisfied that a partial list of ingredients is not the same as a full list with pricing and other proprietary information, formulas and fragrances.

143. We find that Mr Whiteley had reasonable grounds for believing that the Claimant had knowingly sent commercially sensitive proprietary information to her personal email account without permission, in breach of the Respondent's Computer use, Email and Internet Policy, compromising the security of the Respondent's intellectual property, breaching the contractual obligation of confidentially, and that she had also attempted to cover up her misconduct by deleting the emails from her sent items. We are satisfied that it was within the range of reasonable responses for the Respondent to draw adverse conclusions from the Claimant's conduct in deleting her sent emails as being evidence that the Claimant knew what she was doing was wrong and was attempting to cover her tracks.

144. We find that the reason for the Claimant's dismissal was the Respondent's genuine belief in her misconduct. We are satisfied the Respondent had reasonable grounds for believing that the Claimant was guilty of gross misconduct. We do not find that she was dismissed because she did not accept the Respondent's offer of a position as a QC Technician; or because the Respondent allegedly wanted to give the role of junior perfumer to another French national instead of her and/or because the Respondent had allegedly decided that the Claimant's face did not fit the organisation.

The Respondent's decision to dismiss the Claimant without notice or PILON on 9 September 2019

145. We are satisfied that in the circumstances the decision to dismiss summarily for gross misconduct was within the range of reasonable responses.

Wrongful dismissal

146. We find that when the conduct was put to the Claimant, she accepted that she had sent company intellectual property outside of CPL (see the note of the disciplinary hearing at p 357). We are satisfied on the balance of probabilities that the Claimant attempted to over her tracks by deleting some, but not all of the emails in her sent items folder, being aware that Ms Roskin already knew she had forwarded two meeting invites to herself. We find that the Claimant breached the Respondent's policy and tried to cover it up and that in doing so she also breached the implied term of trust and confidence.

147. The effect of the Respondent's policies contained in the handbook, in respect of the company property (page 144), security of computer system (page 160), computer internet and email policies (page 180), state that under no circumstances should the employee remove or transmit data without express permission and that doing so could lead to disciplinary action. The Claimant's contract (207-211) sets out the importance of confidentiality. The disciplinary procedure, (page 177) includes under gross misconduct communicating confidential information outside the company. The Claimant had admitted to sending the information to her private address, therefore, outside the

company. The Claimant made much of the grounds for investigation and the explanation for not being able to login to her emails remotely, but we find that this was an attempt to divert attention away from the conduct which she had admitted. We are satisfied that there was a breach of the policy. We are also satisfied that it was serious enough to amount to gross misconduct justifying the dismissal with immediate effect. Not only had the Claimant breached the policy, we have found, she had attempted to cover her tracks. As a result the Respondent could no longer be expected to have trust and confidence in her. We do not find that the Claimant was wrongfully dismissed.

Summary of conclusions

148. The claims for age discrimination, unfair dismissal and wrongful dismissal fail and are dismissed.

Employment Judge C Lewis
Dated: 30 August 2022