



EMPLOYMENT TRIBUNALS

Claimant: Ms J Liew

Respondent: Aurelius Investments Limited

Heard at: London Central (by Cloud Video Platform)

On: 21, 24, 25, 26 and 27 June 2024 and 1 and 2 August 2024 with further deliberations on 20 September 2024

Before: Employment Judge Joffe
Mr P Madelin
Mr P de Chaumont Rambert

Appearances

For the claimant: Represented herself for two days, subsequently Mr M Harris, lay representative

For the respondent: Ms B Balmelli, counsel

JUDGMENT

1. The complaints of direct sex discrimination are not well-founded and are dismissed.
2. The complaints of harassment related to sex are not well-founded and are dismissed.
3. The complaint of breach of a sex equality clause based on an assertion that the material factors relied on by the respondent were indirectly discriminatory is dismissed on withdrawal by the claimant.
4. The remaining complaints of breach of a sex equality clause are not well-founded and are dismissed.
5. The complaint of breach of contract in respect of bonus is well-founded. The respondent shall pay the claimant £14,307.69 as damages for breach of contract. This figure has been calculated using gross pay.

REASONS

Claims and issues

1. There was a list of issues which had largely been set out at a case management hearing in front of Employment Judge Hopton on 7 December 2023. It was as follows, subject to some amendments we discuss below.

A. TIME LIMITS

1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened on, or before, 20 April 2023 may not have been brought in time.

2. Were the discrimination claims made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2 If not, was there conduct extending over a period? 2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.4.1 Why were the complaints not made to the Tribunal in time?

2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

B. DIRECT SEX DISCRIMINATION (EQUALITY ACT 2010 SECTION 13)

3. Did the respondent do the following things:

3.1 Around Autumn 2021, Thomas März introducing the claimant to a portfolio company as a Project Manager rather than an Operations Manager which gave the impression she was working at a lower level.

3.2 Around winter 2022, Thomas März telling the claimant that her performance was “too top down”.

3.3 Excluding the claimant from Rivus/Pullman board meetings that male colleagues of her seniority attended.

3.4 On 12 March 2022, Stephan Rahmede assumed the claimant’s partner worked at the company instead of the claimant and then assumed the claimant worked in HR.

3.5 At the end of 2022, Magnus Zuther said to the claimant, "You look very nice. Thank you for getting dressed up for the meeting with me".

3.6 Between December 2022 to January 2023, Mogens Soeholm ridiculed the claimant for considering applying for a more senior role and not taking the claimant's promotion ambitions seriously.

3.7 In early 2023, Magnus Zuther failing to engage with the claimant around aligning her objectives with him (her reporting Vice President).

3.8 On 16 May 2023, Magnus Zuther commenting on a hole the claimant had on the side of her trousers, saying: "Well it looks like you have some air conditioning going through your pants. I guess that is one way to ask for a promotion".

3.9 On 02 June 2023, informing the claimant that her employment was being terminated due to performance issues when the claimant had received good feedback during her year-end performance reviews and was not subject to any performance management process.

3.10 On 02 June 2023, Thomas März informing the claimant that she "did not get along with senior management of the portfolio company".

3.11 Failing to comply with the claimant's data subject access request within the statutory timeframe.

4. Was that less favourable treatment?

4.1 The Claimant has confirmed that she is relying on Anthony Tan as her comparator for the purposes of her sex discrimination claim.

5. If so, was the less favourable treatment because of sex?

6. Did the respondent's treatment amount to a detriment?

C. HARASSMENT RELATED TO SEX (EQUALITY ACT 2010 SECTION 26)

7. Did the respondent do the following things:

7.1 Around Autumn 2021, Thomas März introducing the claimant to a portfolio company as a Project Manager rather than an Operations Manager which gave the impression she was working at a lower level.

7.2 Around winter 2022, Thomas März telling the claimant that her performance was "too top down".

7.3 Excluding the claimant from Rivus/Pullman board meetings that male colleagues of her seniority attended.

7.4 On 12 March 2022, Stephan Rahmede assumed the claimant's partner worked at the company instead of the claimant and then assumed the claimant worked in HR.

7.5 At the end of 2022, Magnus Zuther said to the claimant, "You look very nice. Thank you for getting dressed up for the meeting with me".

7.6 Between December 2022 to January 2023, Mogens Soeholm ridiculed the claimant for considering applying for a more senior role and not taking the claimant's promotion ambitions seriously.

7.7 In early 2023, Magnus Zuther failing to engage with the claimant around aligning her objectives with him (her reporting Vice President).

7.8 On 16 May 2023, Magnus Zuther commenting on a hole the claimant had on the side of her trousers, saying: "Well it looks like you have some air conditioning going through your pants. I guess that is one way to ask for a promotion".

8. If so, was that unwanted conduct?

9. Did it relate to sex?

10. Alternatively was it of a sexual nature?

11. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

12. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

D. REMEDY FOR DISCRIMINATION

13. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

14. What financial losses has the discrimination caused the claimant?

15. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

16. If not, for what period of loss should the claimant be compensated?

17. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

18. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

19. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

20. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

21. Did the respondent or the claimant unreasonably fail to comply with it?

22. If so is it just and equitable to increase or decrease any award payable to the claimant?

23. By what proportion, up to 25%?

24. Should interest be awarded? How much?

E. EQUAL PAY (EQUALITY ACT 2010 SECTION 64(1)(A) AND (B))

25. Was the claimant paid less than a real, male comparator (Anthony Tan)?

26. The respondent accepts that the claimant's work and the work done by Anthony Tan was "like work".

27. However, the respondent's decision to pay the claimant less than Anthony Tan was due to a material factor that was not directly or indirectly discriminatory on grounds of sex. Namely:

27.1 Anthony Tan's greater skill and experience; and

27.2 His consequent greater negotiating power.

27.3 His performance at the respondent.

28. If it is found that the material factor was indirectly discriminatory on grounds of sex, then the respondent contends that it was a proportionate means of achieving a legitimate aim of:

28.1 attracting and retaining the best talent; and

28.2 competing with its competitors.

F. UNAUTHORISED DEDUCTIONS

29. The claimant claims she was not paid a bonus payment.

29.1 Did the bonus amount to wages?

29.2 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

29.3 Were the wages paid to the claimant on termination of employment less than the wages that should have been paid?

29.4 How much is the claimant owed?

G. BREACH OF CONTRACT

30. Did this claim arise or was it outstanding when the claimant's employment ended?

31. Did the respondent do the following:

31.1 Fail to pay the claimant a bonus?

32. Was that a breach of contract?

33. How much should the claimant be awarded as damages?

Changes to issues at outset

2. The respondent conceded at the beginning of the hearing that it would be vicariously liable for the complaints against Mr Marz, Mr Zuther and Mr Soeholm, as they were acting as agents for the respondent. The respondent did not concede that Mr Rahmede was acting as its agent in respect of the complaint against Mr Rahmede or that senior management of the company Rivus were acting as the respondent's agent in inviting people to Rivus / Pullman board meetings.
3. Later in the hearing, the claimant withdrew her claim of indirect equal pay. Her representative then sought to revive that claim in submissions and we consider the position further in our conclusions.

Findings of fact

The hearing

Day 1

4. On the first day of the hearing, we were provided with a bundle running to something in excess of 320 pages, with insertions. We had witness statements as follows:
For the respondent:
 - Mr T Marz, operating partner at an Aurelius Group company;
 - Mr M Zuther, vice president in Aurelius Group companies;
 - Mr M Soeholm, vice president in Aurelius Group companies;
 - Mr S Rahmede, vice president in Aurelius Group companies;
 - Ms V Knight, CEO of Rivus Fleet Solutions Limited;
 - Ms A Hartmann, HR Director for Aurelius Group.For the claimant:
 - A statement and a supplementary statement for herself;
 - Mr C Droghoff, the claimant's former partner.
5. There were a number of applications made on the first day of the hearing. We heard an application from the claimant to postpone the hearing so that her recently appointed lay representative could represent her. This was essentially the same application already made and rejected by Employment Judge Smart. There was no material change in circumstances since that application and we did not grant a postponement for reasons we explained orally at the hearing.
6. In the course of her application, the claimant said that she felt able to be cross examined herself but not to cross examine the respondent's witnesses. The claimant's representative was not available for the first two days of the hearing. It appeared to us that we could alleviate the disadvantages to the claimant by:

- a. Doing our reading for the remainder of the first day of the hearing;
 - b. Hearing the claimant's evidence on the second day. The respondent agreed to provide Mr Harris with a copy of its notes of the hearing that day;
 - c. Allowing the claimant to present an opening note from Mr Harris on the second day of the hearing;
 - d. Allowing the claimant to add to her evidence in chief answers to any supplementary questions Mr Harris would have asked her to the extent that those questions would have been allowed if asked by Mr Harris.
7. The claimant had been represented by two different sets of solicitors from a point before the claim form was presented. She disinstructed her most recent solicitors on 12 June 2024, having found Mr Harris via a friend the day before. Mr Harris had been called to the Bar but was providing his services pro bono as a lay representative.
 8. There was also a discussion about the list of issues. In particular, the respondent asked if an indirect equal pay claim was pursued and if so, how the claimant put her case. The claimant agreed she would discuss that matter with Mr Harris.
 9. The respondent raised objections to and sought to strike out paragraphs of the claimant's witness statements which were said to contain new allegations by way of background which the respondent had not had a chance to deal with.
 10. The Tribunal considered that it would be appropriate to hear the evidence before considering whether it would be fair to disregard those matters. There was no application to amend to add these matters as substantive claims either at the outset of the hearing or subsequently when Mr Harris appeared and we made it clear that we were not considering them as substantive allegations.
 11. The claimant objected to Ms Knight's statement being admitted in evidence and also wished to bring a 'rebuttal witness'. We had no statement from a rebuttal witness and indicated that we could not hear an application to admit a new statement / new witness without a statement. Ultimately that application was not pursued.
 12. The basis for seeking to exclude Ms Knight's evidence was that the claimant said that Ms Knight's evidence was untrue and that Ms Knight had not had an adequate opportunity to see the claimant's performance in order to comment on it. These were of course matters of dispute between the parties and Ms Knight's evidence, if true, was relevant to the issues we had to decide. There was no basis for excluding it; its veracity could be tested in cross examination.

Day 2

13. The claimant told the Tribunal that she had spoken with Mr Harris about the indirect equal pay claim and she was happy to withdraw it. I indicated that it would therefore be dismissed.
14. Mr Droghoff attended but it became apparent before his evidence commenced that he was in Germany. There is no permission from the German government for evidence to be given from Germany in Employment Tribunals in England and Wales. We were therefore unable to hear Mr Droghoff's evidence. The claimant said that Mr Droghoff might fly to England to give his evidence and the respondent said that it would not object to his evidence being interposed at a later time. Ultimately Mr Droghoff did not appear as a witness.
15. The claimant gave her evidence.

Day 3

16. Mr Harris wrote to the Tribunal to say that he had been taken ill and asked for postponement of the hearing for a day. The claimant had not prepared to cross examine the respondent's witnesses as she was expecting to be represented by Mr Harris.
17. After discussion as to how the evidence and submissions could still be concluded in the days left in the listing, with Tribunal deliberations deferred to a later date, we decided it was in the interests of justice to allow the postponement so that Mr Harris could attend or, if not, at least the claimant would be able to prepare to cross examine. We explained that she should be prepared to cross examine herself if Mr Harris continued to be well.
18. We note that one effect of this postponement was that the respondent's witnesses, some of whom had travelled from abroad, had to rearrange their own plans. The respondent's solicitor had attempted to engage with Mr Harris about how long he would be in cross examination of each of the respondent's witnesses but had not at that point had a response from Mr Harris.

Day 4

19. Mr Harris attended and represented the claimant. It is relevant in light of submissions made by the claimant about matters which were not put to witnesses to record that we discussed timing in detail with the parties. We canvassed with the parties whether all of the remaining time would be

required for evidence. Mr Harris gave estimates for the time he required with each witness. In fact these times were exceeded and we continued to have to adjust the timings for the remaining witnesses. With the earlier witnesses, we did not guillotine the evidence because we were conscious that Mr Harris was not a legal representative but we note that we considered the time available was sufficient to cross examine the witnesses on the issues. It seemed to us that time was sometimes wasted on irrelevant matters or in repetition of questions and at times we guided Mr Harris to move on and directed him to the list of issues.

Day 5

20. We started the hearing at 9:30 in order to fit in the remaining witnesses. Mr Harris had indicated that he needed an hour with Ms Knight. The respondent explained that Ms Knight could not give evidence past 4 pm. Ms Knight ultimately stayed until 4:15. On Mr Harris' estimates of the time he required with each witness, this should not have presented difficulties. However, Mr Harris indicated he needed a further half hour with Mr Zuther and then spent longer with Mr Zuther than he had estimated by a significant margin with the result that he ultimately only had about 45 minutes to cross examine Ms Knight. The Tribunal had taken a shorter lunch break to accommodate the evidence. We did not consider that the time Mr Harris had with Ms Knight was inadequate to cover the limited number of issues Ms Knight could speak to.

Facts in the claim

21. The respondent is part of a larger group which is in the investment sector, with a focus on private equity, private debt and real estate. The headquarters of the group is in Germany. The group invests globally in portfolio companies with the aim of running the businesses profitably or preparing them for sale. The industry is competitive and Mr Marz told us that the respondent feels the need to 'attract and retain top talent'.
22. On 20 September 2021, the claimant commenced employment with the respondent as a senior manager operations in the operations team of the UK division in London.
23. The claimant was employed on a salary of £115,000 with a bonus of up to £30,000 subject to the following clauses of her contract:

9.1 The parties shall seek to agree each calendar year beginning with the year 2021 objectives for the Employee against which the Employee's performance shall be measured and the percentage of bonus that shall be assigned to the successful completion of each objective. In the event of a failure to agree objectives between the parties the Company shall be at liberty to set such objectives as it reasonably decides are appropriate.

9.2 If the Employee fully or partially achieves the objectives set by the Company referred to in clause 9.1, the Employee shall be entitled to receive payment of a bonus of up to £30,000.00 gross per calendar year. The final amount of the bonus payment shall be determined at the sole discretion of the Company and may be paid at a reduced percentage should the Employee have only partially achieved the objectives. Should a bonus become payable it shall be due for payment minus any statutory deductions, in January of the subsequent year. If the Appointment commences or terminates part way through a calendar year any bonus arrangement shall be calculated on a pro-rated basis.

24. The claimant was the first and only woman in a team of more than 100 in operations. She was primarily based in Doncaster working on the portfolio company, Pullman Fleet Solutions Limited ('Pullman'). She also travelled to Birmingham. She would stay in hotels in both of these locations. She said that she was not reimbursed for her meal expenses. Ms Hartmann gave some evidence about meal expenses. She said that there had historically been no policy for expensing meals, for any employee male or female. From January 2023, people who travelled and stayed overnight were expensed 35 euros per night. The policy applied to men and women. Ms Hartmann was not cross examined about her evidence on the meal expenses policy.
25. The relevant background is that Rivus Fleet Solutions Limited ('Rivus') was acquired by the respondent in in 2019. Pullman was acquired in 2020. As of 28 February 2022, the two companies were partially integrated. The integrated entity was known as Rivus although the companies were operating as two legal entities. As of September 2020, Ms Knight was Rivus' HR director. In Janaury 2023, Ms Knight became interim CEO and was made permanent in February 2023. There were other women in the Rivus executive.
26. Thomas Marz was an operating partner and the claimant's line manager. He had recently been a senior manager of operations. His line manager was Mr M Zuther.
27. We were told that the hierarchy is:
 - Manager of operations ('MO')
 - Senior manager of operations ('SMO')
 - Director
 - Operating partner.
28. MOs and SMOs are assigned to portfolio companies; usually an SMO has just one portfolio company but might have two if there are smaller projects. An SMO tends to be assigned to a portfolio company for 12 – 18 months.
29. The claimant was assigned a mentor from a different part of the business, Mr M Soeholm.

30. The claimant said she was told, and it was well known within the firm that Mr Zuther and Mr Soeholm were good friends. That was denied by Mr Zuther and Mr Soeholm.
31. There were two SMOs in the UK at the time. We were told that the 2021 – 2022 salary band for SMOs was £110,000 – 150,000.
32. The claimant gave some evidence about what she said was the culture at the respondent. She said there was a cultural clash between the respondent and what she was used to. She suggested that in German companies staff ‘expressing positive contributions and sharing their constructive opinions on any given issue is wholly unwelcome.’ She said that it was a ‘top down’ company where orders were sent out and it was expected that they would be followed.
33. On 1 October 2021, an email was sent widely welcoming a number of new recruits by Ms H Adams-Tenschert:

Please join us in welcoming our new colleagues who has started at AURELIUS within the last few weeks, This time we are particularly excited to have gained additional female support for our operations team by Jessica Liew. [smiley emoji]!

More words of welcome followed and congratulations on some promotions. There was an attachment about the new recruits which was not provided in the bundle.
34. The claimant raised as an issue (although not as a substantive complaint) that there was something wrong with the way that the email was phrased; it drew attention to her sex and also suggested that she was being employed in a support role. She was cross examined to the effect that if the email had caused her significant distress she would have raised the matter with someone. She said that she was in the first month of the job at the time. As to the email itself, she said she could not see the need for her being announced on the basis of her gender and thought ‘support’ was not a great word.
35. She complained that in autumn 2021, Mr Marz introduced her to the portfolio company as a project manager rather than as a senior operations manager, which downgraded her role.
36. Mr Marz’s explanation for this was that Pullman had not previously had a project management team and Pullman managers and staff were unaware of the role of senior managers of operations. He thought that this introduction made the claimant’s position and her main responsibilities clear. He did not intend to give the impression that she was less senior or working at a lower level. He said that he would have introduced a male SMO in same way. He said that as it was crucial for the respondent to secure the buy in of management of the portfolio company, he would not have introduced the claimant in a way which would have undermined the group’s involvement in any way.

37. He said that he himself was effectively a project manager in his portfolio company and defines himself in that way when explaining initiatives to the company. He said that he had introduced previous SMOs for Rivus in the same way. He introduced the claimant a number of times in different ways depending on the audience; he was introducing the claimant to project managers of Pullman, to people in the finance department, accountants, HR, payroll, team leaders of call centres, garage managers in workshops. He said that it was clear to these people that the claimant was part of the Aurelius taskforce and a senior part of the shareholder team.
38. The claimant said in cross examination that she did not know anyone else introduced in that way; there were two other operations managers. She thought it would have been very clear what her role was if Mr Marz had said she was from Aurelius and was senior operations manager. She agreed it was illogical for Mr Marz to reduce her status but said that they were 'happy to tear down their own in the Aurelius world'.

The claimant being excluded from board meetings of the portfolio company

39. The claimant said that she was led to believe she would be invited to the board meetings of the portfolio company periodically. She said that it was an essential feature of her job. She said that her colleague Mr Gibbels attended platform portfolio company meetings (by which we understood her to be referring to Rivus board meetings). She said that he asked her why she was not attending board meetings and expressed surprise when she said she was not invited. She said that she was met with derision when she challenged it and was told her attendance was not required.
40. The respondent's position was that the claimant was invited to a Rivus board meeting in November 2021. Mr Zuther said that she was asked to report on Pullman at the board meeting and did not do a good job as her report lacked insight and detail and she failed to instil confidence in the other attendees.
41. Mr Zuther was cross examined to the effect that this was unreasonable as the claimant was new at the time. Mr Zuther said that four to six weeks in the business was enough time to have done the due diligence given the environment they were working in; that was why they hired people 'at that level'.
42. The claimant said that it was not fed back to her that she had not done a good job at the board meeting.
43. The respondent's case was that in any event invitations to board meetings were a matter for the CEOs of the portfolio companies. The claimant said that the respondent had a 'massive say' as to who went to meetings. Mr Zuther said he could ask for people to attend but the portfolio companies had the

ultimate say. Some SMOs and MOs never attended these meetings. Ms Knight was not cross examined on this subject.

44. We saw some documents which showed the invitees to Rivus board meetings over the relevant period. We could see that there were female invitees but these seem to all have been Rivus executives.

2021 assessment

45. Mr Marz was required to assess the claimant's performance for 2021 in order for her bonus to be assessed. The claimant had four targets and Mr Marz assessed her performance against these targets at between 35 and 50%, which was considered a very poor level of performance. The form he used has a section for assessing performance against targets and another section where performance against attributes was scored. The commentary on the form where he made the assessment does not cast much light on what was considered inadequate about the claimant's performance at this point and she was rated as 'good' on many areas of performance such as 'team competence' although a number of others appear to have been rated as 'not observed'.

46. Mr Marz sent Mr Zuther a copy of this assessment on 25 November 2022. Mr Zuther replied:

Phew – we have to talk about that – including what the clear message is! I'll be here for another hour and then a quick visit to the orthopedist – now or later?

47. Mr Marz sent a further version to Mr Zuther that evening after they spoke. He commented:

She has collected a lot and "at the end" wanted to present everything a la consulting / project completion

I explained to her my view of structure, documentation and transparency, and she'll be fine.

48. Mr Zuther replied:

'...it's good to talk [Smiley emoji]

And you want to stick with 'not observed'?...that's devastating'

49. The gist of the respondent's case on what the Tribunal found to be these rather opaque assessment documents was that 'not observed' referred to the 'not observed' for 'leadership' and was a negative reflection on performance rather than a neutral observation. When that was put to the claimant, she asked why she had not been given a 4 in that case (the lowest numerical grade for performance).

50. Mr Marz told us that he and Mr Zuther discussed that if Mr Marz scored the claimant so low against her objectives, they would have to speak to senior leaders in the group about the situation. They felt that as the claimant had only recently started, they would give her the benefit of the doubt and offer her as much support as they could to help her improve. Because they did not want to demotivate her, Mr Marz revised his preliminary evaluation around 7 December 2021 and scored the claimant 90, 70, 80 and 70% across the various targets. Mr Marz sent the new scores to Mr Zuther that day. The claimant was given an overall score of 85% against targets and a rating of 'good'. Areas for improvement were identified as 'project restructuring, documentation and execution, working with PMO tools, independent multi project management and team and stakeholder management'.
51. It was put to Mr Marz in cross examination that inflating the claimant's score to 85% destroyed the credibility of the performance review process. He said that there were clear objectives but that it was only fair to evaluate them against a full year; this sort of short service situation was one occasion where an additional bonus might be justified but they would not be allowed to do that in any other year.
52. On 10 December 2021, the claimant emailed her agreed targets and her self evaluation to Mr Marz and on 13 December 2021, Mr Marz emailed the claimant saying it was a good overview and inviting the claimant to have a chat or call if she wished. The claimant did not request a chat or call.
53. On 14 December 2021, Mr Schoefer (head of HR) wrote to Mr Zuther: 'Dirk said he didn't like Jess that much . Can you confirm that, how do you see her?'
- The subject line was 'Jess Liew – performance. Dirk is Dirk Markus, the group CEO.
54. The respondent said about this email that Mr Markus would have seen the claimant at the Rivus board meeting in November 2021.
55. Mr Zuther responded to Mr Schoefer saying that the claimant was under pressure to deliver and got up to speed too late. He said that he was 'critical but not hopeless' and that they were watching her very closely. After the last feedback discussion she woke up and accelerated more. She also had 'communication deficits with employees' and had to work on 'implementation speed, pragmatism and EBITDA orientation'.
56. Mr Schoefer replied:
- So you seem to be happy. Maybe you could talk to Dirk so that we don't make a decision too quickly.*
57. On 18 January 2022, the claimant, Mr Marz and Mr Zuther met for the evaluation of the claimant's performance. She was told she would receive 85% of her maximum possible bonus. She would have seen from the document that she was evaluated as a 2 or 'good' overall but with a 3 for 'fair'

for 'holistic perspective' and 'result protection'. She would have seen that there were comments about improvements to be made, such as:

'improve individual leadership and communication with regard to different levels in the organisation and skill sets'

'be more pragmatic with implementation'.

58. On 28 February 2022, Pullman partially merged with Rivus and was then known as Rivus. The senior management teams were linked and we were told that they were 'the same group of people'.
59. In terms of the claimant's involvement, Mr Marz told the Tribunal that when the claimant started employment, the opportunity to merge Pullman and Rivus had been identified. Pullman was making heavy losses and the claimant's role was to establish a project management office to identify and explore opportunities for synergy and improved efficiency between the two. When the merger of the two paused, there was greater emphasis on the claimant focussing on standalone improvements for Pullman.

Ski trip comments

60. On 12 March 2022, the claimant was attending a ski trip arranged by the group in Austria, to which partners were invited. This was a trip arranged by the company in Austria. Partners were invited too and Mr Droghoff attended with the claimant.
61. The claimant told the Tribunal that Mr Droghoff told her about a conversation with Mr Rahmede at a formal dinner at the ski resort. She witnessed the conversation but it was in German. She said that Mr Rahmede initially thought her partner must be the employee of company and when he realised the claimant was the employee, he assumed she must be working in HR or some junior administrative role. She said that Mr Rahmede continued to talk across her and address her partner.
62. Mr Droghoff gave evidence in a witness statement which was not tested in cross examination. He attended a formal dinner in the resort. He was sat next to Mr Rahmede. They had a generic and polite conversation in German. Mr Rahmede asked him what division of company he worked for. He corrected Mr Rahmede and said it was his partner who worked for the company. Mr Rahmede asked whether the claimant's role was in HR or as an administrator. Mr Droghoff said that when he put Mr Rahmede right, Mr Rahmede continued to discuss other things with Mr Droghoff and did not engage in conversation with the claimant or ask any questions about her or her role or attempt to introduce himself.
63. Mr Rahmede had a vague recollection of speaking with the claimant but believed the conversation was in the bar on the Friday night of the trip not at the formal dinner on the Saturday night. He said that he was not on a table

with the claimant for the formal dinner. The fact that Mr Droghoff spoke German would have led him to think that he was the employee. He said that he had never met the claimant prior to this occasion so it was probable that he asked whether it was her or her partner who was employed by the group. When he met her she was standing with a group who included members of the HR team so if he assumed she was in HR, that was the reason. He did not recall that conversation.

64. The claimant said that Mr Rahmede would / should have known who she was. She said that she was only female employee of Asian heritage working in the company. Mr Rahmede said that because of the pandemic he had not interacted with many people in the group from 2020 – 2022. He did not know the entire operations team and worked in a dedicated portfolio company. Even if they had been at one of the group's large meetings together before the trip, there were 150 – 200 people at meetings of that type. He might reasonably not have met her / not have known who she was.
65. So far as the allegation of speaking across the claimant was concerned, Mr Rahmede accepted in cross examination that he may have continued to speak to her partner even when knew it was the claimant who was the employee. He said that it was polite and his personal style to involve partners of colleagues and to speak with them as equal to colleagues. He could not remember if the claimant had attempted to speak to him whilst he was speaking to her partner but if that had happened his intention would not have been to make the claimant feel inferior.
66. We had some conflicting evidence from the parties about whether the encounter occurred in the bar or at a formal dinner. The respondent produced a seating plan which showed Mr Rahmede at a dinner not sat with the claimant and her partner. Ms Hartmann gave some evidence that this was the seating plan for the formal dinner on the March 2022 ski trip. The claimant said that there was more than one sit down or formal dinner during the trip and the seating plan produced did not reflect the dinner at which the remarks were made.

Mallorca incident

67. The claimant gave evidence that she attended a firm-wide conference in Mallorca in May 2022 and witnessed an incident involving Mr Zuther. One evening as she was leaving dinner, she saw a young woman who works as an executive administrator standing outside crying. She said that Mr Zuther put his arms around the young woman in a 'predatory' way. She said that the woman did not look comfortable and that it was clear that Mr Zuther was seeking to take advantage of her. She said that at a later point Mr Zuther was referred to by some colleagues as a 'reptile' because of his predatory behaviour towards women.
68. Mr Zuther gave evidence about the Mallorca incident. He said that the former assistant to one of the MDs had been overwhelmed by the stress of

organising the event. He and other colleagues helped her to get out of the event room to recover. He embraced her to console her. She took the next day off work and thanked him for his support. He was not challenged on that account in cross examination.

Claimant's performance in 2022

69. Mr Marz said he spent time advising, guiding and mentoring the claimant but her performance did not improve. He said that he highlighted the need for her to improve her communication skills and implement structured processes for each project.
70. In December 2022 and January 2023, the claimant's performance was being assessed for the next bonus round. The claimant's account of her discussions with Mr Marz was that she was told that she would be receiving 80% and when she challenged Mr Marz about why the score was no higher and what she could do to improve, he said 'well, we have to knock something off'. She relied on that discussion as showing that she was performing very well and meeting all of her objectives.
71. Mr Marz (who is a native German speaker) said that was not something he would say; he had had to google the expression. He expected people to achieve 100% so it was not a sentiment he would have expressed. He was not cross examined about his account.
72. The claimant said that after this discussion, she raised the matter with Mr Soeholm, who told her to speak to Mr Zuther but Mr Zuther referred her back to Mr Marz again; she was frustrated.
73. The chronology of the performance discussions was somewhat unclear. There were discussions between Mr Marz and Mr Zuther and discussions between both and the claimant.
74. Mr Zuther said that he and Mr Marz had met with the claimant in December 2022 to evaluate her performance. The rating of 80% against objectives was considered to be very poor. In the other section of the assessment form, the claimant received an overall rating of 2 again, with 3s for 'holistic perspective', 'communication' and 'natural authority'. Mr Zuther suggested that the overall rating was part of an effort to support the claimant. We could see that there were constructive criticisms in the narrative section of the document but that the outcome was reasonably optimistic:

Areas with potential for improvement: To further grow into the SMO role it is key to focus more on project execution and delivering quantified results. Leading independently a multi-project management with an end-to-end responsibility will help foster the development. Ensure stricter governance and documentation to secure results.

Recommendation: Due to the delay of the integration project there are several projects/initiatives in the pipeline to be delivered in H1/23. Together with the continuous standalone structure of Pullman where Jessica is a key knowledge stakeholder, she is best placed to deliver the projects and support on the implementation of strategic decisions with Pullmans in the next months. Thus, and in line with the clear improvements in H2/22 and some ongoing support, Jessica can grow further into her role.

75. On 8 December 2022 Mr Zuther emailed Mr Soeholm about the evaluation:
We made several rounds to sharpen the evaluation..
Jess made progress but the overall conclusion stays the same
Will give you a call
76. Some time between December 2022 and January 2023, the claimant said that Mr Soeholm ridiculed her for considering applying for a more senior role and did not take her ambitions seriously. It appeared that this related to the role of managing director of Pullman which the claimant had expressed an interest in.
77. Mr Soeholm did not recall the exact conversation with the claimant about this role. He said that he did not ridicule her but was surprised by her suggestion as it came out of the blue. He said that his reaction might have been visible because he was very very surprised. Because of his surprise, he asked her questions to see why she thought she was a good fit for the role. He asked her whom she had spoken to; he said that he would have expected her to discuss the possibility with Mr Marz or Mr Zuther and was surprised she had not. He denied that he was dismissive and said he was trying to understand why the claimant thought she was a good fit and to encourage her to speak to the people who would make the decision. He said that when she raised the matter he thought he said, 'Seriously?', and then asked her why she thought she was a candidate. She said that she knew the company and the challenge.
78. Cross examined about whether his responses to the claimant were because of her sex, Mr Soeholm said that he had promoted a lot of women in his career and that the best management team he ever built and worked with was 80% women.
79. When it was put to him that in a majority male environment it would be more difficult for the claimant to establish relationships than for a man, Mr Soeholm expressed the view that it could sometimes be the opposite as females often have stronger social skills so might find it easier to form relationships.
80. On 13 December 2022, the claimant emailed Mr Zuther asking to catch up for feedback on her performance. There was no email in response. Mr Zuther said that if he failed to respond it would have been because of busyness at year end.

81. The claimant's account of this time is that she felt she had not received an explanation as to why she did not score higher. She developed self doubt and lost confidence because of the attitude of her managers to her. She said that they were just tolerating her as they were professionally required to do so.

Allegation about Mr Zuther complimenting the claimant's appearance

82. One of the claimant's complaints of harassment was that there was an occasion during a meeting when Mr Zuther said to her: 'You look very nice. Thanks for getting all dressed up for me.' She said that at the time she was wearing a black long sleeved top and trousers with no skin on her legs or cleavage on show.
83. The claimant said by way of background that Mr Zuther would regularly start meetings by saying to the claimant: 'You look nice'. She said that she attended at most ten meetings with him during her tenure at the respondent. She never heard him complimenting a man. She said that she did not approach HR at the time because she did not see what would be achieved and thought it would hasten her dismissal in a male dominated environment.
84. The claimant said that on the particular occasion she relied on as harassment Mr Marz then said: 'She always dresses like that.' In cross examination, the claimant said that she was not saying Mr Marz was being sexist but that he would not stand up against the treatment she was receiving.
85. Mr Zuther's evidence was that he had not and would never make a comment like the one the claimant said he made. Mr Marz's evidence was that he was present at most meetings involving the claimant and Mr Zuther; Mr Zuther had never started a meeting by commenting on the claimant's appearance. He would have intervened if he heard something like that.
86. In the claimant's submissions, it was suggested that Mr Marz regularly endorsed Mr Zuther's comments about appearance. The claimant did not give evidence to that effect and it was not put to Mr Marz in cross examination.
87. A difficulty with the claimant's statement was that it was presented in a somewhat thematic rather than chronological way and it was not always clear when particular matters were said to have taken place. The claimant said that Mr Marz criticised her as being 'too top down'. This appears to have been in the winter of 2022.
88. Mr Marz's evidence was that he did not remember saying that but accepted he may have said something similar because one of his concerns was that the claimant did not win the hearts and minds of senior management at Pullman. He said that he would have said the same thing to a man about whom he had a similar concern.

89. In cross examination the claimant said that this was Mr Marz criticising her for being too assertive.
90. On 1 January 2023, the claimant was sent a letter confirming her discretionary bonus calculated at 80% of the maximum. She also got an additional special bonus of £3000 which we understood was a bonus paid to all employees to mitigate the effects of inflation.
91. At some point in January 2023, the claimant had a meeting about her performance review with Messrs Marz, Zuther and Soeholm. The claimant accepted that performance issues were raised at this meeting. Mr Marz said that he gave feedback that the claimant was not working at the standard expected of an SMO and was not working with the expected level of independence, autonomy or with the expected level of skills in communication, leadership or project delivery.
92. In oral evidence to the Tribunal, the claimant said that at this meeting there was yelling and she was told she was not performing because she had not done a full restructuring when that was not part of her objectives.
93. Mr Soeholm denied that there was yelling or that the meeting was hostile or that he had constantly interrupted the claimant. He said that shouting or hostility would have been very unusual for this kind of meeting and that it was handled gently and objectively.
94. Mr Soeholm was cross examined about an email he sent to Ms Hartmann in which he said that the target evaluation had been discussed 'intensively' and then added a smiley emoji.
95. Mr Soeholm said that the smiley emoji was because he and Ms Hartmann had been aware that this would not be an easy discussion. He said that perhaps the emoji was not appropriate; smileys can be misunderstood. It was a difficult meeting.
96. The respondent's witnesses denied that the claimant was told she was not performing due to not having carried out a full restructuring. The change to restructuring rather than integration of Pullman occurred in Q4 2022 and they would not have expected the claimant to do a full restructuring by that stage
97. After the performance meeting, the claimant said in evidence that she decided that she had bitten her tongue for too long and things needed to be escalated to HR. She set up a meeting with Ms Hartmann by email; she asked in her emails to 'connect regarding year end reviews' and get a 'second opinion on my current situation'.
98. On 18 January 2023, the claimant had a meeting with Ms Hartmann. Ms Hartmann did not make a note of the meeting and nor did the claimant.
99. The claimant said that she raised her performance review and the fact that she felt it was unfair. She gave evidence that she said that the comments and the way Mr Zuther was approaching her review process felt very personal to

her as they were not related to the objectives which had been agreed with Mr Marz. She said that she was being asked to do things outside of her normal course of work. These mini side projects were distracting and took up time she should have used to concentrate on her commercial objectives.

100. We note that we did not hear evidence about the 'mini side projects'.
101. The claimant accepted that she did not expressly raise sex discrimination at the meeting but said that she said her review was handled differently from those of her colleagues and that, given the fact that she was a woman and the gender ratio, it would have been obvious to Ms Hartmann that she was making such a complaint.
102. The claimant did not raise any of the particular examples of sex discrimination or incidents of sexual harassment which had by that time occurred at her meeting with Ms Hartmann.
103. The claimant said that Ms Hartmann's response was to ask her: 'What would you like me to do about it?' rather than suggesting any solutions. She said that no action was taken by HR after the meeting.
104. The claimant said in cross examination that although she had stopped biting her tongue, she still did not want to make allegations about sexual harassment or sex discrimination overtly. She felt that she had to tread very carefully in a very political environment and that raising issues of harassment and discrimination would impact her career. She did not want to rock the boat. She felt the situation she described was sex discrimination but did not use those words. 'If you look at the gender ratio in the firm I think it is obvious what this alludes to.'
105. The claimant said that she was looking for another job and going to interviews. She was also hoping to get a new portfolio company and cease working with Mr Marz and Mr Zuther. That might improve the situation. Some individuals at the top of the company were OK.
106. The claimant said in cross examination that she did not set up the meeting with Ms Hartmann because she felt that her mark was bad; the ratings indicated that her performance was good. She said that she was concerned about the fact that she had a call with Mr Zuther and Mr Soeholm where she was criticised for not performing outside of her objectives. This was the occasion when she said that they yelled at her. The yelling was not mentioned prior to the claimant's oral evidence to the Tribunal.
107. Ms Hartmann gave a rather different account of the meeting. She said that the meeting was about career progression and the claimant being keen to grow in company and asking what she could do to grow. Ms Hartmann said that she explained that the claimant would need to speak to Mr Marz and Mr Zuther and that career progression was about meeting targets and goals. Ms Hartmann said the claimant did not make an allegation about yelling. She would have escalated any such allegation as it would have been very

inappropriate had it happened. Ms Hartmann said that she did not minute the meeting but would have done so if something concerning had been raised.

108. The claimant also told the Tribunal that she had had some previous meetings with a more junior employee in HR, Ms S Hawkins. We were provided with no real detail about those meetings save that that the claimant accepted she had not expressly raised harassment or discrimination at those meetings. Although Ms Hartmann was cross examined to the effect that the claimant had previously raised the negative feedback she had received from Mr Zuther and Mr Soeholm on a number of occasions, we had no evidence from the claimant to that effect.
109. Similarly in the claimant's submissions, it was suggested that she raised issues with Ms Hawkins and that her complaints were repeatedly underplayed and batted away. However the claimant had not given that evidence and nor was that assertion put to Ms Hartmann.
110. The claimant's evidence was that things deteriorated for her at the respondent after she raised issues with Ms Hartmann.
111. On 23 January 2023, Mr Soeholm emailed the claimant about signing off on her objectives. Following on from the talk they had, he asked if she had been through the points and had further questions. If not, could she sign and return the document to Mr Zuther or himself as soon as possible? He chased her for a response on 27 January 2023. The claimants said in evidence that she was very busy at the time, needed more time to review the document and planned to get back to them.
112. Mr Soeholm and Mr Zuther exchanged emails about the lack of reply from the claimant and Mr Soeholm commented:
Yes – just confirming her immaturity and insecurity. Our evaluation is right of her.
113. Mr Soeholm was cross examined to the effect that these remark were gender specific.
114. His evidence in response was that:
 - Immaturity: This was not about physical age but about knowing how to act in a certain situation. It was about sending someone with the right level of maturity into a portfolio company;
 - Insecurity: He said he had had a similar conversation with a man who was not performing well in a role. Insecure meant unsure about things. She was insecure about very basic stuff such as who to talk to about things and what kind of freedom she had to do this and that; she asked questions which he would not have expected. He had used the word with other colleagues. He said he had a mix of mentees over the years in terms of sex. The claimant was the first woman in the operations team he had mentored. He gave an example of how the claimant had said she would have done something

differently in relation to the portfolio company but then never answered his question as to what she would have done differently.

115. He was also cross examined about his use of the word 'appearance' when describing the claimant's performance. He said that he meant by appearance how the claimant came across to the portfolio company. She needed to have the appearance of someone who wanted to support the company and had the maturity to do so. He said it was about lots of small things she asked about where she was not sure how to particular things.
116. On 28 March 2023, the claimant emailed Mr Zuther about her objectives. She said that she wanted to share the objectives agreed with Mr Marz and asked if he had some time that week to discuss them. She wanted to make sure that they were on the same page 'for the aim of achievements this year'. She said that Mr Zuther did not respond to this email just as he had failed to respond to the 13 December 2022 email.
117. The respondent said that Mr Zuther typically responded to the claimant's emails within a day and that responding to these two emails was simply an oversight. Mr Zuther was not cross examined about why he had failed to respond to these two emails.
118. The claimant said that Mr Zuther also said 'Do you think I have time to speak to all operations managers' and that comment taken together with the failure to respond to emails showed Mr Zuther ignoring her because she was a woman. Mr Zuther says that he would not have said such a thing.

April 2023 allegation about Mr Rahmede

119. The claimant gave evidence that on a business trip to Barcelona, a colleague said that Mr Rahmede had just said, of a woman who was taking photographs: 'Good thing she is not my PA'. The claimant said that the implication was that he was saying that because he would struggle not to make advances towards her if she worked with him.
120. Mr Rahmede had no recollection of this matter and said that at the time of the alleged incident he would have been focussed on final negotiations for one of the biggest deals in the respondent's history. No one at his level had a personal assistant.
121. On 25 April 2023, the claimant emailed Ms S Tesch in HR asking to talk about working for a different portfolio company. Ms Tesch forwarded the email to Mr Marz and Mr Zuther. She said: 'Before I talk to her, I will set an appointment for us regarding communication of her career prospects at Aurelius.'
122. Mr Zuther that after the year end performance evaluation for 2022, all senior leaders were aware of the claimant's performance and no other portfolio company wanted the claimant to be assigned to them. Employee

performance was discussed at a moderation meeting. Mr Zuther said that he did not feel he could recommend the claimant to another portfolio company.

123. Mr Zuther said had that he had a discussion with Ms Tesch about the claimant's pros and cons and performance.
124. It was put to Mr Zuther that his criticisms of the claimant were 'wishy washy', without substance and were gender-specific and mainly related to soft skills. It was also put to him that he was spreading these views to others in the organisation. At that point in cross examination we made it clear to the parties that we would ultimately have to take a view as to whether those issues (as to criticisms being gender specific and being spread around the company) were fairly on the table as they had not been raised previously.
125. Mr Harris put to Mr Zuther that criticism about the claimant not winning the hearts and minds of people in the portfolio company was gender specific. Mr Zuther said that he did not think any of his comments were gender specific.
126. On 2 May 2023, there were emails between Mr Zuther and the claimant about aligning objectives. Mr Zuther suggested a date to meet if she wanted to discuss her targets with him. There was no email response from the claimant in the bundle and she was not sure if she had responded.
127. On 15 May 2023, the claimant emailed Mr Soeholm. She said that she was working on her handover for Rivus to move onto a new investment. She was postponing their call until the following month when she hoped to know what investment she would be headed to next.
128. Mr Soeholm forwarded the email to Mr Zuther and asked whether Ms Tesch needed to be briefed about their opinion. Mr Zuther said that he had done that and that Ms Tesch had to decide what to do. He had seen nothing about the handover 'but the mgmt.. is quite delighted to get her out of the biz...'

16 May 2023 hole in trousers incident

129. This incident is alleged to have taken place in the course of a meeting attended by the claimant, Mr Zuther and Mr Marz. The claimant said that she was in a board room with Mr Marz for some time before Mr Zuther arrived. She had stood up to better express herself. It was warm in the room. When colleagues noted that the room was uncomfortable because of the heat, Mr Zuther said: 'Well it looks like you have some air conditioning going through your pants, Jess.' The claimant said that the hole was small, the size of a 10 piece, and that for Mr Zuther to have noticed it so quickly he must have been staring at her body intently. She said that she politely acknowledged the remark and he said, 'I guess that is one way to ask for a promotion.'
130. Mr Zuther gave a very different account of the meeting. He said he that he noticed during a meeting that claimant had a hole in her trouser leg. After the meeting ended and when they were walking away, he said that he discreetly

notified the claimant of the hole. She thanked him for letting her know and smiled. He did not say anything about promotion.

131. Mr Marz said that he was present throughout the meeting. If the comment the claimant said had been made had been made, he would have intervened and told Mr Zuther it was inappropriate. He also noticed the hole and notified the claimant of it after the meeting. She appeared to be grateful, thanked him and laughed. He was unaware that Mr Zuther had also notified her.
132. The claimant said Mr Zuther's account could not be correct as she had left him in the room at the end of the meeting; they had not walked out together.
133. We heard a fair amount of evidence about the size and positioning of the hole. All agreed it was in the seam of the trousers and on the claimant's upper leg. The claimant said in her witness statement that the hole was near her bottom; in evidence she agreed it was on the seam but said it was at the level of her bottom. The claimant said it was the size of a 10 pence piece. Mr Marz said it was the size of a credit card. Mr Zuther said that it was bigger than a ten pence piece but may not have been credit card sized. It was a round hole and was sizeable.
134. Both Mr Zuther and Mr Marz denied that anything was said about 'air conditioning' or promotion. Mr Marz agreed these remarks would be degrading and said that is why he would have remembered them if they had been made.
135. After the claimant began to look for a move to a new portfolio company, Mr Zuther said that he had a discussion with Mr Marz, who had decided to terminate the claimant's employment. Mr Marz said that it had been agreed that if he gave the claimant a lot of support and guidance she might be able to continue to support the projects she was working on at Pullman. However the claimant was pushing to go to a new portfolio company and that when her projects came to an end, he made the decision to terminate her employment. His decision was accelerated by the claimant pushing for a new assignment. The respondent's evidence that the decision to terminate the claimant's employment was taken by Mr Marz was not challenged in cross examination.
136. Mr Marz's evidence as to why he dismissed the claimant was that it was a decision based on her performance, her lack of ability to win the hearts and minds of the portfolio company and feedback from senior people in the business. He said that after a lot of support and guidance there was no development by the claimant, no self-reflection or awareness of her lack of ability in certain areas.
137. Mr Marz said that around 23 May 2023 he had a discussion with Ms Tesch, Ms Hartman and Mr Soeholm about who should have the termination discussion with the claimant and it was agreed that it would be appropriate for Mr Marz to have that conversation. Mr Marz said that SMOs are usually assigned to a portfolio company for 12 – 18 months on average. After that, depending on performance, they are assigned to a new portfolio company.

The decision as to where they would be assigned was based on performance and availability of a suitable role in another portfolio company.

138. Mr Marz said that during the bonus moderation process all senior leaders would see the scores received by individuals so would be aware there were performance concerns although individual performance was not discussed in any detail. This meant that no other portfolio company wanted the claimant.
139. Mr Zuther also said that he was under an obligation to give a fair recommendation when putting someone forward for reassignment. He said that he could not recommend the claimant based on her performance.
140. Mr Marz was asked in cross examination whether he had considered putting the claimant on a performance improvement plan. He said that this probably should have been considered. He said that they had believed for a long time that they could help her with the right support. He said that in their industry performance improvement plans rarely happened as they would be negatively perceived.
141. On 2 June 2023, Mr Marz told the claimant in a meeting which also included Ms Hartmann, that she was being dismissed. His evidence was that he told her the reason was her performance but that he had not wanted to upset her by saying that no other portfolio company would take her. The claimant said that Mr Marz told her that she did not get along with senior management of the portfolio company. Mr Marz accepted that he did say that. It reflected the concerns that the respondent had had about the claimant's performance.
142. In a termination letter of the same date the claimant was put on garden leave for her notice period. She was told:

As a gesture of goodwill, Ail will award you a pro-rated bonus in the sum of £14,307.69 which will be paid with your final pay and subject to deduction of income tax and national insurance in the normal way.
143. On 6 June 2023, the claimant had surgery on her right shoulder; she told the Tribunal that she was on prescription codeine for a week after that, which affected her ability to pursue her claims.
144. On 20 July 2023, the claimant contacted Acas.
145. On 24 July 2023, the claimant submitted a DSAR and on 24 August 2023 the respondent made a substantive response to the DSAR.
146. On 31 August 2023, the claimant's Acas certificate was issued
147. On 29 February 2024, the ICO closed the claimant's complaint about the response to the DSAR.

Evidence about the claimant's mental health

148. The claimant gave some evidence about the effect of the matters of complaint on her mental health. She said that her mental health did not prevent her bringing a claim when she was still employed. She said that not bringing a claim when the earlier matters occurred was to protect her career.

Evidence about pay and Mr Tan

149. The claimant was employed on a salary of £115,000 plus a performance-related bonus of up to £30,000. Mr Marz had not been involved in recruiting the claimant but he said in general terms that all SMOs received a salary within the band £110,000 to £150,000 depending on their skills, experience and market forces at the time of their recruitment. Mr Marz said she did not receive a pay rise during her employment due to her performance. She did receive a special bonus of £3000 after the 2022 appraisal to take account of the effect of inflation. The claimant's evidence was that she understood from colleagues that salary rises were intended to deal with the effects of inflation. There might have been some element of performance but that was not disclosed to her or mentioned in her contract.
150. Mr Marz said of his own salary that he himself was promoted to SMO in 2021; at that point he received an annual salary of £114,750 and a discretionary bonus up to £25,000 although he had been in the group for three years with a proven track record. He was the claimant's predecessor in the role.
151. Mr Soeholm manages Mr A Tan, who was recruited by Mr Schoefer. Mr Tan has since these events been promoted to director due, Mr Soeholm said, to his exceptional performance. As an SMO, Mr Tan was recruited at a salary of £120,000 per year and was eligible for a bonus payment of up to £20,000.
152. Mr Soeholm said that he was aware that there were SMOs on various salaries reflecting their different levels of experience. He said that, looking at Mr Tan's CV, Mr Tan had three more years of work experience than the claimant. He was not challenged in cross examination on that assertion.
153. Mr Soeholm said that he conducted Mr Tan's year end performance evaluation in 2022. Mr Tan was said by Mr Soeholm to be a high performer who was excellent at building relationships and a strong team player. Mr Tan's performance was rated as 100% and he had a rating of 'excellent'. In light of Mr Tan's performance he received 100% of his bonus. He received a salary rise to £126,000 in January 2023. His special bonus was £1512.33 because it was pro rated as he had not been employed for the full calendar year. Ms Hartmann told the Tribunal that salary rises were discussed at the year-end review. Pay rises might be awarded due to inflation or the job market or because someone had done a good job and taken on more responsibility.

Evidence about the claimant's performance:

From Mr Marz

154. Mr Marz said that the claimant was confident but lacked any self awareness about the limits of her ability. She did not have the necessary skills to be effective in the role. She had ideas but they were not quantifiable and did not translate into a business plan. Assessments provided by the claimant were at a high level and lacked the necessary detail to base decisions on. She did not seek buy in from existing management which limited the respondent's ability to effect change
155. Mr Marz said that the claimant's brief was to fully understand the business, win the hearts and minds of management at Pullman and Rivus and devise a project plan to drive growth and value; it was crucial to get buy in and build relationships with existing management.
156. Contrary to that plan, he said that both Ms Knight and her predecessor as Rivus CEO gave negative feedback about the claimant and asked for the claimant to be removed.

From Mr Zuther

157. Mr Zuther said that the claimant failed to establish key relationships with management at Pullman and frustrated them by failing to work collaboratively and as part of a team. She failed to produce viable business plans backed up with evidence and analysis.
158. He said that these issues were shared in feedback sessions and in formal performance evaluations at year end. No notes were kept of one-to-one meetings with the claimant.

From Mr Soeholm:

159. Mr Soeholm said that the claimant had been recruited at too senior a level. She required extensive guidance and seemed to struggle with self-reflection.

From Ms Knight

160. Ms Knight said that the claimant's performance was substandard compared to that of her peers and other less experienced individuals within Aurelius that Rivus had worked with.
161. She said that the claimant would approach situations with insufficient information and make decisions based on isolated facts, which made short term gain but did not sustain performance improvement. She had a tendency to run at situations without gathering all the facts leading to poor decisions being made / unrest being created within the business. She rarely took into

consideration other people's workloads and could not judge people's bandwidth. She failed to take people in Pullman 'on a journey'.

162. Ms Knight said that the claimant lacked communication skills to establish and maintain professional relationships and failed to build effective relationships with stakeholders.
163. She said that the claimant had a lack of self-awareness, as evidenced by her confidential phone calls in public open plan spaces within earshot of other staff. Ms Knight said that she told the claimant that this was not appropriate and requested she take calls in a private area but she did not do so.
164. Ms Knight said that her predecessor as CEO asked for the claimant to be removed from Pullman due to her performance and failure to work collaboratively with a broad team.
165. She said that she herself asked Mr Marz and Mr Zuther for the claimant to be removed several times between late 2022 and early 2023.
166. It appears that Mr Marz insulated the claimant from these requests and this feedback.
167. Like those of other witnesses, Ms Knight's criticisms were largely expressed without reference to particular incidents or situations but she did give some examples by reference to documents in the bundle.
168. She pointed to an email of 7 December 2022 from the claimant and said that, in introducing Rivus' head of payroll to Mr Wells from the respondent's finance team, the claimant gave no context, did not explain that the request related to Pullman not Rivus nor the purpose of the introduction nor the range of any review exercise. Ms Knight responded to that email asking to be kept in loop before these requests were made. She said that these requests made the team nervous. Ms Knight pointed to this correspondence as an example of the claimant's lack of self-awareness and tendency to act before considering the consequences.
169. She also pointed to some email correspondence of 26 April 2023 which had led her to have concerns about the claimant's involvement in technicians' pay arrangements. Ms Knight said that the claimant had wanted to look at individuals' arrangements for specific sites without considering the holistic impact across the business in relation to broader trade union negotiations.
170. The claimant contended that Ms Knight was not in a position to observe her performance. She said that she and Ms Knight had had very limited interaction as she, the claimant, was primarily in Doncaster working with the Pullman team.
171. Ms Knight said that Pullman and Rivus operated under one senior management team so that central functions at Pullman including HR reported into her as CEO of Rivus; she would hear about the claimant's involvement in that way. In addition she had direct contact with the claimant on a project

about the site at Wembley and they would attend group meetings. In late 2022 to early 2023 they had contact about cost saving initiatives, including use of agency technicians and pay negotiations. She said she did not have day to day interactions but did have feedback from people who interacted with the claimant on a day to day basis and had concerns, including Mr D Jones, managing director of Pullman, Ms A Roughly, HR director of Pullman, and others.

Evidence of performance expectations

172. The respondent's witnesses told the Tribunal that 80% performance against targets is considered poor and the average across the group is 94%. Initially there was no documentary evidence of that but during the course of the hearing a spreadsheet was produced which showed that figure.
173. Ms Hartman explained that she had calculated that figure at a point recently when the respondent was considering restructuring remuneration packages as, over the years, the bonus payout was almost 100%. She calculated the figure by averaging target and bonus achievements over a period of three years. She presented the spreadsheet to management.
174. Mr Marz's evidence was that the respondent expected 100% performance from all staff. The gist of the claimant's evidence was that she had not understood that level was expected. She gave the example that 80% would be a good mark in school.

Law

Harassment

175. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.
176. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.
177. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have

felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so.....Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

178. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Direct discrimination

179. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.
180. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. "
181. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to 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 an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

- (2) *If the claimant does not prove such facts he or she will fail.*
- (3) *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*
- (4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
- (5) *It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
- (6) *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
- (7) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*
- (8) *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
- (9) *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*
- (10) *It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*
- (11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*
- (12) *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on*

the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

182. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: '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.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.
183. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
184. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.
185. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'
186. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

187. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT

Equal pay

188. The relevant parts of the Equality Act 2010 provide as follows:-

65 (1) For the purposes of this Chapter, A's work is equal to that of B if it is -

(a) Like B's work.

.....

(2) A's work is like B's work if -

(a) A's work and B's work are the same or broadly similar

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to -

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.”

.....

66 (1) If the terms of A's work do not (by whatever means) include a sex equality clause they are to be treated as including one.

(2) A sex equality clause is a provision which has the following effect-

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

189. A sex equality clause will have no effect if the employer can show that the difference in pay is due to a material factor, reliance on which does not involve direct or unjustified indirect discrimination: section 69 Equality Act 2010. The employer cannot rely on an indirectly discriminatory material factor (ie one which puts women at a particular disadvantage) unless that material factor can be objectively justified: Jenkins v Kingsgate (Clothing Productions) Ltd [1981] ICR 715, EAT.

190. The term 'material' is to be construed as meaning 'significant and relevant' and may include skill, experience and training: Rainey v Greater Glasgow Health Board [1987] ICR 129.

Law on bonuses

191. Contractual terms about bonuses should be interpreted as meaning what they would convey to 'a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract': Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) 1998 1 WLR 896, HL
192. Where a bonus scheme contains a discretion, that discretion may not be exercised in an irrational or perverse manner: Clark v Nomura International plc [2000] IRLR 766, QBD. Even where a scheme refers to a discretion, other parts of the clause or contract may use words of entitlement such that it is clear there is a contractual right to the bonus: Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] IRLR 715, CA.

Submissions

193. Because the evidence took longer than expected and because of the loss of a day due to Mr Harris' ill health, we ultimately received written submissions from the parties. The parties then produced written replies to each other's submissions. We also asked the parties to make further submissions on the bonus payment.
194. We took the submissions into account in their entirety. We make the following observations about the submissions:
- a) Mr Harris sought to introduce some new ways of putting the case. Where these had not been properly explored at the hearing and/or did not reflect the evidence which we had heard, we disregarded them. For example, we had not heard evidence that Mr Marz and Mr Zuther were feeding negative remarks about the claimant to Rivus and Pullman or that 'too top down' meant 'bossy and shrill', as submitted by Mr Harris;
 - b) Mr Harris suggested that the claimant had not understood questions posed in his absence about why her claim had not been presented earlier and whether her mental health had played a role. That was not our impression;
 - c) Mr Harris suggested that the claimant had not understood what was being asked in respect of her indirect equal pay claim and had not intended to withdraw that claim. The claimant had been given the

opportunity to confer with Ms Harris about that claim and had withdrawn it after doing so.

Conclusions

General observations on credibility

195. The respondent urged us to make general findings about the claimant's credibility. It pointed to her failure to make contemporaneous complaints about the allegations pursued in the Employment Tribunal. It was suggested in submissions that the claimant had had to try to scrape together a sex discrimination case as she did not have two years' service to bring an unfair dismissal claim and that her pursuit of these claims was a tactic to try to provoke a settlement. The respondent pointed to inconsistencies in the claimant's evidence and the way she put her case. We do not rehearse these arguments in detail but we considered them carefully. We did not find that there was a general issue with the claimant's credibility. The lack of contemporaneous complaint seemed to us to be understandable in the circumstances. We recognised that the claimant's witness statement did not present her evidence chronologically and was not always clear. We formed the impression that apparent inconsistencies in the claimant's evidence were in the main due to the quality of her witness statement and imperfect recall when pressed about matters beyond her witness statement. We did not consider that she was a dishonest witness.
196. We did not consider there were any overall credibility issues in respect of any of the respondent's witnesses although it was suggested that some of them were close friends and that some were dependent on others for favour or advancement. We did not have evidence which caused us to conclude that either of those matters was a factor.

Toxic and misogynistic culture

197. The claimant's case was that there was a 'toxic and misogynistic' culture at the respondent and the respondent's case was that there was no such culture.
198. We simply did not have the sort of broad evidence which would have enabled us to form any view about the overall culture at the respondent and it would not have been possible for us to make any sensible finding.

Background issues

199. We considered in relation to each of the following background issues, which were only raised in the claimant's witness statement or supplementary witness statement, whether the respondent had had a fair opportunity to deal with the material in evidence.

Reimbursement of meal purchases

200. We had some very vague evidence from the claimant that she had not been able to expense meals but believed that men may have been able to. We had Ms Hartmann's clear evidence that there was no policy at the relevant time but subsequently a policy was introduced which applied to men and women.
201. We accepted that evidence, which was not challenged. There was nothing in this matter which could form part of material from we might reasonably draw inferences of sex discrimination.

Introductory email about 'female support'

202. The sender of the email had a German name and it seemed likely that she was German and had German as a first language given that much of the group seems to be based in Germany. We did not have in the bundle the document attached to the email so could not form any view on whether that document affected the interpretation of what was said in the email.
203. We concluded that the email was clumsily expressed but appears to have been intended to celebrate the fact that there was a woman in the operations team and therefore some greater diversity. We did not conclude that 'support' was intended to suggest that the claimant was in a support function such as HR or admin. There was no material which would contribute to a picture from which we could reasonably draw an inference of sex discrimination.

Mallorca incident May 2022

204. Because this incident was raised by the claimant so late, any evidence which the respondent might have wished to call, apart from that of Mr Zuther, was not available. This was a serious allegation raised less than a week before the full merits hearing. In those circumstances, we would not have considered it appropriate to reach a conclusion on this incident and potentially use it as a part of the overall picture which we considered when deciding whether the burden of proof shifted.
205. Having said that and in fairness to Mr Zuther, we would not in any event have concluded on the basis of the evidence we did hear that we were satisfied that Mr Zuther embraced a female junior colleague with an improper motive.

Dinner with colleagues where it was suggested that Mr Zuther was referred to as reptile because of predatory behaviour with women and other references to Mr Zuther as a reptile

206. There was no detail to these allegations or explanation of what behaviour colleagues were said to be referring to. The respondent's witnesses were not

cross examined about this matter. We heard from Ms Hartmann that there had not been complaints about or investigations into Mr Zuther's conduct.

207. In those circumstances, there was simply no material from which we could reasonably draw any inferences.

Mr Marz's alleged comment 'she always dresses like this'

208. The claimant said that this comment was made after Mr Zuther thanked her for dressing up for him. We considered that this was part of the context of that substantive allegation and that the respondent had a fair chance to deal with it. We consider it further in reaching conclusions on the substantive claim below.

April 2023 Barcelona incident

209. We could not reach any useful conclusions on this incident. It was reported second-hand by the claimant and the words could be interpreted in at least two ways; 'I am glad she is not my PA because she is not very good' or 'I am glad she is not my PA because she is so attractive I could not keep my hands off her'. We did not conclude that the respondent had had a fair opportunity to deal with the evidence nor that we could have reached any fair conclusions on the incident as described by the claimant.

Claimant being described as 'too top down' and 'assertive'

210. The respondent said that these comments were too vague and unattributed so it was not able to fairly deal with them. Insofar as it appeared that the comments were said to have been made by Mr Marz, we considered that the respondent was able to respond to them and we have considered them further below in relation to the substantive allegation already in the list of issues about Mr Marz saying the claimant was 'too top down'. It was not put to Mr Marz that he had said that claimant was 'too assertive' and it appeared that this was simply the claimant's interpretation of 'too top down'.

Schoefer email about how Dirk Markus didn't like the claimant that much

211. The respondent had not called Mr Markus and Mr Schoefer had left the respondent's employment. Other witnesses were able to say what they thought was meant by the email. Mr Marz and Mr Zuther thought that it was likely linked to the claimant's performance at the November 2021 board meeting. Mr Zuther also thought that the claimant might have spoken with Mr Markus at the respondent's London office and Mr Markus formed an impression from that meeting.
212. We concluded that even if this matter had been raised by the claimant earlier, the respondent was unlikely to have called other evidence, particularly as Mr Markus is a founding partner with a busy diary. We

considered we could take this matter into account in context but we had no evidence from which we could reasonably infer Mr Markus' remark was connected with the claimant's sex.

Claimant being asked to arrange coffee at a meeting by Mr Soeholm

213. On 9 January 2023, Mr Soeholm emailed the claimant about arranging a meeting between the claimant, Mr Soeholm and Mr Zuther in London. He said, 'So if you can arrange a meeting room and some coffee around noon that would be great?' Mr Soeholm said that London was not his home office and he did not know the processes for arranging a meeting room and coffee. He would have asked anyone based at another office to arrange coffee in those circumstances. If the meeting had been in Munich, he would have arranged the room and made coffee himself. Mr Marz said he would have acted in the same way himself.
214. We considered that the respondent had had a fair opportunity to deal with this matter and we accepted Mr Soeholm and Mr Marz's evidence. We were not satisfied that there was anything to suggest that the claimant was asked to arrange for there to be coffee (as opposed to making coffee herself) because she was female.

The suggestion that the claimant was told that she was not performing in areas outside her objectives.

215. In explaining this allegation, the claimant said that she was told that she should have carried out a full restructuring of Pullman.
216. Mr Marz said that in Q4 2022 the integration plans changed for Pullman and the claimant's objectives changed for 2023 to include carrying out a restructuring of Pullman. A restructuring could not have been done in one quarter and the claimant was marked on the earlier agreed objectives.
217. Mr Soeholm agreed with that account and said he had been doing restructurings for 30 years. They are a heavy burden which takes a significant amount of time.
218. The respondent's witnesses were not cross examined on the account they gave in relation to this matter.
219. We considered that the respondent had an opportunity to deal with this matter but we accepted the respondent's evidence on the issue, which was not challenged.

B. DIRECT SEX DISCRIMINATION (EQUALITY ACT 2010 SECTION 13)

Did the respondent do the following things: {as per below}

Was that less favourable treatment?

If so, was the less favourable treatment because of sex?

Did the respondent's treatment amount to a detriment?

Issue: 3.1 Around Autumn 2021, Thomas März introducing the claimant to a portfolio company as a Project Manager rather than an Operations Manager which gave the impression she was working at a lower level.

220. We bore in mind that the claimant told us that she did not consider Mr Marz to be sexist or misogynistic.
221. We considered what Mr Marz told us about what he was seeking to do and whether he would have had any motive for downgrading or undermining the claimant. It appeared to us that his success was partly dependent on the claimant's success. He would have a very strong incentive for Pullman to succeed. We also understood that the respondent, in inserting people into other organisations, has to do so in such a way that they appeared to be an ally rather than a threat; this is what was frequently described as 'winning hearts and minds' in evidence. We accepted that Mr Marz would have referred to the claimant in this way to make her role understood by particular audiences within Pullman and not in order to downgrade or devalue her.
222. On its own, we could find nothing in this complaint which would reasonably cause the burden of proof to shift.

Issue: 3.2 Around winter 2022, Thomas März telling the claimant that her performance was "too top down".

223. On its face, this was also consistent with the respondent's concern to 'win hearts and minds' in portfolio companies, ie to influence the management without appearing to be ordering them around or taking over.
224. In that context, we could see nothing that suggested the remark was gender specific, ie premised in a belief that women should not lead or assert themselves and therefore should be criticised when they do behave in those ways.
225. Taking this claim on its own, we did not find anything in the evidence relating to this complaint which caused the burden of proof to shift.

Issue: 3.3 Excluding the claimant from Rivus/Pullman board meetings that male colleagues of her seniority attended.

226. We accepted the respondent's evidence that attendance at board meetings was ultimately a decision for the portfolio companies to make and that the claimant had not impressed at the first meeting she attended and so was not asked again.
227. In particular we reached that conclusion because there was evidence which we accepted from Ms Knight that the claimant had made an unfavourable impression on Ms Knight and her predecessor. Ms Knight was not asked about this matter in cross examination; she could have been questioned about the role played by portfolio companies in decisions about who attended board meetings but was not.
228. The claimant did not raise an issue with her own managers about not attending board meetings. We heard evidence that not all MOs and SMOs attended board meetings of their portfolio companies.
229. In those circumstances, we were able to conclude that the reasons for the claimant not being invited to board meetings did not relate to her sex.

Issue: 3.4 On 12 March 2022, Stephan Rahmede assumed the claimant's partner worked at the company instead of the claimant and then assumed the claimant worked in HR.

230. We found it very difficult to form a view of what happened on this occasion . The claimant's first account was in her claim from some 18 months after the event. Although her partner gave a witness statement corroborating the claimant's account, his evidence was not ultimately tested and so we were unable to give it the same weight it would have had had the witness attended.
231. We did not find the seating plan evidence assisted us in choosing one account over another, given that there were different accounts of how many formal dinners took place.
232. As to the assumption that it was the claimant's partner who worked for the company, it seemed to us that the fact that Mr Droghoff spoke German was a sufficient explanation for that assumption, taken in isolation, and one which we accepted.
233. A presumption that someone works n HR rather than in an operational role could of course be a sexist assumption, given that (and this was true of the respondent company) women have traditionally been more prevalent in support roles as compared with operational roles.

234. Mr Rahmede said that he spoke with the claimant when she was in a group of HR staff so, if he assumed she was also in HR, that would have been the reason. The claimant's account differed in that she said that the remarks were made when they were sat down at the table rather than gathered in the bar area, as described by Mr Rahmede.
235. We did not feel there were facts from which we could reasonably conclude that Mr Rahmede treated the claimant less favourably than he would have treated a man because of her sex. Even if the claimant's account was correct and Mr Rahmede did express the assumption at the dinner table rather than in the bar area, his recollection of seeing the claimant standing with members of the HR department at some other point during the event seemed to us an explanation for any assumption he made. We also accept that the claimant could reasonably have perceived that the question was related to her sex in circumstances where she was no doubt conscious of being the only woman in her type of operational role.

Issue 3.5 At the end of 2022, Magnus Zuther said to the claimant, "You look very nice. Thank you for getting dressed up for the meeting with me".

236. The claimant said that the background was that Mr Zuther regularly commented on her appearance in this way, ie commenting that she looked nice.
237. Mr Marz said that he was present at most meetings and would have intervened if this had been said. He said that he never heard it said.
238. The claimant said that on the occasion about which she complains, Mr Marz commented that the claimant always dressed in that way. On the claimant's account of events, Mr Marz could not have simply failed to hear the remark made by Mr Zuther.
239. We gave careful consideration to the lack of contemporaneous complaint. We bear in mind that it is often difficult to raise a complaint of this sort and that the claimant said that she did not want to rock the boat as she was hoping to move on in the company. We also note that she was willing to say quite critical things to Ms Hartmann in relation to her performance appraisal.
240. Ultimately the majority (Mr Madelin and Mr de Chaumont Rambert) reached a different conclusion from the minority (Judge Joffe) on this issue, in circumstances where the entire panel felt we were working with very limited evidence and that the conclusion was finely balanced.
241. The majority considered that Mr Marz was a consistent and credible witness who corroborated what Mr Zuther said. They bore in mind the lack of other

complaints by women against Mr Zuther in a context where he clearly worked with some very senior women, if not in the respondent itself, in portfolio companies such as Rivus. They considered that if he behaved in the way the claimant described, it would have been evidenced in other interactions leading to complaints. They considered that the lack of contemporaneous complaint by the claimant about this matter was significant, given her willingness to make other complaints at the time. They found Mr Zuther and Mr Marz generally credible. They concluded that the claimant had not satisfied them of her account on the balance of probabilities.

242. The minority considered that there was nothing about the claimant's evidence which suggested she would simply invent these incidents. Judge Joffe considered that in context what was said was probably intended, misguidedly, to be a pleasantry by Mr Zuther, which Mr Marz dealt with awkwardly. It was quite possible that neither remembered it because it did not seem to them of any significance at the time. Judge Joffe considered that Mr Zuther would probably be more careful with senior women in portfolio companies for obvious reasons relating to the need to not offend the management portfolio companies, so the lack of evidence of similar treatment was not particularly persuasive. Judge Joffe was satisfied on the balance of probabilities that the remark was made whilst recognising that it was a particularly difficult decision to make on the evidence when there was very little contextual material to assist us to choose between two versions of events.
243. On the basis of the majority's findings of fact, there was no incident which could have amounted to sex discrimination (or harassment).
244. The whole Tribunal panel agreed that, if the remark was made, as Judge Joffe found, that would constitute less favourable treatment because of sex. There was no evidence that Mr Zuther made similar remarks to male employees and it was implicit in what Mr Zuther and Mr Marz said about the inappropriateness of the remarks that they recognised that the remarks were inappropriate because such remarks tend to be addressed to women rather than men and objectify or sexualise women in the workplace. This is of course context specific; there could be workplaces where employees of all sexes equally comment on one another's appearance or clothing, such as perhaps in workplaces in the fashion or beauty industries. There was no evidence that this was such a workplace. We were also satisfied that it would be a detriment in that a woman to whom such remarks were made could reasonably feel, as the claimant said she did, that she was being put at a disadvantage, in not being treated professionally and valued for her skills but rather for her appearance.

Issues 3.6 Between December 2022 to January 2023, Mogens Soeholm ridiculed the claimant for considering applying for a more senior role and not taking the claimant's promotion ambitions seriously.

245. It was clear from the evidence we heard that Mr Soeholm was surprised that the claimant thought to put herself forward for the MD role and that he communicated that surprise to the claimant. We did not consider that his reaction constituted 'ridicule' but the claimant could reasonably have felt hurt by his expression of surprise in circumstances where she did not perceive her performance to be seriously deficient.
246. For the reasons we describe more fully below, we accepted that the respondent had a genuine belief that the claimant's performance was deficient, which perception was not tainted by her sex. That perception would account for Mr Soeholm's surprise, so there was nothing in these facts which, without more, could reasonably cause the burden of proof to shift.
247. The claimant pointed to the use by Mr Soeholm of the words 'immature' and 'insecure' in the emails we have referred to above as supporting her case that his behaviour was because of her sex.
248. We did not consider that the words 'immature' and 'insecure' were intrinsically gendered and we were satisfied by Mr Soeholm's account of why he had used those words about the claimant. We were not able to conclude that there was any evidence that would lead us to believe he would not have used those words about a man in similar circumstances.

Issue: 3.7 In early 2023, Magnus Zuther failing to engage with the claimant around aligning her objectives with him (her reporting Vice President).

249. The claimant pointed to two emails which Mr Zuther had failed to respond to. We could see other emails which he had responded to promptly. We bore in mind that Mr Zuther was the claimant's second line manager and that his second line reports would not have been his priority.
250. We could see no evidence from which we could reasonably conclude that a man in similar circumstances would have been treated differently.

Issue: 3.8 On 16 May 2023, Magnus Zuther commenting on a hole the claimant had on the side of her trousers, saying: "Well it looks like you have some air conditioning going through your pants. I guess that is one way to ask for a promotion".

251. There were different accounts. Both Mr Zuther and Mr Marz said they noticed the hole and raised it with the claimant discreetly. In submissions, the

claimant sought to raise an alternative case that the respondent's account of events was itself sex discrimination. The respondent resisted the claimant's attempt to rely on that alternative account.

252. We considered first the claimant's account of events. A point made by the respondent was that this incident occurred at a point when the claimant said she had stopped 'biting her tongue', yet she did not raise it with Ms Hartmann or anyone else. The respondent's submission was that if the incident had occurred as the claimant described it, and had the effect on her she said it had, she would certainly have complained about it.
253. The Tribunal panel considered that if the remarks described by the claimant had been made, they would amount to less favourable treatment because of sex. Although the pointing out of the hole was not of itself necessarily something which would not have occurred had the claimant been male, we considered that a suggestion that exposing part of the body might be a way of seeking a promotion was clearly gendered. There is a common trope that women use sex to achieve job promotion (the 'casting couch') and we considered it improbable that Mr Zuther would have made a similar remark about a man. That remark would be a detriment because it implies that the claimant was using sex or sexual attractiveness to achieve job success and it is inherently degrading, even if made in a jokey way, between a boss and subordinate, at least in the context of the relationship between the claimant and Mr Zuther described in the evidence we heard. There was no suggestion that they both appreciated and indulged in this sort of joke.
254. But did the remark occur? For similar reasons to those they considered in relation to the remark about the claimant's appearance, the Tribunal majority considered that they were not satisfied on the balance of probabilities that the remark about promotion was made, although, like the minority, they accepted that the remark about 'air conditioning' was made. It was a jokey way of referring to a wardrobe malfunction. The fact that the claimant said she had stopped biting her tongue by this point but did not raise the remark with Ms Hartmann or anyone else was a significant factor in rejecting her account about the promotion remark. The majority also thought, given the strength of feeling the remark was said to have caused, the claimant would have mentioned it at her dismissal meeting if it had occurred.
255. The minority (Employment Judge Joffe) considered that the remark about promotion was also made. It was too singular a remark to have been a misunderstanding of something else said by Mr Zuther. Judge Joffe did not consider that there was evidence that the claimant would simply invent incidents. She was, at the time this incident occurred, hoping to move to a new role away from Mr Zuther and it was understandable that she would want to keep her head down. It was not necessarily surprising that the claimant did not bring it up at her dismissal meeting, when she was taken by

surprise by the dismissal itself. On the balance of probabilities, Judge Joffe considered that the most likely reason for the difference in accounts was that Mr Zuther had forgotten what he considered an inconsequential piece of 'banter' at the time. Either Mr Marz had not been present when Mr Zuther made the remark (because it had been made discreetly when Mr Zuther and the claimant were walking together) or had not heard or processed it. Judge Joffe accepted that both were genuine in their recollection of having raised the issue about the hole with the claimant separately.

256. The whole panel considered that the 'air conditioning' remark on its own was not made because of the claimant's sex. It was a humorous way of addressing an awkward issue. It was not inherently sexual and we accepted Mr Zuther's evidence that he thought it was the polite thing to do to tell a colleague about a problem with their clothing and that he had told a male colleague about a hole in his jumper.
257. So far as the alternative case raised in submissions is concerned, that it was sex discrimination for Mr Zuther to have raised the issue of the hole in the manner he himself said he raised it, the suggestion was that the hole was so insignificant that the only way Mr Zuther would have noticed it is if he had been intensely staring at the claimant's bottom area. We rejected that suggestion; the hole was clearly obvious enough that Mr Marz, who was not said to be sexist, had also noticed it. As we have said above, we were satisfied that Mr Zuther had benign and non-gendered reasons for raising it, although on Judge Joffe's alternative finding, he then went too far in making a joke about promotion which was sex-specific.

Issue 3.9 On 02 June 2023, informing the claimant that her employment was being terminated due to performance issues when the claimant had received good feedback during her year-end performance reviews and was not subject to any performance management process.

258. We considered that the respondent did not assist its own case by having a system of appraisal which was far from transparent. If we accepted the respondent's evidence that the claimant's performance, as described in the appraisal documents, was substandard we would also have to conclude that the system was at best confusing for employees like the claimant. It did not seem to us that anyone in the claimant's situation would have understood that there was an issue with performance from the appraisal documents without considerable explanation.
259. We were very conscious that the nature of these documents presented an evidential challenge for the respondent, which was arguing that the claimant's performance was bad enough to merit dismissal when these documents, taken in isolation, did not show that.

260. We looked at what contextual evidence there was. We accepted the evidence of the respondent's witnesses, as supported by the document produced, that 94% was the average performance. In that context, 80% was certainly well below average. There were specific criticisms in the claimant's appraisal documents but they could easily have seemed insignificant to someone who looked at them in the context of the ratings.
261. We also considered the other documents we have described above which seemed to us to show that there were real concerns relatively early on but that Mr Zuther was seeking to support the claimant and argue for her to be given further opportunities to prove herself.
262. The claimant said that the criticisms made of her were vague and general. We noted the following:
- that the concern about 'not winning hearts and minds' in the portfolio company was consistent across witnesses. We accepted that it was a genuine concern in the context of the respondent's business;
 - that Ms Knight was able to give what seemed to us to be some specific examples of concerns about the claimant. We accepted that in her role she would have been in a good position to either observe the claimant's performance herself and/or to receive reports from those who reported in to her. The teams at Pullman and Rivus were intertwined and she had a responsibility for both entities.
263. We also accepted that the claimant had not understood there were significant concerns about her performance until the January 2023 discussions although we accepted that there were real and significant concerns. There were certainly issues with the respondent's systems and the way in which the respondent was communicating with the claimant about her performance. To an extent the respondent is the author of its own misfortune in having to respond to this particular allegation.
264. The respondent's account was that there became a need to terminate the claimant's employment once she started pushing for a move to a new portfolio company. Other senior operational managers were aware of the claimant's substandard appraisals and did not want her to transfer to their companies. That account was consistent with the chronology and the documents which showed the claimant seeking to move at this time.
265. We also bore in mind that the decision maker in respect of the dismissal was Mr Marz, someone the claimant herself did not consider to be sexist. We did not consider the facts we found of themselves material from which we could reasonably conclude that claimant's sex had played a role in her dismissal.

266. One way in which the case was put on the claimant's behalf was a submission that references to 'not winning hearts and minds' and 'soft skills' (the latter being something the respondent's witnesses were questioned about - to the effect that the claimant was criticised in respect of her soft skills) were somehow gender specific. The Tribunal panel did not recognise either an inability to win hearts and minds or a lack of soft skills as reflecting any stereotypes about female employees that the panel was aware of. If anything, it seemed to the panel that soft and/or social skills are areas which women are stereotypically thought to be good at.
267. In any event, we accepted that 'winning hearts and minds' was very important to the respondent's business model.
268. There was also some evidence that the claimant said she had been described as 'assertive' but this was not put to the respondent's witnesses. There may be instances where a woman is perceived as being too assertive in the workplace when she evidences behaviour which would be entirely acceptable coming from a male employee. We had no evidence that this was an issue in this case.
269. We did not conclude that the burden of proof had shifted. Alternatively if it had, we were satisfied that the respondent had discharged it and that the claimant's performance was the reason for her dismissal.

Issue: 3.10 On 02 June 2023, Thomas März informing the claimant that she "did not get along with senior management of the portfolio company".

270. Mr Marz accepted that he said something like that to the claimant. We accepted the evidence of the respondent's witnesses that both Ms Knight and her predecessor had been unhappy with the claimant's involvement and wished her to be removed from Pullman. In those circumstances, it was relevant information to provide the claimant with when Mr Marz was explaining to her why she was being dismissed. We could see no evidence which would cause the burden of proof to shift.

Issue: 3.11 Failing to comply with the claimant's data subject access request within the statutory timeframe.

271. This claim was not made out as a matter of fact. The DSAR was responded to within one month and the claimant's complaint to the ICO was not upheld.
272. We did not uphold this claim.

Direct discrimination claims looked at holistically

273. Having not found that any of the direct discrimination claims succeeded when looked at in isolation, we considered whether taking the claims together, rather than separately, there were features of the matters which meant we could reasonably conclude that the claimant had been treated less favourably because of her sex than a man was or would have been. We did not so conclude.
274. For those reasons we did not uphold any of the direct sex discrimination claims.

Issue: The Claimant has confirmed that she is relying on Anthony Tan as her comparator for the purposes of her sex discrimination claim.

275. We considered throughout our deliberations on the direct discrimination complaints whether Mr Tan was a useful actual or evidential comparator. We were not able to conclude that he was. He was managed by Mr Rahmede so his circumstances were in that sense different from those of the claimant. We had almost no evidence about Mr Tan and his treatment and the claimant did not rely on him in her submissions.
276. In submissions, the claimant sought to rely on Mr Marz as a comparator in relation to an allegation which had not previously surfaced. The complaint was that Mr Marz had not been required to have worked in two portfolio companies before being promoted. The respondent's evidence was that the usual rule was that a person needed to have worked in two portfolio companies but that rule might be waived if an individual performed exceptionally. Mr Zuther believed the rule had changed in recent times.
277. We did not consider that we could reach any conclusions on this issue which first arose during cross examination of Mr Zuther and was then not explored with Ms Hartmann, although Mr Zuther had said that Ms Hartmann could give evidence about the policy.
278. We note that it was suggested in the claimant's submissions that Mr Zuther winked whilst giving this evidence and that this showed he was acknowledging the claimant had been unfairly treated because of her sex. The Tribunal panel did not see any winking and Mr Zuther was not cross examined about the alleged winking. In those circumstances we were unable to reach any conclusions about that matter.

C. HARASSMENT RELATED TO SEX (EQUALITY ACT 2010 SECTION 26)

- 7. Did the respondent do the following things:*
- 8. If so, was that unwanted conduct?*
- 9. Did it relate to sex?*

10. *Alternatively was it of a sexual nature?*

11. *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

12. *If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

Issue: 7.1 Around Autumn 2021, Thomas März introducing the claimant to a portfolio company as a Project Manager rather than an Operations Manager which gave the impression she was working at a lower level.

279. We accepted Mr Marz's account of why he introduced the claimant in the way he did. His purpose was not a harassing one. We did not consider that a reasonable person could consider that it had the proscribed effect. A reasonable person who was concerned would have asked Mr Marz and would have accepted his explanation.

280. Just as we found no evidence which would have led us to conclude that the conduct was because of sex, nor did we find evidence to suggest that it was related to sex.

281. We did not uphold this claim.

Issue:7.2 Around winter 2022, Thomas März telling the claimant that her performance was "too top down".

282. The claimant's submissions about this matter were to the effect that there was a gender-specific criticism of the claimant's abilities and that the claimant was subjected to criticism 'about qualities which go to her sex rather than her substantive performance or her ability to do a good job'. The Tribunal simply did not understand the submission. If the suggestion is that women are 'top down' or less able than men to 'win hearts and minds', that appears to be of itself a discriminatory generalisation. If the suggestion is that there are stereotypes about women being 'top down' and unable to 'win hearts and minds', those are not stereotypes which the Tribunal recognises.

283. In any event, the Tribunal found Mr Marz's evidence that he would have raised similar criticisms about a man cogent and credible in circumstances where these were important concerns for the respondent when operational staff were working with portfolio companies.

284. In the circumstances we could see no relationship with sex nor did we consider that the remark had the proscribed purpose or effect.

285. We did not uphold this claim.

Issue 7.3 Excluding the claimant from Rivus/Pullman board meetings that male colleagues of her seniority attended.

286. We had evidence that one individual – Mr Gibbels – had attended a number of meetings and the claimant only attended one. We had Mr Zuther’s evidence that this was a matter for portfolio companies and some operational managers did not attend board meetings.
287. In circumstances where we had only a difference in sex and a difference in treatment, we were not satisfied that we could reasonably conclude there was a relationship with sex. Alternatively, we were satisfied with the respondent’s explanation that it appeared the portfolio company had not wished the claimant to attend further. This was consistent with Ms Knight’s view of the claimant and Ms Knight was not cross examined on the subject.
288. We did not uphold this claim

Issue 7.4 On 12 March 2022, Stephan Rahmede assumed the claimant’s partner worked at the company instead of the claimant and then assumed the claimant worked in HR.

289. We did not conclude that this was conduct related to sex for the same reasons we did not consider that it was because of the claimant’s sex.
290. We did not uphold this claim.

Issue 7.5 At the end of 2022, Magnus Zuther said to the claimant, “You look very nice. Thank you for getting dressed up for the meeting with me”.

291. The majority did not find that this remark was made. We did not uphold this claim.

Issue: 7.6 Between December 2022 to January 2023, Mogens Soeholm ridiculed the claimant for considering applying for a more senior role and not taking the claimant’s promotion ambitions seriously.

292. We did not conclude that this related to sex for the same reasons we did not consider it was because of sex.
293. We did not uphold this claim.

Issue: 7.7 In early 2023, Magnus Zuther failing to engage with the claimant around aligning her objectives with him (her reporting Vice President).

294. We did not conclude that this related to sex for the same reasons we did not consider it was because of sex.
295. We did not uphold this claim.

Issue: 7.8 On 16 May 2023, Magnus Zuther commenting on a hole the claimant had on the side of her trousers, saying: “Well it looks like you have some air conditioning going through your pants. I guess that is one way to ask for a promotion”.

296. The majority found that words to the effect of 'I guess that is one way to ask for a promotion' were not said by Mr Zuther. For the reasons the panel concluded that the rest of the remark was not because of sex, they also concluded it was not related to sex.

297. We did not uphold this claim.

E. EQUAL PAY (EQUALITY ACT 2010 SECTION 64(1)(A) AND (B))

Issue: 25. Was the claimant paid less than a real, male comparator (Anthony Tan)?

298. The evidence the Tribunal had was that Mr Tan had a starting salary of £120,000 as compared with the claimant's starting salary of £115,000. Mr Tan also received a salary increase when the claimant did not. Mr Tan had a lower entitlement to bonus but we take each element of the remuneration package separately.

Issue: 26. The respondent accepts that the claimant's work and the work done by Anthony Tan was "like work".

Issue: 27. However, the respondent's decision to pay the claimant less than Anthony Tan was due to a material factor that was not directly or indirectly discriminatory on grounds of sex. Namely:

27.1 Anthony Tan's greater skill and experience; and

27.2 His consequent greater negotiating power.

27.3 His performance at the respondent.

28. If it is found that the material factor was indirectly discriminatory on grounds of sex, then the respondent contends that it was a proportionate means of achieving a legitimate aim of:

28.1 attracting and retaining the best talent; and

28.2 competing with its competitors.

299. The claimant withdrew the indirect discrimination claim, having been given time to consult with Mr Harris and having told the Tribunal that she had done so.

300. In evidence she said that she was not complaining about the original salary differential but about the fact that she did not receive a pay rise when Mr Tan did. She was not then cross examined further on issues to do with her starting salary. None of the respondent's witnesses were questioned about the difference in starting salaries.

301. Mr Harris then sought to revive the indirect discrimination claim in submissions and also to pursue on the claimant's behalf an equal pay claim based on the original difference in salary. He said that the factors 'better negotiating power' and 'performance' were inherently discriminatory. One

difficulty he faced, apart from the fact that the claimant had withdrawn the indirect discrimination claim, was the fact there was no evidence or cross examination on the proposition that using factors related to negotiating skills, skill and experience, or performance disadvantaged women as compared with men. There were no pools put forward and no evidence of disparate impact.

302. The claimant's submissions went on to compare the CVs of Mr Tan and the claimant in order to maintain a submission that Mr Tan did not have greater experience than the claimant. This was problematic because the Tribunal had not heard evidence or cross examination on these matters.
303. The Tribunal concluded that the only claim which was fairly on the table and in respect of which we had heard evidence was the claim of direct equal pay in respect of the fact that Mr Tan received a salary rise and the claimant did not. Although the Tribunal had not yet dismissed the indirect equal pay claim at the time when Mr Harris made his submissions, the claimant had not in any event adduced the necessary evidence or put her case to the respondent's witnesses. Similarly the case in respect of starting salaries was not put to witnesses. We had no reason to believe that the claimant, who is an intelligent, articulate and highly educated person, was not fully capable of understanding questions about how she was putting her case and whether she was pursuing a claim in respect of the difference in starting salaries.
304. As to the claim in relation to pay rises, we had clear evidence that Mr Tan's performance had been exceptional and that the claimant's had been below the expected standard. We would comment that the respondent did not appear to have been transparent with its employees about how pay rises were calculated; however, in circumstances where there was good evidence of a substantial difference in performance, we accepted that the genuine reason for the difference as to base salary was performance. That was a material factor in that it was significant and relevant.
305. We did not uphold this claim.

Issues: F. UNAUTHORISED DEDUCTIONS

29. The claimant claims she was not paid a bonus payment.

29.1 Did the bonus amount to wages?

29.2 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

29.3 Were the wages paid to the claimant on termination of employment less than the wages that should have been paid?

29.4 How much is the claimant owed?

G. BREACH OF CONTRACT

30. *Did this claim arise or was it outstanding when the claimant's employment ended?*

31. *Did the respondent do the following:*

31.1 *Fail to pay the claimant a bonus?*

32. *Was that a breach of contract?*

33. *How much should the claimant be awarded as damages?*

306. We concluded that the proper construction of the bonus clause was that the claimant was contractually entitled to a bonus which reflected her performance, subject to a discretion as to the assessment of performance, which discretion had to be exercised rationally. Should her employment be terminated early, the bonus would be pro rata to the extent of the bonus year which had expired and would reflect performance in that part of the year.

307. There was no mechanism in the contract to assess performance in these circumstances, however it seemed to us that the respondent would have had two options, if exercising the discretion rationally: to base the assessment on the previous bonus year or to conduct an assessment process of performance over the part of the year which had expired in line with its formal appraisal processes.

308. We concluded that in either event, the assessment was likely to have been 80% or near to that figure. We did not have evidence that the claimant's performance had deteriorated, simply that it had not improved to an acceptable level. Doing a calculation at 80% of £30,000 for the part of the bonus year which had expired at the time of the claimant's dismissal, we arrived at a figure of £14,307.69, which was the figure the respondent declared it was going to pay the claimant and the refused to pay.

309. We upheld this claim and order the respondent to pay the claimant that sum.

Issue: Time limits

310. We did not have to go on and consider the issue of time limits as we did not find any of the discrimination claims made out.

Employment Judge Joffe

8 October 2024

Sent to the parties on:

21 October 2024

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For the Tribunal Office: