EMPLOYMENT TRIBUNALS

Claimants: Mrs E Sunley (1)
Mrs N Corrie (2)

Respondent: The Secretary of State for Justice

Heard at: Manchester **On:** 22-26 January 2024

Before: Employment Judge Phil Allen
Ms C Bowman
Mr A Gill

REPRESENTATION:

Claimants: Mr G Barrett, a lay representative
Respondent: Mr T Perry, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints of direct sex discrimination of both claimants are not well-founded and are dismissed.

REASONS

Introduction

1. The claimants are both employed by the respondent. They were both subject to investigation and a disciplinary process, as a result of an event on 23 June 2020. Between ten and fifteen people attended the event in question. Four were initially investigated (including the claimants) and approximately five were ultimately given sanctions. Both claimants initially received a verbal warning to remain on their record for six months. On appeal, the sanctions imposed on the claimants were removed but the finding itself was not. All four who were the subject of the initial investigation were women, as were all of those who received a disciplinary sanction. At least two men attended the event (and probably more), but they were neither investigated nor did they have a finding made against them. The claimants claimed direct sex discrimination and alleged that each of the following amounted to less favourable treatment: the re-opening of the investigation; the targeting of females within the

investigation; failing to interview the relevant men; and/or issuing sanctions. The respondent denied sex discrimination and contended that the claims had not been entered at the Tribunal within the time required.

Claims and Issues

2. A preliminary hearing (case management) was conducted in this case on 26 July 2023 by Employment Judge Grundy. The case management order prepared following that hearing contained a list of issues (82). At the start of this hearing, it was confirmed with the parties that those issues remained the ones which needed to be determined. It was also confirmed with both parties that where the draft list of issues referred to allegations in paragraph 48 of the case management order, it was to be read as referring to the four points at paragraph 47. In this Judgment the Tribunal has determined the liability issues only as it was confirmed at the start of the hearing that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimants succeeded in their claims. The eight liability issues (incorporating the contents of paragraph 47) are set out below.

3. The issues identified were as follows:

TIME LIMIT / JURISDICTION

1. For the purposes of section 123 EqA 2010, was the submission of the claim form for each claim more than 3 months after the alleged discrimination (plus any ACAS extension)?

2. If so, do the matters relied upon by the Claimants form part of a continuing act, which ended within 3 months of the submission of the claim forms? (EqA 2010, s 123(3)(a)).

3. If not, would it be just and equitable for the Tribunal to hear the part(s) of the claims which relate to the conduct which occurred more than 3 months (plus any ACAS extension) before the submission of the claim forms?

Direct sex discrimination (Equality Act 2010 section 13)

4. Did the Respondent treat the Claimants less favourably than it treats or would have treated others? (EqA 2010, s 13(1))

   The less favourable treatment allegations are:

   (1) The re-opening of the investigation into alleged breach of covid 19 distancing rules in June 2020;

   (2) Targetting of females within the investigation;

   (3) Failing to interview relevant males within the investigation who were named during the process; and/or

   (4) Issuing sanctions to women

5. Was any less-favourable treatment accorded to the Claimants because of the Claimants sex? (EqA 2010, s 13(1))

6. Who are the appropriate comparators? The claimants identified Tom Burke, Mark Craven and Eddie Taffy and possibly John Oxley.

7. Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimants? (EqA 2010, s 136(2))

8. If so, has the Respondent shown that it did not discriminate against the Claimants? (EqA 2010, s 136(3))

Procedure

4. The claimants were both ably represented by Mr Barrett, a Prison Governor. Mr Perry, counsel, represented the respondent at the hearing.

5. The hearing was conducted in-person with both parties and most witnesses attending at Manchester Employment Tribunal in person. In advance of the hearing, the respondent had made an application for Ms Coccia to attend the hearing remotely by CVP and that had been granted. She gave evidence remotely by CVP. At the start of the hearing, the claimants applied for Ms Gribbin and Ms Albutt to be allowed to give evidence remotely by CVP and that was also granted. They also gave evidence remotely by CVP. On the first day of the hearing, due to storm damage, one of the members of the panel (Ms Bowman) was unable to travel to Manchester and she therefore attended (for the first day only) remotely by CVP.

6. On the first morning of the hearing, we clarified the issues with the parties, discussed the timetable for the hearing, and agreed what we needed to read. The discussion needed to be adjourned and re-started later in the morning due to a technical issue. The panel took the opportunity to start the reading required during the delay.

7. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 878 pages. On the first morning, we read the pages from the bundle referred to in the witness statements, those included in the respondent's chronology document in bold, and those which the claimants' representative specifically requested should be read. During the hearing, we read only the documents to which we were referred. Where a number is included in this Judgment in brackets, that is a reference to the page number in the bundle.

8. We were provided with witness statements from fourteen witnesses; five called by the respondent and nine called by the claimants (including the claimants themselves). We read the witness statements on the first day.

9. One of the respondent's witnesses was only available to attend on the first two days of the hearing. The respondent's representative proposed that the respondent's witnesses be heard first, partly for that reason but also because he

explained that he believed it made sense to do so in this case as the claims would largely turn upon the evidence of the respondent's witnesses. The claimants' representative did not object to the evidence being heard in that order. Accordingly, we agreed to hear the respondent's evidence first, followed by the claimants', as we concluded that accorded with the overriding objective of dealing with the cases fairly and justly.

10. We heard evidence from each of the following witnesses for the respondent. They were each cross examined by the claimants' representative before we asked questions (where we felt it relevant to do so) and (where he wished to) they were re-examined by the respondent's representative. The respondent's witnesses' evidence was heard from 2.30 pm on the afternoon of the first day until party-way through the third day. The witnesses were:

a. Mr Robert Durgan, the Governor of HMP Buckley Hall, and the disciplinary investigation officer for both claimants;

b. Mrs Sarah Coccia, the Executive Director Public Sector Prisons South, and a disciplinary investigation officer for some of those who attended the event (but not the two claimants);

c. Mr Alan Scott, the Executive Director Public Sector Prisons North, and the person who determined what should happen in response to the complaint and that there should be further investigation after the initial fact-finding investigation. He was also the disciplinary decision-maker for two of those alleged to have attended the event (but not the claimants);

d. Mr Colin Hussey, the Governor of North Sea Camp Prison, and the disciplining officer for both of the claimants (described in the documentation as the Hearing Authority); and

e. Mr Paul Cawkwell, the Director of the East Midlands Prison Group, and the commissioner of the disciplinary investigation undertaken (for both claimants).

11. We then heard evidence from the second claimant, who was cross-examined by the respondent's representative before we asked questions and she was re-examined. The same process was followed for each of the claimants' witnesses (albeit the questions asked were much briefer for those witnesses). The second claimant gave her evidence on the afternoon of the third day and the start of the fourth. To accommodate the arrangements of witnesses and to limit the time that they were required to be in attendance at the Tribunal, the first four of the claimants' witnesses were also heard during the morning of the fourth day, with the same process being followed. The evidence of the first claimant was heard on the afternoon of the fourth day. The claimants' final two witnesses were heard on the morning of the fifth day. The witnesses for the claimants (in addition to the claimants themselves) were:

a. Ms Laura Gribbin (nee Garner), formerly Treatment Manager at HMP Styal (she has now left the respondent's employment);

b. Mr Mike Davies, Head of Security at HMP Styal;

c. Mr Thomas Burke, Band 7 Operational Manager at HMP Styal (and a named comparator);

d. Mr Danny Khan, the Governor of HMP Styal at the relevant time (now retired but also on a fixed term contract);

e. Ms Andrea Albutt, Band 11 Operational Manager within HMPPS and the President of the Prison Governors Association, who accompanied the second claimant at her appeal hearing; and

f. Mr Graham Barrett, currently on secondment to the Parole Board, and previously the Governor of HMP Wandsworth, and accompanier of the claimants at some (or, in the case of the first claimant, all) of their internal hearings (and their representative at this hearing).

12. The claimants presented the statement of one witness who did not attend the hearing and was not available to be cross-examined. That was Mr Edward Tarry, Band 6 Manager at HMP Styal (and a named comparator). The statement was read but was given less weight as the evidence could not be tested or questioned at the hearing.

13. After the evidence was heard, each of the parties was given the opportunity to make submissions. Written submissions were provided to the Tribunal shortly before the start of the hearing on the fifth day, and verbal submissions were provided later that morning (after a break was taken after the close of the evidence, to allow each party time to read the other party's submissions). As the claimants' representative was not a professional representative and with the agreement of the respondent's representative, he was offered the choice of when (in terms of order) he would prefer to make his submissions, and he chose to go second. The respondent's oral submissions were heard first.

14. We used the time remaining on the fifth day of the hearing to reach our decision (in chambers). Judgment was reserved and accordingly we provide the Judgment and reasons outlined below.

Facts

15. Ms Sunley (who we will describe as the first claimant) is a Band 10 Governor for His Majesty's Prison and Probation Service (HMPPS). At the time of the event which was central to these proceedings, she was a Band 9 Deputy Governor at HMP Styal. During the process followed, she was Head of Prison Group Directors Office (Band 9). She has worked for the prison service for twenty-four years and (save only for the issue central to these proceedings) has had an unblemished disciplinary record.

16. Ms Corrie (the second claimant) is a Band 8 operational manager for HMPPS. Her role is Head of Function as Head of Business Assurance at HMP Styal. Her employment began in November 1999 and (save only for the issue central to these proceedings) she has an unblemished disciplinary record. At the time of the relevant events, she had a particular responsibility for Covid at the prison.

17. During the hearing, we were provided with and referred to the respondent's conduct and discipline policy (769). The primary objective of that policy was stated to be to encourage improvement in an individual rather than to impose a disciplinary sanction. The disciplinary rules and procedures are designed to be non-discriminatory. The policy sets out detailed procedures to be followed during a disciplinary investigation, including how an investigation should be commissioned and investigated. Very clear rules are set down for interviewing staff. The policy also includes a twenty-eight working day timeframe for an investigation report, with a requirement for justification and agreement from the commissioning manager where that is not adhered to. The policy includes a fast-track procedure, where an employee accepts the findings of the investigation and does not wish to contest the charge. Very clear rules are set out for the disciplinary hearing, which is heard by the Hearing Authority. An appeal procedure and the rules which apply are also included. The policy is accompanied by a detailed set of documents to be used during any procedures. We were told that the policy was agreed with the unions when it was introduced.

18. The policy does not contain any detailed process to be followed for an initial fact-finding investigation. As there is no such process, the policy also does not contain any safeguards or procedures for how such investigations are to be undertaken, or how any decisions are to be made, in stark contrast to the otherwise very detailed procedure. At 3.5 (774) there is an acknowledgement that a line manager may need to meet with a member of staff to find out what has happened before deciding whether a disciplinary process is commenced. The policy says that the manager must make clear that it is not a disciplinary meeting, must tell the employee of the range of options available, and must not continue with such a meeting if it becomes clear that a disciplinary investigation is necessary. As there is no process for a fact-finding investigation, there is also nothing said in the policy about any circumstances in which a senior manager can refuse to accept a commissioning manager's decision about when a disciplinary investigation is required, or when the conclusions of a fact-finding investigation can be ignored, rejected, or re-opened (as happened in this case). The provisions which address the line-manager's decision about whether to commence a disciplinary investigation, contain no provision or power for someone more senior to overturn the initial decision or to decide otherwise (as happened in this case).

19. On 18 June 2020 an email was sent by Ms Griffin to eleven people (161). The email was sent to both claimants. It was sent to a total of seven women (including the claimants). It was sent to a total of four men, including the then Prison Governor at HMP Styal, Mr Khan. It was clear on the face of the email to whom it had been sent. The subject was "*Laura Garner's 30th Birthday*". It referred to her birthday the following week and addressed signing a card and a present collection. It went on to say:

> "*We're also going to do a buffet party for her in the Clink at 12:15 on Tuesday 23rd June, all are welcome. If you'd like to come, please just bring something to add to the buffet*"

20. On 23 June 2020, during the period of lockdown in the initial months of the Covid pandemic, a number of employees of the respondent ate lunch in an area which in non-Covid times was the Clink restaurant. Those giving evidence to us were not sure of the precise number, but the lunch was attended by approximately ten to fifteen people. All attendees were staff at the prison. Those who attended included: both claimants; Ms Gribbin (nee Garner); Ms Griffin; Ms Baldwin; Mr Burke; Mr Tarry; and Mr Davies. Mr Khan was not present as he was on annual leave. At the time (because the Governor was on leave), the first claimant was the person responsible for the prison (as Deputy Governor). Ms Baldwin (Governor, Head of Safeguarding Strategy) was more senior than the first claimant and attended, but she was not responsible for the operation of the prison at the time.

21. There was no dispute that significant steps were taken to ensure that the event complied with the obligations in place at the time around social distancing and Covid protection. The food was individually wrapped. Attendees wore PPE and masks. Whilst a cake was given to the person whose birthday it was, as the attendees could not establish a Covid-safe way of cutting and distributing it, the person whose birthday it was took the whole cake home. There was no alcohol or dancing. Social distancing was observed. The lunch took place during the attendees' statutory lunch break. The event involved the attendees eating their lunch whilst socially distanced, during the lunch hour to which they were entitled.

22. Those who attended were members of either the Covid team or another team (of senior managers). The Covid team at the time, during their normal working day, all shared a single portacabin as their office (during the pandemic). The portacabin was smaller than the Clink restaurant space. The members of the team usually ate their lunch at their desk in the portacabin. There was no alternative space available at the prison for the employees to eat lunch. Immediately after the lunch on 23 June, all of those who attended the lunch then attended a meeting about Covid and the operation of the prison. That meeting was a usual daily meeting at which the Covid response was discussed.

23. There was some evidence heard about the location and nature of the Clink. At the time, it was a space available to be used for meetings. It was not, at the time, a restaurant available for public use. It is a prison service site and is on the prison grounds. It is not within the area to which the more stringent security measures apply. We did not need to determine whether the Clink was technically a public place for the purposes of the Covid regulations in place at the time, but it was clear that there could be a genuine and difficult dispute/disagreement about whether or not it was. By eating lunch in the Clink, the attendees (or, at least, those who were members of the Covid team) were able to social distance more effectively than was normally the case when they ate lunch in the portacabin in which they were based.

24. On 25 January 2022 (that is one and a half years after the event), a complaint was made (106). For the purposes of these proceedings, it was anonymous, albeit it may have been that the name of the complainant was known to the original recipient.

The email in which the complaint was made reported two events and drew a comparison with the timing and nature of allegations which were in the news at the time which had occurred at 10 Downing Street during the pandemic. One of the events at HMP Styal to which the email referred was not relevant to these proceedings and did not ultimately lead to any disciplinary investigation or action being taken (save that it was part of the same initial fact-finding investigation)

25. The first claimant was named as having helped to organise the other event but was not named at all in relation to the relevant event. The second claimant was not named in the email at all. Three female employees were named in relation to the relevant event, being the person whose birthday it was and two others who were stated to have been there. The Governor of the prison was referred to in relation to the other event (in the context of it having been his birthday), but no other male employees were named. What was said relevant to this event was:

> "*the Clink restaurant situated in the grounds was also used during the first lock-down period for a buffet. The buffet was attended by members of the Covid-19 Team and was in order to celebrate the 30th birthday of the Treatment Manager Laura Garner/Gribbin who was seconded to the Covid-19 Team. Also in attendance was …"*

26. The complaint was passed to Mr Scott and considered by him. He asked Ms Pia Sinha, Prison Group Director for Womens' Prisons, to commission a fact-finding investigation into what was alleged. Ms Sinha commissioned Ms Teresa Clarke, Prison Group Director West Midlands, to investigate by undertaking a fact-finding investigation. As we have said, nothing in the relevant policy set out that a fact-finding investigation could be undertaken or how that was to be done. Whilst the respondent's case was that such a procedure fell within what was said at 3.5 of the policy, it was clear that a full fact-finding investigation with a commissioning manager and an appointed investigator did not fall within the terms of the policy. It was Mr Scott's evidence that fact-finding investigations were not unusual. The evidence which we heard was highly complementary of Ms Sinha and Ms Clarke, who were clearly considered to be senior and highly-competent managers.

27. We were provided with the report which Ms Clarke prepared as a result of her fact-finding investigation (114). We did not hear evidence from either Ms Clarke or Ms Sinha. We also, perhaps surprisingly, were not provided with any of the source material obtained by Ms Clarke for her investigation, including the notes, transcripts or recordings of any meetings undertaken by her (the report stated that all bar one of the interviews was recorded; the one exception was said to have been noted). The report stated that Ms Clarke had interviewed seven people in undertaking her fact-finding investigation. All of the interviewees were female, save for Mr Khan (the Governor at the time of the events). Both claimants were interviewed, and it was the first claimant's evidence that she had a very lengthy meeting with Ms Clarke.

28. In her executive summary Ms Clarke said:

> "*The second event in June 2020 was organised by members of the covid team to celebrate the birthday of Laura Gribben (nee Garner). An email inviting 11 people to attend was sent to members of the SMT and covid team.*

> *It seems likely between 10 and 15 people attended. Those who attended told us that individually wrapped items of food were brought and shared by those attending. Although a cake had been made for Laura this was not shared because they could not work out how to do so in a covid secure manner…*
>
> *The lunch … was held in the Clink because it was felt there would be more space to accommodate people safely. The Clink is on prison property and the event was carefully managed in relation to COVID safety. Having said that we think the decision to allow this event was unwise.*
>
> *No-one is clear who authorised the use of the Clink for lunch. This is not surprising given that these events were almost two years ago.*
>
> *We do not recommend any further formal investigation in respect of either of these events*"

29. In the findings section of the report, Ms Clarke summarised what had been said by each of the interviewees (except for one female interviewee, about whom no information was provided). It was stated that Mr Khan definitely did not attend the event. A named female interviewee was not aware of the relevant event. It was explicitly stated in the report that each of the claimants had attended the lunch. It was also clear from what was said that the other two female interviewees had also attended.

30. In her conclusions, Ms Clarke said the following (125):

> "*While the use of the Clink restaurant appears to have been for health and safety reasons it could be considered that this, along with the use of the words 'buffet party' in the invitation email, gave the impression that a party was being held and that this was a social event. Those who attended insisted to us that they mostly would have been eating together anyway and that the lunch was followed by a COVID meeting which SMT and COVID Team members would jointly attend. This … was probably unwise in the circumstances … It could perhaps be described as contrary to the spirit rather than the letter of the rules. The Clink is on prison property and the event was carefully managed in relation to COVID safety. Having said that we think the decision to allow this was unwise"*

31. The fact-finding report explicitly stated that a formal investigation was not recommended.

32. Ms Clarke's email of 4 March 2022 which attached the report (140), also stated that she was not recommending a disciplinary investigation. On 8 March Ms Sinha sent two emails in which she stated she had accepted the recommendations for no further action. In her email to Mr Illingsworth, the Prison Group Director for Cumbria and Lancashire, (139) Ms Pinha said that she did request that the first claimant's line manager advise her to reflect on her involvement as a senior leader in relation to the event, with reference to the "*public perception test*" and the wisdom of the decision taken at the time. The first claimant was informed of this outcome.

33. On 9 March Ms Singha emailed the previous recipients of her emails and asked them to "*hold fire*" on informing the individuals involved (141). This was because she had not received agreement from a more senior manager. She went on to say, "*As you know this matter was escalated all the way to the Perm Sec (due to the high profile and topical nature of the enquiry)*".

34. Mr Scott emailed Ms Carter (the Head of the High Profile and Complex Investigations Team) on 11 March and said (142):

> "*I have been thinking about the "party" at Styal and am uncomfortable about party 2 that took place in the Clinks restaurant … Despite trying to get my head around the party in the Clinks I feel that this is just such a clear and indeed blatant breach of the rules that it needs to be formally investigated under the code of discipline…*
>
> *I spoke with Phil on Friday afternoon and have agreed the following:*
>
> *We commission a formal investigation into Party 2.*
>
> *It is commissioned by someone other than Pia*
>
> *The investigation is carried out by someone outside the female estate.*
>
> *Emma Sunley the Deputy Governor is informed that this is the course of action being taken (Emma is the only person who has been told that no further action is being taken). Phil's view is that as Teresa's investigation was a fact finding we can do this though it is not ideal"*

35. As that email explained, Mr Scott had spoken to someone more senior than him about the outcome of the fact-finding investigation and the commissioning manager's decision. They decided that, despite it being entirely contrary to the recommendation of the investigator and the decision of the commissioning manager, a further person should be given the report to review and that (if that person agreed as they surely would in the light of what they were being asked to do) a disciplinary investigation would follow. Mr Scott took that approach and asked Mr Cawkwell to review the fact-finding report. Perhaps unsurprisingly, Mr Cawkwell agreed with Mr Scott and decided that (contrary to the report's recommendations) a disciplinary investigation should be undertaken. Mr Cawkwell then took on the position of commissioning authority for a disciplinary investigation and he asked Mr Durgan to undertake the investigation.

36. Both Mr Scott and Mr Cawkwell gave evidence to us about the reasons for their decisions. In his evidence, Mr Scott explained that he thought Ms Clarke and Ms Sinha had been wrong. He felt that the report read like a justification for the events, and he did not feel that it had been a robust investigation. In particular, Mr Scott focused upon whether the outcome was one which he felt was justified if he was challenged upon it by those more senior than him or by the press (albeit that there was no evidence that the press knew about it). During the evidence which we heard we were told by a number of witnesses about the Daily Mail test. That was a test which appeared to be applied by the senior people from whom we heard as a

standard consideration. It considered how the decision being made would appear if reported by the Daily Mail. Without passing any comment on the advisability (or otherwise) of using such a test as a method of considering important decisions, we accepted that it was the test which Mr Scott applied and that the reason why he decided to re-open the investigation or to ask for the report to be reviewed afresh, was because of the view which he took of the event reported. We had no doubt, having heard from Mr Scott, that his view was genuinely and strongly held. It was Mr Cawkwell's evidence that, after he took a fresh look at the report, he made the decision to commission a disciplinary investigation because he felt that there were reasonable grounds to suspect that those being investigated had broken the law and acted in a way which might embarrass HMPPS.

37. Mr Cawkwell commissioned Mr Durgan to undertake the disciplinary investigation. We were provided with the terms of reference for that investigation (167). Four employees were named as being the employees who were under investigation. Those employees were all female. The claimants were two of them. The four identified, were the four people who had been explicitly identified as having attended the event by Ms Clarke in her report.

38. It was Mr Cawkwell's evidence that from the outset he anticipated the potential for other names to be added to the investigation as potential attendees at the event. He directed Mr Durgan to follow the evidence. However, from the evidence of both Mr Cawkwell and Mr Durgan, there appeared to be a concern about the investigation getting out of hand. It was therefore agreed between Mr Cawkwell and Mr Durgan that the disciplinary investigation would only be extended to include other individuals if their names were verified or referenced by two sources. From the evidence we heard it was not entirely clear what exactly was required to constitute the two sources (for example, whether being an invitee to the event and named by an attendee would suffice). We also did not understand why there was a concern about the investigation getting out of hand when it was known that there were no more than fifteen attendees (and ultimately eight people were investigated). We also found it somewhat surprising that a statement about who attended by a very senior member of the prison service would be ignored, if the person's attendance was not verified by someone else. It appeared somewhat inconsistent with the view taken by Mr Scott and Mr Cawkwell of the potential reprehensibility of attending the event, that the process was limited rather than focussed on establishing all who had attended (which it appeared to us could have been done relatively easily). Nonetheless, we accept that such an approach was what was agreed.

39. As part of his investigation, Mr Durgan interviewed Ms Gribbin (188) (we were provided with transcripts of the interviews undertaken). She was accompanied by Ms Jordan, the Prison Officers Association representative. In the interview Mr Durgan referred to the fact that somebody else to whom he had spoken (but to whom no reference was made in his report) had informed him that the attendees were the members of the Covid team. Ms Gribbin then proceeded to provide the names of the Covid team members, with the names provided being female. Mr Durgan sought clarity of the surname of a female employee named. Ms Jordan then stated that both herself and "*John*" had attended the event. Ms Gribbin said she could not recall whether John had been there or not. Mr Durgan did not seek to identify John's

surname. He also did not clarify with Ms Jordan that she had stated she attended. Instead, he stated that he would rather stick to the Covid team.

40. When the claimant interviewed the employee who had sent the invite to the event, she provided him with a copy of the invite. That copy would have had recorded on it the names of the invitees. There was no evidence that Mr Durgan sought to clarify with those invitees whether in fact they had attended the event. Those invitees were listed by Mr Durgan in the interview. Mr Durgan interviewed others, including both claimants. The claimants explained to Mr Durgan the event and why it was that they did not consider that there was anything untoward about the event. They were both candid and honest with Mr Durgan.

41. On 6 April 2022 Mr Durgan sought permission by email from Mr Cawkwell to add one female attendee at the lunch to the terms of reference and Mr Cawkwell confirmed that he could (877). In his email Mr Durgan said, "*This staff member has been identified by more than one witness as someone who attended the alleged event"* and Mr Cawkwell replied "*This approach is entirely consistent with what we discussed*". It was not in dispute that a second female attendee was also added to the terms of reference in a similar way, albeit similar emails were not provided for that person.

42. The investigation took considerably longer than the twenty-eight days provided for in the policy. On two occasions Mr Durgan sought an extension of time for his investigation. On the second occasion he did not inform the claimants that he had done so. The investigation took far longer than the claimants expected (particularly when the period taken for the initial fact-finding investigation was also considered). The evidence of the claimants was that, unsurprisingly, they found it very difficult to have this issue outstanding for such a long period of time. It also impacted upon their ability to be appointed to alternative roles (in contrast to the other attendees at the event, who were not the subject of the investigation).

43. During the investigation it was identified that Ms Baldwin and Mr Khan might have attended the event. The investigation was extended to include those two individuals. Due to their seniority, Mr Durgan was unable to investigate their attendance at the event. Mr Scott asked Ms Coccia to undertake the investigation into those two individuals. She did not meet them to do so. She simply sent questions to each of them and then reviewed the answers they gave. Ms Coccia wrote a report addressing the allegations against those two individuals and she recommended that they both have the allegations tested at a disciplinary hearing. That report described Mr Durgan as the lead investigator. Mr Durgan was provided with the report and the statements. In her statement, Ms Baldwin listed by name eleven people who she recalled had attended the event (albeit she erroneously listed Mr Khan). That list included Mr Burke and Mr Tarry. As a result, and applying the methodology agreed with Mr Cawkswell, Mr Durgan should have included additional people (including men) in the investigation. He did not do so.

44. Mr Durgan accepted that he had not acted consistently with the methodology he had set out. Most significantly, after Ms Coccia had obtained the written account from Ms Baldwin that was provided to Mr Durgan, he did not identify that male attendees at the lunch were named and, according to his methodology, at least one

of those named should have subsequently been investigated (having already been named by another interviewee).

45. We were shown the transcript of Mr Khan's disciplinary hearing (held on 15 December 2022) in which Mr Durkin was asked about the fact that he had not interviewed people who were named (and corroborated) by Ms Baldwin in her interview. He was recorded as having said (674):

> "*It may have been an oversight on my part. I've just reflected actually on a lot of things and one of the things I've reflected on was why did I, why did I not go on with that list and all's I can come up with was, rightly or wrongly, when I submitted my report and Sarah Coccia took over the last two interviews, my job was done and being honest I did not pay any attention to the list that Sandra gave her. There were two interviews to be done, they were done. I was given the results of those interviews with Danny was, was he there, wasn't he there, your answers Danny and Debra's answers, I'd stopped looking for further witnesses at that point"*

46. In his witness statement for this hearing, Mr Durgan accepted that five attendees (or potential attendees) at the lunch had received one mention during his own interviews and were corroborated by Ms Baldwin. The five referred to included two women and two men (other than Mr Khan). The men were: Mr Burke; and Mr Tarry. In his statement, Mr Durgan acknowledged that in accordance with his investigation method, they should also have been interviewed. He said, "*It was a failure on my part that they weren't – I was keen to get the investigation completed by the deadline*". He went on to highlight that two women were overlooked as well as the men.

47. One of the women named but not investigated was the secretary of the Prison Officers Association. She had not only been named previously and corroborated by Ms Baldwin, but she had also admitted that she had been in attendance herself during one of the interviews when accompanying the attendee. The claimants' suggested that there was an ulterior motive for her omission from the people formally investigated, as investigating an official of the POA would have opened up the investigation to greater scrutiny and potentially publicity, and they suggested Mr Durgan would have been fully aware of those potential issues if he did so.

48. Whilst undertaking the investigation, Mr Durgan was provided with a statement from the Prison Governor of HMP Styal. He included it within his report. It had no relevance to the investigation as the Governor had not been in post at the time. The claimants' case was that the statement was irrelevant, potentially prejudicial, and it would have been preferable if it had not been included in the report.

49. In the reports he produced, Mr Durgan omitted one of the sections present in the standard template. That was the box which recorded mitigation. In his oral evidence he said that he had done so because he had used his own copy of the template and that section was not included in his copy.

50. It was Mr Durgan's evidence that he had not seen the fact-finding report prepared by Ms Clarke. He confirmed that at some point it had been sent to him, but he had not looked at it as he decided he should not do so. It was also his evidence that he personally wrote the report (or reports) which he prepared following his investigation. During cross-examination, Mr Durgan was taken to a number of sections of his report which contained entire sentences which were identical to those used in Ms Clarke's report. In replying, Mr Durgan initially explained that he had taken content about the prison from the website for His Majesty's Inspector of Prisons and possibly other similar sources, and he suggested that explained any similarities. When he was asked about a paragraph for which it appeared the source could not have been of that nature, he could not explain the similarities.

51. It is not necessary or appropriate to reproduce large sections of the two reports in this Judgment for comparison. Nonetheless we noted that the following paragraphs of Ms Clarke's report (118) had identical content to the same paragraphs of Mr Durgan's report (348): 3.4; 3.5; 3.6; 3.7; and 3.8. Paragraph 3.9 contained identical sentences, albeit the entire paragraph was not the same. That paragraph explained what the report-writer had been told by the first claimant (and in Ms Clarke's report also Mr Khan) and did so using identical words to describe what had been said (not as a quotation, but as a description). At the end of that paragraph, was a sentence in which Mr Durgan described his own perception using identical words to those used by Ms Clarke to describe her perception.

52. Some of what was said in Mr Durgan's report could have been sourced from the same external sources as those used by Ms Clarke. Some of what was said could have reflected similar answers being given to questions. However, even where a report-writer has been given the same answers or information, we would have expected to have found the content of the report worded differently. We noted the extent to which the contents were the same and we particularly noted the identical wording used at the end of paragraph 3.9. As a result, we found Mr Durgan's evidence to us to have been untruthful. It was simply inconceivable that his report was written as it was without him having seen the fact-finding report, if he genuinely wrote the report himself (as he told us under oath that he had).

53. The investigation report recommended that the allegations against eight employees were to be tested at disciplinary hearings. The eight included the two claimants. Seven were female and one male (Mr Khan). Both claimants proceeded to disciplinary hearings conducted by Mr Hussey. Not all of the female employees ultimately faced a disciplinary hearing, as a result of ill health or resignation.

54. The one male employee for whom a hearing was recommended was Mr Khan, the former Governor (who it was ultimately confirmed had been on leave at the time of the event). The Governor and Ms Baldwin were significantly senior and, under the respondent's procedures, their investigation and hearing needed to be conducted by someone more senior than they were. That was why Ms Coccia undertook their investigations and not Mr Durgan. Their investigations were commissioned by Mr Scott. Their hearings were also both conducted by Mr Scott. Whilst we were not provided with the documents which evidenced the process and outcome for her, we were told that Ms Baldwin was ultimately given a disciplinary sanction. Mr Khan, the Governor, was not given a disciplinary sanction.

55. We were shown an email of 15 September which had been redacted, but it was agreed had been sent by Mr Durgan (341). In that email he stated that another person (presumably Ms Coccia) had completed her part of the further enquiries "*and no issues arose which would require me to reinterview those I already have, and no new evidence was presented that would need me to broaden my enquiry*". That statement was not in fact correct (had Mr Durgan applied his methodology correctly and fully considered the report and attached statements).

56. By letters of 27 October 2022 each of the claimants were invited to a disciplinary hearing by Mr Hussey. In his letter, Mr Hussey spelt out that the potential decisions were (only): no further action; informal action; or formal action by giving a disciplinary warning up to and including a written warning. The allegations were the same in both claimants' letters and said:

> "*It is alleged that on the 23 June 2020 you attended a gathering at the Clink, HMP Styal in contravention of The Health Protection (Coronavirus Restrictions) (England) Regulations 2020 in place at the time. This had the potential to bring HMPPS into disrepute and in doing so you acted unprofessionally"*

57. On 29 November the first claimant raised a grievance with Mr Cawkwell about a breach of confidentiality with the disciplinary investigation. She noted that the investigator had discussed the investigation with the Prison Governor despite the policy stating that it would be treated in the strictest confidence. On 7 December Mr Cawkwell wrote to the claimant and said that as this related to an ongoing conduct and discipline matter it was outside the scope of the grievance procedure. The grievance was never substantively addressed.

58. The first claimant's disciplinary hearing took place on 7 December 2022. It was attended by the claimant and Mr Barrett as her accompanier. Mr Hussey conducted the hearing. A note taker attended. Mr Durgan attended for part of the hearing by Teams. We were provided a full transcript of the lengthy hearing conducted (499).

59. It was Mr Barrett's evidence that he introduced himself to Mr Hussey just before the allotted time for the first claimant's disciplinary hearing. What was said was not part of the transcript. It was Mr Barrett's evidence that Mr Hussey told him that what was going to happen was that he was going to give the first claimant the lowest possible award (or words to that effect). He said Mr Hussey told him that the respondent (that is, a predecessor of the current office holder) and the Permanent Secretary wanted blood, so that if he gave the claimants the lowest award it prevented them coming after the claimants in the future as that would be double jeopardy. Mr Hussey denied that he had said what was alleged. He did emphasise that it had always been his view that the only potential outcomes to the hearings were: not found; verbal warning; or written warning. He said he had always been clear that he did not see the outcome as being a more serious sanction.

60. At the end of the very lengthy hearing, Mr Hussey spoke about the investigation and said that the investigating office was "*in some places all over the place*" and he described there being "*holes*" in his report. He also said that he had no

doubt that "*every possible safety procedure was in place by you and your staff and that's commendable to you as the senior leader*" and that "*there is no question that you and your team run a covid safe event*". There was an adjournment for a little over ten minutes. Mr Hussey then informed the first claimant of his decision. He decided that there was nothing in evidence that said that the first claimant had brought discredit on the organisation. He also said there was no evidence that suggested that the first claimant had been in any way unprofessional. However, for (what he described as) the charge that the first claimant had not followed orders and instructions, he found that proved. He explained that without the invite email he would not have done so because there "*would have been nothing*". He did not set out exactly what order or instruction it was that he had found the first claimant had not followed. He also did not explain how the wording he used fitted with the allegation he had been required to consider. He also did not explain how the wording of the email could have resulted in an event which was otherwise in accordance with orders and instructions, having not been. In his evidence to us, he said that if the email had not included the words "*buffet party*" he would not have found misconduct.

61. Mr Hussey informed the first claimant that he would give her the lowest award for the shortest period which he could. The first claimant was given an oral warning which would expire in six months. Mr Hussey said that he would, if he could, have given a lesser award, but that was the lowest he could give. He said to the claimant that he understood and "*accept everything you say*".

62. On 8 December Mr Hussey conducted the disciplinary hearing for the second claimant. The second claimant had opted for the fast-track procedure. We were provided with notes of the hearing (622). In the hearing the second respondent confirmed that she had no involvement in the conception, planning or execution of the lunch. Mr Hussey stated that he accepted that every possible safety precaution was followed. He said that it was nothing more than a poorly worded email. He reached the same decision as he had for the first claimant and imposed the same sanction, explaining that he had done so having in mind that the matter would then be closed and could not be re-opened.

63. Each of the claimants were sent outcome letters from Mr Hussey on 12 December (634). The letters stated that the allegation found proven was "*Failure to obey a lawful/reasonable order/written instruction*". Within the decision letter it was said "*The gathering went against COVID Guidance issued by COVID Gold command and against the Government instruction not to have social gatherings*". The letter did not identify the precise Gold command guidance. The first claimant's letter included as a point that as the most senior person within the establishment at the time and acting as the Governor on the day, the fact that she took no action to prevent the gathering also fell under a failure to obey a lawful and reasonable order or written instruction (without identifying the order or instruction, and despite the fact that the first claimant had not been the most senior person present). Both claimants' letters said they were given an oral warning to be disregarded after a period of six months.

64. On 15 December the first claimant again raised a grievance about the breach of confidentiality relating to the disciplinary investigation. Mr Scott responded to the first claimant on 20 December to say that because the grievance was in relation to a disciplinary hearing, the appropriate way was for it to be addressed through the

appeal process rather than the grievance process. The grievance was not addressed.

65. Both claimants appealed. The appeals were heard by Mr Spencer. The first claimant's appeal was heard on 12 January 2023. At the hearing she was accompanied by Mr Barrett. A transcript was provided (724). The second claimant's appeal was heard on 13 January 2023. She was accompanied by Ms Allbut. A transcript of her hearing was also provided (739). In the appeal meeting Ms Allbut expressly stated that it had been a shambolic and discriminatory investigation. Mr Spencer's decision for both claimants was to remove the penalty and take no further action. That was confirmed in letters of 17 January 2023 (756). The letters referred to the inconsistency of treatment and investigations when compared to Tik Tok videos (taken in prisons) which had been circulated at the time. In the second respondent's decision letter he also stated that he could find no evidence to support the assertion of gender discrimination (although he did not explain what evidence he had sought or considered). Mr Spencer also wrote to the second claimant on 25 January 2023 (760) and clarified that he had upheld the finding of guilt, however he had decided that no further action should be taken.

Other evidence

66. It was Mr Burke's evidence, that he attended the lunch. He stated that other male colleagues attended the gathering. He was neither questioned nor subjected to a disciplinary investigation. Mr Burke was named by the first claimant as having attended the lunch in her interview with Mr Durgan. He was also named as an attendee by Ms Baldwin in her statement provided to Ms Coccia. He was clearly one of those invited to the event from the invite email (161).

67. It was Mr Davies' evidence that he attended the lunch. He was neither questioned nor subjected to a disciplinary investigation. Nobody named him as having attended during the interviews undertaken as part of the investigation. He was one of the invitees recorded on the email (161).

68. It was Mr Tarry's evidence in the written statement that he provided, that he had attended the lunch. He said that Mr Craven, Mr Burke, and one other named man had attended, as well as possibly a few other male staff. He was neither questioned nor subjected to a disciplinary investigation. Mr Tarry had been named as an attendee by the second claimant in her interview with Mr Durgan, and by Ms Baldwin in her statement provided to Ms Coccia.

69. Mr Craven was named by the claimants as a comparator. He was neither questioned nor subject to a disciplinary investigation. Nobody named him as having attended during the interviews undertaken as part of the investigation. He was one of the invitees recorded on the email (161). In his witness statement for this hearing, Mr Tarry confirmed that Ms Craven attended.

70. Mr Oxley was named by the claimants as (possibly) being a comparator. He was not an invitee. Whilst attending Ms Gribbin's interview with Mr Durgan as her accompanier, Ms Jordan told Mr Durgan that Mr Oxley (using only his first name) was at the lunch with Ms Jordan. The notes record that Ms Gribbin said she could

not remember if it was his day off and so did not confirm his attendance herself. Mr Durgan responded by saying "*I'd rather you just stick to the Covid team*" (190). It was clear from the transcript that at that time Mr Durgan was disinterested in identifying who the person named was or whether he had in fact attended and he closed down that part of the conversation. Mr Oxley was not an invitee and he was not named by anyone else as having attended the lunch.

71. We heard evidence from Ms Gribbin who had attended the lunch but had not known about it in advance. She said that not all those who had attended were interviewed. She was on maternity leave when the investigation commenced and was interviewed immediately upon her return. She was told that the fact-finding interviews had been concluded with no case to answer. She said she was shocked when she was informed that an investigation had been opened. She has since left the prison service and it was her evidence that this was, in part, as a result of the process followed. The first claimant, in her evidence, emphasised that Ms Gribbin's value as an employee and described her as the sort of person who you would always want to be an employee.

72. Mr Khan was the Prison Governor at the time. He was invited to the lunch in the email sent. He explained in evidence why it was that on the day the email was sent he was focussed upon a particular event at the prison which took up all his focus and he would not have read the email (and we fully understand why that was the case). In the fact-finding investigation undertaken by Ms Clarke, it was recorded (121) that he "*definitely did not attend this and may have been on leave at the time*". In the light of that having been established, very surprisingly, after he was erroneously named as an attendee by one person in her interview with Mr Durgan, he was subjected to a disciplinary procedure for having attended the event. He was sent questions by Ms Coccia and he was also named in error by Ms Baldwin as having attended the event. He was required to attend a disciplinary hearing. It appeared from the evidence heard that (as Mr Khan alleged) neither Mr Durgan nor Ms Coccia attempted to investigate whether he had been on annual leave at the time (which presumably could have been easily established). At the disciplinary hearing, Mr Khan established that he had been on leave and not in attendance, and no action was taken. Mr Khan was the only man who was investigated and subjected to a disciplinary process following the event. Unsurprisingly, as he was not present, he was not sanctioned. It was Mr Khan's evidence to the Tribunal that "*the fact that I am a minority ethnic cannot be ignored*". It was not our role to determine the suggestion/allegation that Mr Khan had been treated less favourably due to his race as that was not one of the claims we needed to address.

73. We also heard evidence from Ms Albutt, a band eleven Operational Manager and an elected official of the Prison Governors Association. In her evidence, she stated her shock at what she described as a complete disregard for due process. She said she had never seen a fact-finding investigation's recommendations accepted, only to be unaccepted, then a decision to ignore them and move forward to the full investigative process, without new evidence coming to light.

74. The respondent's witnesses were asked by the claimants' representative when they had last received training on discrimination matters. Some had relatively recently, but for others it had not been for some time. Most notably, it was Mr

Durgan's evidence that he had undertaken equality/discrimination training, but he could not remember when, although it would have been over twenty years ago.

The Law

75. As direct discrimination claims, the claims relied on section 13 of the Equality Act 2010 which provides that:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

76. Section 39(2) of the Equality Act 2010 sets out various ways in which discrimination can occur and these include any other detriment. The characteristics protected by these provisions include sex.

77. In this case, the respondent will have subjected the relevant claimant to direct discrimination if, because of her sex, he treated her less favourably than he treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different. It is not a requirement that the situations have to be precisely the same.

78. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".*

79. In short, a two-stage approach is envisaged:

a. At the first stage, we must consider whether the particular claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that she has been treated less favourably than her comparator(s) and that there is a difference of sex between them; there must be something more.

b. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that we must uphold the claim unless the respondent proves that he did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof

is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

80. In **Shamoon v Chief Constable of the RUC** [2003] IRLR 285 the House of Lords said the following:

> *"In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."*

81. It also said that there may be cases where:

> *"The act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy enquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the enquiry is the ground of, or the reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in* ***James v Eastleigh****, a benign motive is irrelevant…the ultimate question is – necessarily what was the ground of the treatment complained of (or - if you prefer - the reason why it occurred)."*

82. In **Hewage v Grampian Health Board** [2012] ICR 1054 the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong** [2005] ICR 931, as refined in **Madarassy v Nomura International PLC** [2007] ICR 867. As we have said, in order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in sex, and a difference in treatment. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory

explanation. In **Madarassy v Nomura International PLC** [2007] ICR 867 Mummery LJ said:

> *"The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it…The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

83. In its decision in **London Borough of Islington v Ladele** [2009] IRLR 154 the Employment Appeal Tribunal set out the following commentary on direct discrimination claims:

> *''The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*
>
> *(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in* **Nagarajan v London Regional Transport** [1999] IRLR 572, 575*—"this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*
>
> *(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in **Nagarajan** (p 576) as explained by Peter Gibson LJ in* **Igen v Wong** [2005] EWCA Civ 142*,* [2005] ICR 931*,* [2005] IRLR 258 *paragraph 37.*
>
> *(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the*

> *two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in* **Igen v Wong**.…
>
> *(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. …*
>
> *(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the* **Igen** *test: see the decision of the Court of Appeal in* **Brown v Croydon** LBC [2007] EWCA Civ 32*,* [2007] IRLR 259 *paragraphs 28–39. …*
>
> *(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in* **Anya v University of Oxford** [2001] EWCA Civ 405*,* [2001] IRLR 377 *esp paragraph 10.*
>
> *(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in* **Watt (formerly Carter) v Ahsan** [2008] IRLR 243*,* [2008] 1 All ER 869 *… paragraphs 36–37)* …"

84. In his submissions, the respondent's representative relied upon the Supreme Court decision, in **Hewage v Grampion Health Board**, which he said agreed with a warning given by Underhill J in **Martin v Devonshires Solicitors** UKEAT/0086/10, that it is *'important not to make too much of the role of the burden of proof provisions*'. He said that Lord Hope in **Hewage** went on *'they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*'.

85. In his submissions, the respondent's representative quoted at length from **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] IRLR 332 in which the Court of Appeal provided guidance on how the burden of proof should operate:

> *"(1) Pursuant to s 63A of the SDA 1975, 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 1975 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 SDA 1975 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) …

(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"*

86. The Supreme Court's guidance in **Royal Mail v Efobi** [2021] UKSC 33 was that we must consider all the evidence when determining the first stage of the test. The respondent relied upon that Judgment for his submission that the Supreme Court said that, so far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. He also relied upon **Pnaiser v NHS England** [2016] IRLR 170, that whilst we might find it helpful to go through the two stages suggested in **Igen**, it is not necessarily an error of law not to do so and in many cases moving to the second stage is sensible.

87. In his submission document and his verbal submissions, the respondent's representative made reference to the recent decision of the Employment Appeal Tribunal in **Virgin Active Limited v Hughes** [2023] EAT 130 in which the shifting of the burden of proof in cases involving an actual comparator was considered and clarified. We have considered what was said in that case and, in particular, noted what was said in the following passages:

> "*In other cases, the claimant compares his treatment with that of one or more other people. There are two ways in which such a comparison may be relevant. If there are no material differences between the circumstances of the claimant and the person with whom the comparison is made (the person is usually referred to as an actual comparator), this provides significant evidence that there could have been discrimination. However, because there must be no material difference in circumstances between a claimant and a comparator for the purpose of section 23 EQA it is rare that a claimant can point to an actual comparator. The second situation in which a comparison with the treatment of another person may provide evidence of discrimination is where the circumstances are similar, but not sufficiently alike for the person to be an actual comparator. The treatment of such a person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ to those of the claimant would have been treated (generally referred to as a hypothetical comparator). Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ to those of the claimant. That distinction is not always sufficiently considered when applying the burden of proof provisions …*
>
> *It is worth noting that in* ***Madarassy*** *the Employment Tribunal did not analyse the treatment of the claimant in comparison to actual comparators. Ms*

> *Madarassy's claim was not analysed on the basis that there were men who were actual comparators, but that the scoring of men in a redundancy exercise could help establish how a hypothetical comparator would have been treated. Where there is an actual comparator, it might be said that there is more than the bare fact of a difference of status and a difference of treatment…*
>
> *If anything more is required to shift the burden of proof when there is an actual comparator it will be less than would be the case if a claimant compares his treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator.*
>
> *For example, if two people who differ in a protected characteristic attend a job interview and one is appointed but the other is not, that, of itself, would not be enough to shift the burden of proof, but if they scored the same marks in the assessment, so there is an actual comparator, the difference of treatment would seem to call out for an explanation…*
>
> *Accordingly, where a claimant compares his treatment with that of another person, it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination."*

88. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council** [1998] IRLR 36. In his submissions, the respondent's representative highlighted this point and referred to a number of relevant authorities and passages which emphasised that issue. In particular, it was noted that he quoted the following passage from the decision of the Employment Appeal Tribunal in **Chief Constable of Kent Constabulary v Bowler** EAT/0214/16 (which we found to have particular application to this case):

> *"Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic"*

89. In his submissions, the respondent's representative also addressed an employer's failure to follow policies and procedures. That can support an inference of discrimination. He said that nevertheless, an employer's failure to follow its own policies or procedures will sometimes be the result of poor organisation or incompetence as opposed to discrimination. He referred to **Medrysa v London Borough of Tower Hamlets** EAT 0208/20 as an example of such a case.

90. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or significant influence for the treatment. The respondent quoted from **Nagarajan** that the protected characteristic (her sex) must be "*a cause, the activating cause, a substantial and effective cause, a*

substantial reason, an important factor". Reliance was also placed upon what was said in **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562 that liability will only be established where the protected characteristic formed the motivation for the individual performing the act complained of; unwittingly acting on the basis of someone else's tainted decision will not be sufficient: *'I see no basis on which* [the individual employee who did the act complained of] *can be said to be discriminatory on the basis of someone else's motivation*".

91. If the burden of proof shifts, the employer is required only to show a non-discriminatory reason for the treatment in question, it does not have to show that it acted reasonably or fairly in relying on it (**Griffiths-Henry v Network Rail Infrastructure Ltd** [2006] IRLR 865 was cited in support of that contention).

92. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

93. The key date is when the act of discrimination occurred. We needed to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme.

94. If out of time, we need to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable".* The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. A Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, and factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 confirms the breadth of the discretion available to the Tribunal, but also says that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. The Employment Appeal Tribunal in **Concentrix CVG Intelligent Contact**

Ltd v Obi [2022] 149 set out the correct approach to considering the just and equitable extension to incidents which together were a course of conduct, but which were out of time.

95. Whilst it was not necessary for us to decide whether or not it had been complied with, we would also record that throughout the hearing reference was made to Regulation 7 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and a copy was included within the respondent's chronology document. That said (as it applied to these proceedings):

> "*During the emergency period, no person may participate in a gathering in a public place of more than two people except – (b) where the gathering is essential for work purposes"*

96. During this hearing there was (in summary) a dispute between the parties about: whether or not the location of the lunch was a public place; whether the regulations should be followed in any event even if it was not in accordance with the guidance issued for those employed by the respondent; and how the regulations applied to a gathering for a statutory lunch break taken by people who would be gathering as essential for work purposes immediately following the lunch break in any event. We did not need to determine those complex issues.

97. We considered the entire written and verbal submissions of both parties, whether or not they are expressly addressed in this Judgment. Understandably, the claimants' representative in his submissions focussed on the facts and not the applicable law.

Conclusions – applying the Law to the Facts

98. It is really important that we start by emphasising that we were only required to determine the claims brought and the issues included in the list of issues. We did not need to decide whether or not the lunch in fact breached the Covid regulations in force at the time. We did not need to decide whether the respondent had followed its own procedures or a fair procedure, save to the extent that impacted upon the issues we needed to decide. We did not need to apply the Daily Mail test ourselves, about which much was heard during the hearing. We were not deciding whether the claimants would (or might) have had meritorious grounds to claim that there had been a breach of the duty of trust and confidence, because we were not hearing a constructive dismissal claim.

99. It was a significant part of the claimants' cases, that one of the reasons why it is important to have procedures, and to adhere to procedures, is that not doing so increases the risk of discrimination. That is entirely correct. Adherence to the procedures laid down, and to those agreed with the trade unions, can assist in discrimination being avoided. As we have addressed in relation to the allegations being considered below, non-adherence to a policy or procedure can also be a factor in shifting the burden of proof, albeit it does not invariably and always do so. However, it is not correct that a failure to follow a procedure is, in and of itself, proof that discrimination has occurred. In this Judgment we have not needed to determine many of the procedural issues raised by the claimants.

100. We would also confirm that we did consider the claims on the basis that there were two claimants' claims being heard and it was not necessarily the case that the outcome in the two claims would be the same. In practice, and as explained below, our conclusions and decisions were the same in both cases (save only for the decisions reached on time/jurisdiction issues). We understood and considered the slightly different circumstances which applied to the two claimants, including their involvement and seniority, but we have explained our determination in both claims below where the findings were common to both claims (which applied save where we have expressly said that it did not).

101. We did not consider the issues relating to time and jurisdiction first (issues one to three). We considered the substantive discrimination issues first (issues four to eight). We considered all of the issues (four to eight) as they applied to each allegation of less favourable treatment, and therefore have addressed our findings for each of the allegations in turn. We would observe that the precise distinction about what fell within each of the first three allegations was not entirely clear.

Re-opening the investigation

102. The first allegation of less favourable treatment was said to be the re-opening of the investigation into the alleged breach of Covid 19 distancing rules in June 2020. There was some overlap between that, and the second alleged less favourable treatment and it was not entirely clear that in practice there was any difference at all in the material issues which needed to be considered and the decision made between the two. We considered the detailed decision to re-open the investigation when considering this allegation. Had we considered the decision broadly, the claimants could not have succeeded in their claims, because a decision purely to re-open a fact-finding investigation could not have been less favourable treatment at all, as the re-opening of the investigation applied equally without any reference to individuals or sex.

103. For the first allegation, the first question which we needed to ask was whether the claimants were treated less favourably than either their named comparators were, or a hypothetical male comparator would have been? It was Mr Scott's decision that the fact-finding investigation should be re-opened, after Ms Clarke (as fact-finding investigator) and Ms Sinha (the commissioner of the fact-finding investigation) had decided that no disciplinary investigation was required. Mr Cawkwell also contributed to that decision as he reviewed the initial fact-finding investigation when he took (what was described as) a fresh look at the fact-finding report and commissioned a disciplinary investigation.

104. For this alleged less favourable treatment, we needed to consider the four named comparators: Mr Burke; Mr Craven; Mr Taffy; and Mr Oxley. We did not find that the claimants were treated less favourably than the named comparators, as the named comparators were not in materially the same circumstances as the claimants. Those four individuals were not named in the initial fact-finding report and had not been spoken to as part of that investigation. For the allegation that the investigation was re-opened, it was re-opened with some focus on the claimants precisely because the claimants had been named by Ms Clarke in her fact-finding

report and identified as having been at the event. The named comparators were not part of the decision that the investigation be re-opened because they had not been spoken to or identified as present by Ms Clarke. They were not in materially the same circumstances.

105. Turning to the issue of a hypothetical comparator, we considered the burden of proof and issue seven. Were there any facts from which we could decide, in the absence of any other explanation, that the respondent discriminated against the claimants in this way? That issue of course needed to be read alongside issue five as the claimants needed to demonstrate the "something more" required to shift the burden of proof for an allegation that a hypothetical male comparator in the same circumstances would have been treated more favourably.

106. We considered whether the claimants had shown the something more required to reverse the burden of proof in their sex discrimination claims for this allegation. We decided that the burden of proof had shifted because the numbers involved provided the something more required to do so, in circumstances where the decision taken by Mr Scott (to re-open a fact-finding investigation which had ended because no action had been recommended) was either unique (as evidenced by Ms Allbut) or at least rare and outside the norm. The re-opening of the investigation applied to four women and only women. It did not apply to any men. We know that at least two men (and probably more) had attended the event, but the re-opening of the investigation did not apply to any of them. Men had been invited to the event. We found that the statistical disparity between those who were the subject of this decision (being only women), when men had also attended the event, was (when allied with the unique or highly unusual nature of the decision taken) sufficient for us to decide that in the absence of any other explanation, the respondent would be found to have discriminated in this way (comparing the claimants with a hypothetical male comparator who would have been named in the report). The burden of proof shifted. That was not however the end of the decision which we needed to reach, as we then needed to go on and determine issue eight in relation to this allegation.

107. As we decided that the burden of proof had shifted, we needed to then consider issue eight in relation to this allegation. Had the respondent shown that sex was in no sense whatsoever the reason for the re-opening of the investigation? In considering this, we focussed upon the evidence which Mr Scott gave and his reasons for deciding that the investigation should be re-opened, as we decided he was the principal decision-maker. In practice, based upon the evidence which we heard from him, there were two reasons why he made the decision to reconsider (and to ask Mr Cawkwell to take a fresh look): his personal conviction that the event which had taken place had been outside the rules in place at the time (which was made very clear from his evidence to us); and the obvious political pressure which was being applied to him at the time. We accepted Mr Scott's evidence about why he made the decision to re-open the investigation. As a result, we found that the decision made was in no sense whatsoever on the grounds of sex. We found that a hypothetical male employee who had also been named in Ms Clarke's report and identified as having been present at the event, would also have had the investigation re-opened and have been targeted as part of that re-opening. We

noted that it was those named in the report who were investigated (at least initially) and we found that would have occurred irrespective of the sex of the people named.

Targeting females

108. The second alleged less favourable treatment was targeting females within the investigation. We have in practice addressed and determined this alleged less favourable treatment when determining the first allegation. We fully understood that it was well outside the normal process for the outcome of a fact-finding investigation, and the decision of the commissioning manager, to be reconsidered and overturned. We accepted Ms Allbut's evidence that she had never known it to have occurred. That shifted the burden of proof when taken together with the statistical disparity of impact as it was only women named and targeted when men had also attended the event. However, for the same reason as we have explained for the first allegation, we accepted Mr Scott's evidence about why he did so, and therefore found that his decision was in no sense whatsoever on grounds of sex (albeit unusual and outside normal/expected procedure).

Failing to interview relevant men

109. The third alleged unfavourable treatment was failing to interview relevant males within the investigation who were named during the process. This was a failure or omission by Mr Durgan (with potentially there also being some part played by Mr Cawkwell who was the commissioning manager). Mr Durgan did not interview the male employees who were named on the invite email. He did interview the claimants and the other female attendees who were either named in the fact-finding report or (in two cases) who were named by two interviewees in the course of his investigation. Some men were named during the investigation as having attended the event. Those men were not interviewed (with the notable exception of Mr Khan, the Governor). All of the claimant's named comparators were not interviewed: Mr Burke; Mr Craven; Mr Taffy; and Mr Oxley. The claimants were. At least two of those comparators had attended the event and so were in materially the same circumstances as the claimants. Even if being named in the investigation was considered as a requirement for the circumstances to be materially the same, at least two of them were named during the investigation and at least one was named twice, but they were still not interviewed. The claimants were treated less favourably than their named comparators (or, at the least, were treated less favourably than one of them).

110. In considering this issue, we needed to take account of the evidence which we heard about the investigation and the rule which Mr Durgan and Mr Cawkwell evidenced they applied. We would observe that we could not understand why any rule needed to be applied to this investigation at all to limit those interviewed. It was common ground that no more than fifteen people had attended the event, and potentially fewer. The respondent's position was that attending the event was potentially serious and could require disciplinary action. The respondent's evidence appeared to be that they did not want the investigation to get out of control, but for an event with such a limited number of attendees there was no reason why it should. Eight people were interviewed (including one who was not there at all). A

sensible and reasonable investigation could relatively easily have identified who was invited or named as attending and have interviewed all of them without significant delay. Ms Coccia's approach to the investigation required little administrative effort, as she simply sent a set of questions to the interviewees and considered their responses. If a named attendee explained when interviewed that they were not present, procedures could have been ended. We could not understand why people identified as having attended by someone as senior as Ms Baldwin were not interviewed as a result (albeit she incorrectly named Mr Khan as attending when he had not). We could not understand why all those invited were not interviewed or sent questions. A sensible and reasonable investigation could, in our view, have been undertaken for all the named attendees (whatever the source). We could not understand why a methodology was introduced which required an attendee to be named twice and, in any event, that methodology was not ultimately applied by Mr Durgan.

111. We needed to consider whether the burden of proof shifted (issue seven – whether there were facts from which we could decide, in the absence of any other explanation, that the respondent discriminated against the claimants). We identified the following as being the something more which shifted the burden of proof:

a. Applying what was said in **Virgin Active** from which we have quoted above, the claimants had identified actual comparators in materially the same circumstances which meant that the lesser something more was required as identified in that case;

b. There was a statistical difference of seven women and only one man being interviewed, when there were men present at the event;

c. As we have already recorded, we found Mr Durgan's evidence to be untruthful (as we have recorded for one issue); and

d. Mr Durgan failed to apply the methodology which he had agreed with Mr Cawkwell.

112. We then needed to determine issue eight as it applied to this allegation. Had the respondent shown that the less favourable treatment was in no sense whatsoever because of sex? As we have explained, we did not understand the decision made by Mr Durgan (in conjunction with Mr Cawkwell) to apply the methodology which he did. Nonetheless, having heard their evidence, we accepted that was what Mr Durgan decided to do. We did not find that Mr Cawkwell and Mr Durgan were consistent in their evidence about what would meet the criteria but accept that Mr Durgan applied the criteria as he understood it (initially). It was the respondent's case that the failure to interview the men who should have been interviewed as part of the investigation was because Mr Durgan made a mistake and did not do so (it was described in the respondent's counsel's submissions as a fairly sizeable mistake). We would have fully expected someone who works as a Prison Governor to have been able to review the investigative materials and ensure that the right people were interviewed. It was not a difficult or overly onerous task to have undertaken the investigation appropriately and to have reviewed the

interviews undertaken by Ms Coccia to apply the methodology chosen. However, having heard his evidence, we accept that Mr Durgan did not. He failed to appropriately review the investigation materials produced by Ms Coccia. He failed to identify those who should have been interviewed as a result. We accept that the reason why he did so was in no sense whatsoever due to sex. We did note that he failed to identify women as well as men who should have been interviewed and accept it was a mistake. Mr Durgan said he made a mistake. We think that it was a greater error than that, it was incompetent. However, it was not due to the sex of those identified.

Sanctions were issued to women

113. The fourth allegation was that sanctions were issued to women. Looking at that allegation at its broadest, as a matter of fact the claimants were treated less favourably than their named comparators (or at least those whom it was confirmed they had attended the event), because they all attended the same event and only the claimants were issued with a sanction. The claimants were treated less favourably. That was the case even after the outcome of the appeal when the sanction itself was reversed because the finding remained.

114. However, when looking specifically at the sanction applied, the claimants were not in materially the same circumstances as their comparators, because the comparators had not been the subject of the investigation. The only man in the same circumstances as the claimants (in being required to attend a disciplinary hearing) was Mr Khan. The difference in outcome between the claimants and Mr Khan was because he wasn't present at the event at all, so his circumstances as they applied were materially different.

115. We therefore considered the fourth allegation in relation to a hypothetical male comparator who was also invited to a disciplinary hearing having attended the event. The sanction on both claimants was imposed by Mr Hussey. He only conducted disciplinary hearings for women; he did not conduct any hearings for a man. He imposed sanctions in the four cases he heard. We noted that Mr Hussey did not uphold the disciplinary case in respect of two of the ways in which it was presented/alleged, even for the second claimant who had opted for the fast-track procedure. He was also very clear in his evidence that if the invite email had not referred to a "*buffet party*" he would not have found as he did. We did not find there to have been anything which shifted the burden of proof in relation to the decision reached by Mr Hussey, there was nothing which showed the "*something more*" required to show the prima facie case that the sanctions he imposed were on grounds of sex. We accepted Mr Hussey's evidence about why he imposed the sanctions that he did, and we found there to be no evidence that the sex of those who attended hearings with him had an impact on his decision.

116. Mr Hussey, by his own admission, had identified the likely outcomes of the disciplinary hearings before he heard the cases. He did emphasise in evidence that he exercised his own judgement, but we did think that he had pre-determined that a sanction was likely to be required. It was clear to us that there were senior people within the service who had decided that some sanction was required

following the event. We decided that Mr Hussey reached his own decision but one which was influenced by what he perceived to be the view of the organisation. However, even having reached that view, we still found nothing which reversed the burden of proof and showed the something more required to show that the sanction could have been on the grounds of sex.

Other issues

117. In the pleaded case, the respondent had relied on the employer's defence. That issue was not one recorded in the list of issues written at the preliminary hearing and confirmed at the start of this hearing. It was not an argument advanced by the respondent. This was unsurprising in circumstances where it had been at least twenty years since Mr Durgan has been trained on equality/discrimination, according to his evidence. We were surprised that somebody in his position had not received some form of discrimination training more recently.

118. We did consider issues one to three on time and jurisdiction, albeit that as a result of our findings on the substantive issues, the decisions made on issues one to three did not materially alter the outcome of the proceedings.

119. In terms of the dates when the alleged less favourable treatment occurred those were as follows:

a. The decision of Mr Scott to re-open the investigation was made in March 2022. The email to Ms Carter recording why he made the decision was dated 11 March 2022 (142) and Mr Cawkwell was asked to undertake the review in March;

b. The alleged targeting of females as part of the investigation in effect occurred at the same time as (a);

c. The third allegation was the failure to interview relevant male employees. That had occurred, at the latest, on the date when Mr Durgan concluded the investigation and decided there was no need to further broaden the enquiry on 15 September 2022 (341); and

d. The sanctions were issued to the claimants on 12 December 2022 (634/636). The outcomes of the appeals were on 17 January 2023 (756), with clarification about what that meant provided to the second claimant on 25 January 2023 (760).

120. The first claimant entered into ACAS Early conciliation on 24 January 2023 and that continued until 26 January (1). Her claim was entered on 22 February. Based upon the date when ACAS Early Conciliation was commenced, anything which occurred prior to 25 October 2022 would be outside the primary time limit. Based upon the dates recorded above and if considered in isolation, the claims arising from the first, second and third allegations were out of time; the claim arising from the fourth was in time, based upon the date the sanction was imposed.

121. Had we needed to have done so, we would have found all of the alleged unfavourable treatment to have been part of a continuing course of conduct. We found the process followed from the decision to re-open the fact-finding investigation through to the sanction being imposed was all part of continuing course of conduct even though different people and decision-makers were involved. As a result, as the first claimant's claims were brought in the time required for the fourth allegation, they would have been brought within the time required for all of the allegations had we found that they all occurred (because they were part of a continuing course of conduct).

122. The second claimant entered into ACAS Early conciliation on 13 March 2023 and that continued until 16 March (22). Her claim was entered on 24 March. Based upon the date when ACAS Early Conciliation was commenced, anything which occurred prior to 14 December 2022 would have been outside the primary time limit. We found that the date upon which the sanction was imposed, which the second claimant contended was less favourable treatment, was 12 December and not the date of the appeal decision (when the sanction was removed). As a result, the claim was entered outside the primary time limit for all of the second claimant's claims.

123. Had we needed to have considered whether it would have been just and equitable to extend time for the second claimant's claims, we would have done so. The reason why the second claimant did not enter her claims earlier was because she waited for the internal procedures to conclude. A key part of the test is to balance the prejudice to the parties. There was no forensic prejudice to the respondent if a just and equitable extension were to be granted (the respondent would of course have to defend a claim entered out of time as would always be the case). The respondent was in fact fully able to defend the claims brought. The potential prejudice to the second claimant would have been significant if the claims had been upheld. We therefore in the circumstances of this case would have considered it to have been just and equitable to extend time for all of the allegations. The second claimant's claims would accordingly have been found to have been in time, as a result of the exercise of that discretion.

Summary

124. For the reasons explained above, we did not find that the respondent had directly discriminated against the claimants on grounds of sex.

Employment Judge Phil Allen

9 February 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19 February 2024

FOR THE TRIBUNAL OFFICE

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