EMPLOYMENT TRIBUNALS

Claimant: A Booth

Respondents: (1) Ocorian Services (UK) Limited
(2) Frederik Van Tuyll
(3) Cato Holmsen

Heard at: London Central (in person)

On: 10 – 13 and 16 - 20 September 2024

Before: Employment Judge E Burns
Ms S Plummer
Mr S Williams

Representation

For the Claimant: Ronnie Dennis, Counsel
For the Respondents: Daniel Stilitz, KC

WRITTEN REASONS

INTRODUCTION

1. The claimant is referred in these written reasons with a capital C. There were three respondents to this claim. The first respondent was the Claimant's employer. We refer to it as R1 in these written reasons. The relationships of the second and third respondents to the Claimant and R1 are explained in the section containing our findings of fact. We refer to the individual respondents in these written reasons as Mr Van Tyull and Mr Holmsen respectively. When referring to all three respondents we use a capital R.

2. The hearing was a final hearing to determine liability in relation to a number of complaints arising from the Claimant's employment with R1. The Claimant had been dismissed with six months' notice by R1 on 28 March 2023. He was immediately placed on garden leave and his employment came to an end of 28 September 2023. Prior to being dismissed, the Claimant had submitted a grievance to R1 about Mr Holsen's conduct which he claimed was both a protected act pursuant to section 27 of the Equality Act 2010 and a protected disclosure pursuant to section 43A of the Employment Rights Act 1996.

3. In essence, the Claimant's claim was that Mr Holmsen had harassed him and others and that when he complained about this behaviour he was dismissed. Alternatively, the reason Mr Holmsen dismissed him was because he was gay.

4. A list of issues had been agreed between the parties following earlier case management hearings. That list is contained in the attached appendix. As can be seen from the list, we were concerned with eight separate allegations, albeit giving rise to various legal complaints against the respondents in various combinations.

5. R1 had conceded prior to the hearing that the Claimant had been unfairly dismissed, but none of the his complaints had conceded. The Claimant withdrew some of his legal complaints at the point of making closing submissions. We have recorded which complaints this applied to in our judgment and have accordingly dismissed the claims on withdrawal.

6. The judgment also records the complaints that succeeded. The key complaint that succeeded was the complaint that the Claimant's equity treatment on leaving was different (and less favourable than it would have been) because he had done a protected act and made a protected disclosure. This was an adaption of the allegation that was contained in the list of issues.

THE HEARING

7. The hearing took place in person over the course of 9 days.

8. The Claimant gave evidence. In addition, the following gave evidence on his behalf:

   - Sally Gilding, a former consultant to and non executive director of a UK Ocorian company
   - Martin Reed, former Head of Capital markets of R1. Mr Reed's evidence was given via video link

9. Mr van Tuyll and Mr Holmson gave evidence. In addition, on behalf of the Respondents we heard evidence from:

   - Tom Parkins, R1's Head of Reward
   - Tania Mohacs, Global head of Countries and Managing Director, Bermuda of Ocorian Services Bermuda Limited

10. There was an agreed trial bundle of 2758 pages which included some additional documents which were admitted into evidence during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred or asked questions about. We refer to the page numbers of key documents that we relied upon when reaching our decision below.

11. The parties prepared written closing submissions, in advance of making closing oral submission. We thank them for their helpful submissions. The tribunal delivered an oral judgment at the end of the hearing finding in favour of the Claimant in respect of some of his legal complaints. A request for written reasons was made by the Respondents. Employment Judge E Burns apologises for the length of time it has taken to prepare these reasons and send them out.

FINDINGS OF FACT

12. Having considered all the evidence, we found the following facts on a balance of probabilities. Some of our findings on disputed factual issues are dealt with in the analysis and conclusions section of these written reasons.

13. The parties will note that while most of the matters they told us about are recorded in our findings of fact, not everything is included. That is because we have limited our findings to points that are relevant to the legal issues.

The Respondents

14. The Claimant was employed by R1, which was part of the Ocorian Group of companies. The controlling interest in the group is held by Inflexion Private Equity Partners LLP (“Inflexion”).

15. At the time of the hearing, the second respondent, Mr van Tuyll, was the Chairman of the Ocorian Group and was the Group CEO from 1 April 2021 until 11 September 2023. He had been employed by R1, until 29 February 2024.

16. The Third Respondent, Mr Holmsen was employed jointly by two other companies within the Ocorian Group, NT Holding AS and Nordic Trustee AS (commonly referred to as "Nordic Trustee"). He was employed as Global Head of Capital Markets and he was located in, and worked principally in, Norway.

Remuneration Arrangements – Equity Holdings

17. Within the Ocorian Group there is a practice of issuing senior employees with equity. This is to reward them for past performance and incentivise their future performance. The reasoning behind this is to align the employee’s interests with shareholder interests in relation to generating value for shareholders.

18. The equity that is issued is in the ultimate holding company, Standford HoldCo Limited. Decisions about equity issues and the treatment of equity when employees leave are made by a committee called Remco in accordance with the articles of association of that company. For the purposes of this claim the relevant version of the articles was dated 18 January 2022.

19. Those articles included the following definitions:

Bad Leaver	means a leaver who is neither a Good Leaver nor an Intermediate Leaver
Good Leaver	means a leaver in any of the following circumstances (a) death (b) permanent incapacity due to ill health or disability (other than as a result of the abuse of drink or drugs) which, in the reasonable of the Investor Majority, is sufficiently serious to prevent the relevant person from complying with the terms of his service agreement with the relevant Group company; (c) retirement in accordance with the relevant Employer Company's prevailing retirement policy as approved n writing by the Investor Majority from time to time or to he extend that such policy does not specify a retirement age, retirement on or after the Employee's 60th birthday; or (d) would otherwise be an Intermediate leaver or bad leaver but (in the absolute discretion of the Investors) is designated a Good leaver by Investor Direction

20. At the relevant times for the purposes of this claim, the composition of Remco claim was Mr van Tuyll (Chair of RemCo), Mr George Collier and Ms Florencia Kassai (both partners at Inflexion) and Mr Rick Medlock (non-executive director). Mr Collier and Ms Kassai represented the interests of Inflexion and acting together were the Investors as that term in used it the articles and able to give Investor Direction.

21. Although the articles refer only to three categories of leaver, there is in practice a fourth. Remco can also additionally decide that the treatment of shares will be something between what would happen for a Good Leaver and an Intermediate Leaver. In such circumstances, the expectation is that this would be agreed through negotiation and subject to the relevant employee signing an agreement waiving all potential legals claims.

22. The ultimate decision as to what happens with share holdings when an employee leaves rests with the Investors in their absolute discretion. However, the normal process is that a recommendation is made by Mr Van Tyull. In practice, his recommendations are followed.

FCA Regulation

23. Two entities within the Ocorian Group are regulated by the Financial Conduct Authority (FCA): Ocorian (UK) Limited and Ocorian Depositary (UK) Limited. R1 is not regulated.

24. Senior employees of FCA regulated entities are either approved by the FCA or certified under the Senior Managers and Certification Regime ("SMCR") by the relevant company and are subject to the FCA conduct rules.

25. The Claimant was registered with the FCA as the SMF1 for the regulated UK Ocorian entities. This is the FCA's categorisation for the person with the chief executive function. Neither Mr Van Tuyll nor Mr Holmsen were registered with the FCA.

26. The FCA expects breaches of its conduct rules to be reported to it. According to the FCA itself, "*sexual harassment and other forms of non-financial misconduct can amount to a breach of [its] Conduct Rules, which include the requirement to act with integrity*." Individuals working in FCA regulated firms can raise sexual harassment issues directly with the FCA thought its whistleblowing procedures.

The Claimant's Sexual Orientation

27. The Claimant is a gay man. One of the factual matters we needed to address is whether Mr Holmsen was aware of the Claimant's sexual orientation.

28. Mr Holmsen said he was not aware of the Claimant's sexual orientation until around the time the Claimant raised his grievance. The Claimant, however, told us that he considered his sexual orientation was well known in the London office and within the Ocorian Group and that he was sure that Mr Holmsen would have been aware of it. In addition, he relied on a specific conversation they had as set out below.

29. Our finding was that Ms Holmsen did not know that the Claimant was gay until he raised his grievance. We reached this decision based on the available evidence on the balance of probabilities.

30. The Claimant accepted when cross examined, that he was generally a private and reserved man. The Claimant said that in 2020 he met his now husband and that event changed his life, as "*there was no hiding it*." We infer from this that although the Claimant may have been circumspect about people knowing he was gay before he met his future husband, from the time he met his husband that changed. This is consistent with the timing of speaking to Ms Gilding about it.

31. Ms Gilding told us that she had known the Claimant since around 2015 from previously working with him at another organisation. She had been two levels above him at that time and the part of the business they worked in had around 300 people employed in it. She did not therefore consider them to be particularly close at the time. When she joined Ocorian she worked quite closely with him in 2018 and 2019 and they became closer. She confirmed the Claimant was private and reserved. Despite their long standing professional relationship, they did not discuss the topic of the Claimant's sexual orientation until the summer of 2020.

32. Ms Gilding told us that she had always thought the Claimant was probably gay, but had not known for sure until they went for a lunch together in the Summer of 2020. She had heard someone in the London office talking about the Claimant being gay earlier that year as if it was common knowledge.

33. The Claimant married his husband in April 2023 shortly after his dismissal. He told us that he had spoken about his wedding plans quite openly in the London office in the run up to it. They were engaged for at least a year before getting married. Ms Gilding recalled overhearing conversations about the Claimant's wedding in the London office in early 2023.

34. Ms Mohacs told us that she was aware that the Claimant was gay from relatively soon after she joined Ocorian in 2019. Her evidence was that he did not hide his sexual orientation at work, but equally he did not actively discuss it and was quite a reserved individual.

35. Ms Mohacs was also aware that the Claimant was getting married as she congratulated him. The Claimant told us that he shared with Ms Mohacs that he and his partner were thinking of using as surrogate to have children. Ms Mohacs could recall that the Claimant talked to her about children but could not recall him mentioning surrogacy. In any event she gave evidence, which we accepted, that she did not speak to Mr Holmsen about the Claimant's sexual orientation, wedding plans or plans to have children

36. Mr Reed told us that he thought the Claimant's sexual orientation was well known and that he was surprised to learn that Mr Holmsen was claiming he was not aware. He could not provide evidence to show Mr Holmsen knew.

37. We also saw evidence that Paul McAvoy, R1's HR director until around the end of 2021/beginning of 2022, himself a gay man, was aware that the Claimant was gay.

38. Mr Van Tyull told us that he knew the Claimant was gay, but could not remember when he learned this. He thought it was fairly common knowledge in the London office, although his general view was that the Claimant was quite a private and reserved man. He told us that the question of the Claimant's sexual orientation was not a matter he discussed with Mr Holmsen. We accepted his evidence on this point.

39. Taking into account the above, we find that Mr Holmsen did not know he Claimant was gay through the fact that it was generally known. Mr Holmsen was not present in the London office very often. In addition, based on the Respondent's investigation findings referred to below, he was not the type of manager that the London office employees would feel comfortable chatting with and sharing details of their personal lives. It is entirely plausible in our judgment, that he would not have picked up the fact that the Claimant was gay from the interactions in the office environment.

40. The Claimant told us that even if Mr Holmsen was not aware of his sexual orientation from hearing it in the office, Mr Holmsen knew because of something the Claimant had said at a private lunch they went to together in February / March 2022 albeit in a busy restaurant.

41. The Claimant admitted, however, that he did not proactively tell Mr Holmsen that he was gay at the lunch. He recalled that during with just him and Mr Holmsen that took place sometime in February/March 2022 he referred to

his partner as “he” (although not by name) when mentioning their holiday plans.

42. Mr Holmsen told us he recalled the lunch, but not the conversation about holidays, and said he had not picked up on the reference to the Claimant’s partner being gay. We accept his evidence on this point. The Claimant’s reference to being gay was subtle and we find that it is entirely plausible that Mr Holmsen missed it.

43. Before leaving this issue, we note that Mr Parkins told us that he was not aware that the Claimant was gay until around the time of his dismissal. Mr Parkins worked in the Belfast office, but had had interactions with the Claimant on remuneration matters from time to time and had met him.

44. We gave careful consideration to whether we accepted the evidence of Mr Parkins on this point. The reason for this was because Mr Parkins noted a potential discrimination risk in relation to terminating the Claimant’s employment. He sought to explain this as a generic reference to a potential discrimination risk, rather than a known risk. This explanation seemed to lack credibility to us, however, because it was inconsistent with the notes made about Mr Hughes. He was also not identified as having any known protected characteristics, but no such similar generic risk was identified in his case.

45. We did not conclude that Mr Parkins has been dishonest with us, but that the references may have been included because of a confusion between discrimination and unfair dismissal. We were referred to written evidence that suggested Ms Zrobek was not aware that the Claimant was gay until after he submitted his grievance. It seemed likely that had she known he was gay a more explicit reference would have been on the slides.

46. Ultimately do not consider it is was necessary for us to resolve this inconsistency in the evidence because the issue we needed to decide related to Mr Holmsen’s knowledge of the Claimant’s sexual orientation and we are satisfied that he was not involved in the preparation of the slides and that they were not shared with him.

The Claimant’s Employment Prior to July 2021

47. The Claimant commenced employment with the R1 on 19 February 2018 in the role of Managing Director of Ocorian (UK) Limited. He reported to the CEO of the Ocorian group who at that time was Nick Crawley. His recruitment was as a result of an approach by Ms Kassai.

48. The Claimant invested nearly £100,000 in the group on joining and was issued with shares and loan notes accordingly.

49. At some point in 2018, the Claimant took over responsibility for the Ocorian office in Ireland because of problems with the existing leadership there. The Claimant continued to have Ireland as part of his remit until his dismissal.

50. In the Claimant's performance review for 2018, undertaken in September 2018, he was rated as meeting expectations. The feedback from his manager was positive. In October 2018, the Claimant was awarded 290 C3 shares.

51. In the Claimant's performance review for 2019, conducted on 1 October 2019, he was not given an overall rating. However he was rated as having met or exceeded in all areas of performance that were being measured.

52. On 20 November 2020, the Claimant was given a new job title of Head of Capital Markets EMEA and Regional Head of UK and Ireland. His salary was increased to £170,000. He also joined Ocorian's Executive Committee which meant he was involved in the strategy of the wider business and various other issues such as HR matters and finance. The letter he received confirming the new job title thanked the Claimant for his "*valuable contribution and commitment to the business*."

53. Following an acquisition of a business in February 2020, Ocorian's financial year changed to the calendar year, and the performance year followed suit. This meant the Claimant's performance review for 2020 was not undertaken until early 2021. We were not provided with any documentation to confirm this, but the Claimant told us that Mr van Tuyll conducted this with him and did not raise any issues or performance concerns with him. Mr Van Tuyll did not dispute this. The timing is consistent with when Mr van Tuyll joined the group as CEO.

54. In April 2021, the Claimant was awarded a tranche of C4 shares. The letter telling him about the award said that his "*participation was designed to align [his] reward to [Ocorian's] long-term success*" and that it was "*limited, in this quantum, to a small number of leaders like [himself] who's personal contribution to our journey is considered critical.*"

55. During this period of the Claimant's employment, the group changed from a geographical focus to a service line offering. Mike Huges joined the group in the role of Head of Service Lines. He became the Claimant's de facto line manager for day to day operations, although the Claimant continued to formally report to the position of CEO.

56. We note that this change in focus resulted in most people with leadership within the Ocorian group having two elements to their roles. One element was based on their geographical location with the other being their place in a service line offering. In the Claimant's case, the reference in his job title to being the Regional Head for the UK and Ireland was a reference to his responsibility for oversight of the UK and Ireland corporate entities and offices while the reference to being Head of capital markets EMEA represented his service line area.

Acquisition of Nordic Trustee and the Impact on the Claimant's Role

57. In the latter half of 2021, the Ocorian group began the process of acquiring the Norwegian business run by Mr Holmsen, known as Nordic Trustee. The

business had a particularly strong offering in the area of loan agency, which was part of Capital Markets.

58. Mr Hughes first spoke to the Claimant on around 8 or 9 July 2021 to tell him that the decision had been taken that Mr Holmsen would take over the role of Head of Global Capital Markets and that he, the Claimant would be required to report into Mr Holmsen following completion of the acquisition. This was followed by a more formal conversation on 12 July 2021, between Mr Hughes and Mr van Tuyll and the Claimant. The Claimant covertly recorded the meeting and a transcript was contained in the bundle of documents at the tribunal hearing.

59. The Claimant was, by his own admission unhappy and frustrated with this decision. His unhappiness was not helped as a result of the fact that it subsequently took several months to settle on precisely what his new role and job title and would be. The Claimant considered leaving the R1 as a result.

60. In order to encourage the Claimant to remain with the business, he was offered a salary increase and additional shares. The Claimant sought to negotiate in relation to this offer, but the negotiations did not lead to an improved offer. The Claimant eventually accepted the original offer and his salary was increased to £210,000 from 12 October 2021 when the acquisition completed. He was also issued with an additional tranche of C5 shares. The Claimant's job title was eventually confirmed as Regional Head for UK and Ireland and Head of Capital Markets, EMEA, but this was not until the start of 2022.

Late 2021 into 2022

61. It is relevant to note that while the Claimant's role and the salary negotiations were taking place, several events occurred.

62. The first of these was a pre-merger off site strategy meeting that took place on 20 – 21 September 2022. Both Mr van Tuyll and Ms Mohacs felt that the Claimant was unnecessarily dismissive towards Mr Holmsen during some of the discussions and spoke to Mr Holmsen about this.

63. Mr Holmsen met with the Claimant to have a one to one meeting with him at which they could discuss the Claimant's future role on 24 September 2022. Mr Holmsen summarised the discussion they had in an email to Mr Van Tuyll dated 24 September 2022 and copied to Mr Hughes and Mr McAvoy (645). In the note, Mr Holmsen recorded that the Claimant was not happy about the change in his role, but that he had sought to reassure him that he was valued and suggested that he took a period of a couple of months to reflect on his position before leaving. He said that he would try and engage with him in an effort to build some rapport, but he thought that the Claimant would look for external opportunities and there was a more than 50% chance that he would leave due to his "*bruised ego and his sense that he has been 'demote*d'".

64. Mr McAvoy replied to Mr Holmsen saying that he thought he had given the Claimant good advice and that there were three ways the situation might develop. He felt that the Claimant and Mr Holmsen could get into a "good rhythm" and grow the business, the Claimant might leave for another opportunity and claim constructive unfair dismissal or he stayed but became a "blocker" and they would need to dismiss him (645). He suggested Mr Van Tuyll also meet with the Claimant to reinforce that the message that he was a valued employee. In addition, he did this himself when writing to the Claimant to confirm his salary increase and equity adjustment (643).

65. Mr Van Tuyll told us that he and the Claimant had several in person meetings over coffee throughout this time. He formed the view that the Claimant remained unhappy with the situation and in particular the requirement to report to Mr Holmsen.

66. Mr Holmsen had a further meeting with the Claimant, as well as other members the London Capital Markets team in October 2021. He reported back on the meeting to Mr Van Tuyll and Mr Hughes and that he had told the team that building a broader footprint in Loan Agency and Trustee roles were their top priority. It is relevant to note that a significant factor that had led to the acquisition of Nordic Trustee was that it was a successful Loan Agency and trustee business which Mr Holmsen had grown.

67. At this time the precise nature of the Claimant's future role had still not been determined, but Mr Holmsen's note records that they had agreed to work together to jointly clarify a satisfactory role for the Claimant in the context of the Ocorian priorities in Capital Markets (671). His email was followed shortly after, on 26 October 2021, by an email from Mr McAvoy to the Claimant, effectively thanking him for his patience while the issue over his role was being resolved and seeking to reassure him that R1 was keen to find an outcome that was the best one for him and the business within the framework of strategic priorities for Capital Markets (675). The email from Mr McAvoy was drafted with input from Mr Holmsen, Mr Hughes and Mr van Tuyll.

68. Later that month, Mr Hughes and Mr Holmsen conducted the Claimant's annual performance review for 2021. As Mr Holmsen's experience of working with the Claimant was limited, Mr Hughes dealt with his past performance while Mr Holmsen focussed on his objectives for the future. The version of the document recording their comments on the Claimant's performance included in the bundle was not signed by the Claimant and he questioned its accuracy as he could not recall seeing the final version. We considered it was a reliable document, however (739 – 746).

69. We note that the Claimant was assessed by Mr Hughes against four criteria as follows:

- Group Financial performance: Part Met
- Operational Excellence: Met
- Client Engagement: Part Met
- People and Culture: Met

70. In the performance review document Mr Hughes noted that the current size of the London business was significantly behind original business plan and that the priority for 2022 was to create a step change in revenue growth. He commented further that more attention was needed on P&L management for the Capital Markets business which remained unprofitable in the UK despite having been operating for 3+ years.

71. Mr Hughes also added that the Claimant should "Avoid the temptation of being "too tactical or political"" and should "respect the reporting line and embrace the One Ocorian philosophy." We interpret this as Mr Hughes telling the Claimant he needed to accept the change in his role and that he was reporting to Mr Holmsen.

72. For his part, Mr Holmsen added very few comments, but these included that he needed to see the Claimant "come off the fence and re-commit to your role with Ocorian" with his fill focus being on delivering the commercial objectives for Capital Markets.

73. Mr Holmsen emailed Mr Hughes about the review on 28 January 2022 with a note saying that the Claimant's overall rating was, in his view, somewhere between Met and Part Met, but he would leave this with Mr Hughes. In his email, Mr Holmsen referenced that he and Mr Van Tuyll were keeping an eye out for good candidates to replace the Claimant if he resigned and ha d a meeting lined up (808). There is a suggestion in the email that it might be wise to delay making the decision on the final rating until such time as the meeting had taken place. The implication is that if R1 was minded to recruit an alternative, the rating could be finalised as Part Met as a way of helping R1 ease the Claimant out of his role.

74. Nothing came of any approaches made to alternative candidates in January 2022 however, and the Claimant was given an overall rating of Met.

February 2022

75. On 11 February 2022, Mr Holmsen and the Claimant had a long meeting by telephone. Towards the end of the call, Mr Holmsen raised an issue with the Claimant regarding his demeanour at a meeting that had been set up to discuss the expansion of the Loan Agency business into the UK. A member of Mr Holmsen's team had reported back to him that the Claimant had appeared unprepared for the meeting and lacking engagement. Mr Holmsen raised this with the Claimant towards the end of the call.

76. The Claimant was very upset by this. He told Mr Holmsen that he had offended him. Although Mr Holmsen told him that this was not his intention, the Claimant terminated the call.

77. Following the call, Mr Holmsen emailed Mr Hughes and Mr van Tuyll to tell them what had occurred (814) and the Claimant sent a lengthy email Mr McAvoy about the call. Their separate contemporaneous records are consistent with each other. In his email to Mr McAvoy the Claimant said he "*had not experienced such a personal affront as to [his] character.*" We note

that, even though Mr McAvoy was aware that the Claimant was gay, was gay himself and was an HR director, the Claimant did not say that he thought Mr Holmsen's behaviour towards him was influenced by his attitude towards the Claimant's sexual orientation. He made no mention of any suspicion of this at all (815).

78. The Claimant told us that he did not accept that anyone had spoken to Mr Holmsen about his attitude, but we find that Mr Holmsen was being truthful about this and concerns had been raised with him.

79. Mr Holmsen later sent the Claimant a follow up email on 15 February 2022 (819). Mr Holmsen explained he had not intended to cause the Claimant any offence, but had wanted to provide him timely feedback and coaching about how his behaviour was being perceived. He said that he did not want the misunderstanding between them to fester and instead would prefer them to develop an open dialogue where they could provide each other with mutual feedback. The note emphasised that Mr Holmsen had a managerial responsibility to give direction, clarify priorities and provide feedback to the Claimant. The Claimant did not reply to the email which was sent while he was on holiday. He did not consider the email by Mr Holmsen was an attempt to diffuse the situation, but saw it as a further example of Mr Holmsen's poor behaviour towards him.

80. The Claimant met with Mr Hughes and Mr van Tuyll via telephone later the same month, February 2022. The Claimant covertly recorded the conversation. Before Mr Hughes joined, the Claimant told Mr Van Tuyll that he had had a difficult conversation with Mr Holmsen. He explained that in addition to taking a different approach to sales, Mr Holmsen had offended him by raising an issue with regard to his enthusiasm. The Claimant said that he thought Mr Holmsen's style and approach were not resonating well both with him and his colleagues in the London office. The Claimant did not say that he thought Mr Holmsen's behaviour towards him was related to his sexual orientation. Later, after Mr Hughes joined the call and Mr van Tuyll has left, the Claimant said that Mr Holmsen was treating the acquisition as a reverse takeover which was creating a toxic environment. He also said that he thought Mr Holmsen "didn't get it" when referring to the business and suggested that if the Claimant just waited the situation out, Mr Holmsen would "kill himself". We interpret this as the Claimant saying that Mr Holmsen would do something that led to his position being compromised.

The Second Half of 2022

81. In May 2022, because of ongoing concerns about the Claimant's attitude to Mr Holmsen, Mr Van Tuyll and Mr Holsen engaged a recruitment agency to explore who might be available in the market as a potential replacement for the Claimant. A candidate, Imelda Shine, was identified with whom there was discussions about her taking on the role being performed by the Claimant. She was not happy to accept the terms she was offered, however, and nothing progressed.

82. In June 2022, the Irish corporate entities within the Ocorian group received correspondence from the Department of Justice and Employment of Ireland

(DOJ) following inspections that had taken place. The Claimant took on responsibility for the Irish entities in later 2018. It became apparent that there was some serious issues because of concerns about their anti money laundering and know your client checks (AML/KYC). Having taken action to resolve the issues and replace key staff in Ireland, the Claimant encourage the team to petition the DOH to undertake new AML/KYC inspections. Unfortunately, when the DOJ did these new checks, they refused to renew the licences held by the Irish entities including putting a moratorium on any new business by them.

83. The correspondence was received by Padraic Doherty, Country Head of Ireland. He immediately referred it to the Claimant (his line manager) who in turn flagged it up to Mr Hughes and Mr Holmsen. Ultimately the issue was resolved once the DOJ were persuaded to take a different view. However, in order to achieve this the Ocorian group had to engage assistance from external counsel who were engaged to perform files reviews on every client in Ireland. According to the Claimant's evidence this was organised on the instructions of Mr Hughes and the external expenditure was approved by him. On 11 July 2022, Mr Holmsen emailed all who had been involved in resolving the issue, including the Claimant to thank them for handling the matter saying that he thought the work they had done was excellent (2521).

84. In July 2022, Mr Holmsen undertook the Claimant's mid-year performance review. The Claimant's self assessment was that he was on track to meet all of his objective. Mr Holmsen did not disagree with this, but added an overall assessment in which he noted various positives and negatives. Positives included that the Claimant's revenue growth was above budget and that he was generally considered to be a good people leader. Negatives included that the FLEC costs were also above budget, the DOJ report in Ireland and there had been somewhat disappointing traction on Loan Agency in London.

85. By around November 2022, plans were being developed in the Ocorian group to make several changes to senior positions. The plans included:

- Getting rid of the role of Head of Service Lines, with the result that Mike Hughes would be made redundant
- Getting rid of the role of Commercial Services , with the result that Simon Behan would be made redundant
- Recruiting a replacement for the Claimant's role
- Exiting the Country Head of Ireland, Padraic Doherty

86. When approaching these matters issues, the Respondent had in mind the desire to avoid losing too many senior people at the same time, because of the unsettling impact on employees and clients and the reputational risk in the wider market. There was also a desire to ensure that senior roles that are needed are not left vacant, including taking the step of recruiting to roles that are not yet vacant notwithstanding that this gives rise to claims of ordinary unfair dismissal.

87. On 30 November 2022, Mr Parkin prepared a slide deck suggesting exit terms for discussion by Remco (987 – 990). The senior people mentioned in the slides deck were, Mr Hughes, Mr Behan and the Claimant. Mr Parkins changed his initial slide deck as a result of feedback from Renata Zrobeck, who had taken over as the Director of HR of R1, following her speaking to Mr Van Tuyll. The slide pack that went to the Remco meeting on 7 December 2022 was prepared in accordance with Mr van Tuyll's instructions. We find that it was him who decided what proposals should be presented to Remco.

88. The slide deck presented to Remco envisaged the departure of all three senior managers, but with slightly different treatments. Mr Parkins told us that the usual practice was to outline proposals which would then be subject to negotiation with the individuals and subject to them entering settlement agreements.

89. In the case of Mr Hughes, the slide deck identified the approach towards him as follows:

"Redundancy – Role of Global Head of Service Lines will be removed form the organisation. Heads of Service lines will report to the Ocorian CEO in the new structure"

90. It noted that as Mr Hughes had less than two years' service, he had no statutory protection. It was proposed that he be offered a payment in lieu of notice and an ex-gratia payment of £30,000 as an opening offer, with an expected deal being agreed in the region of more than £100,000.

91. The proposal regarding the treatment of his equity holding was that he forfeit his C3, a repurchase of his at the original purchase prince to reply loan and a partial repurchase of his C5 shares with him retaining £500,000. It is relevant for us to note that Mr Hughes is not understood to be gay.

92. In the case of Simon Behan, the slide deck identified that the approach towards him as follows:

"Redundancy – Role of Chief Commercial Officer will be removed from the organisation. In transition period, sales organisations will report to Head of Countries role on an interim basis. Existing COO function will be divided into separate functions with head of Sales role reporting directly to Ocorian CEO"

93. The slide deck noted that Mr Behan he had a health condition and therefore a risk of disability discrimination. It also noted that, because Mr Behan was employed under Irish law, there was a potential risk of having to pay up to a maximum of 2 year's compensation. The slide deck proposed he be paid his notice pay plus an ex-gratia payment to reflect the unfair dismissal risk of between 3 and 6 months' pay. It is relevant for us to note that Mr Behan is not understood to be gay.

94. The proposal regarding the treatment of his equity holding was that he forfeit his C3, and there be a repurchase of his C4 and C5 shares at the original purchase price.

95. In the case of the Claimant, the slide deck identified the approach towards him as follows:

"Negotiated exit related to poor performance and behaviour issues."

96. The slide deck noted the potential liability for unfair dismissal and added that the "*Focus of opening discussion with [the Claimant] should be around performance to mitigate discrimination risk."* The slide deck proposed he be paid his notice pay plus an ex-gratia payment of £30,000.

97. The proposal regarding the treatment of the Claimant's equity holding was that he forfeit his C3, and there be a repurchase of his C4 and C5 shares at the original purchase price.

98. The minutes from the Remco meeting that took place on 7 December 2022 record the following:

"Committee also discussed the initial leaver treatment for Mike Hughes and other senior exists. Provisional approval on proposed starting regarding equity treatment."

99. Mr Hughes left in January 2023. The share treatment was as outlined on the slide deck. He was required to sign a settlement agreement which was drawn up by an HR consultant acting for R1 called Robert Joy. Following him having left, on 8 January 2023, Mr Hughes and the Claimant exchanged messages in which the Claimant told Mr Hughes that he thought it was "Likely my goose is cooked." Mr Hughes empathised with him and told him that he was in a better position that he had been in because he could claim unfair dismissal and there were no performance issues involving him (1067).

2023 and the Termination Plan

100. In January 2023, Mr van Tuyll and Mr Holmsen had further discussions about a potential replacement for the Claimant. They had identified two potential candidates. Their preferred candidate was Ms Shine, with whom there had been discussions in May 2022. Alternatively they had identified someone who was known to Mr Van Tuyll having previously worked with him, Kevin Butler.

101. Their plans remained fluid at this time because they depended on recruiting the right replacement, what was happening with Mr Doherty in Ireland (who was also being planned to be exited) and the timings of the other planned senior exits.

102. At this time, in early January 2023, it was envisaged that Ms Shine would be offered the geographical and service line roles held by the Claimant, namely Head of UK and Ireland and Head of Capital Markets EMEA. If she accepted, the thinking was that Mr Butler could be offered a lesser. If she did not accept, however, the Claimant's role could be offered to Mr Butler. Approval was sought from Remco for offers to be made on this basis (1032). It is notable that Mr Holmsen's email says: *"If [Ms Shine] does not respond*

or responds negatively, I have not better option than to procced with an offer to [Mr Butler] (assuming we still want to go ahead and replace [the Claimant]") We interpret this as meaning that if the only option was Mr Butler, Mr Holmsen was not sure they would want to proceed.

103. Ms Shine did not respond positively and so the Respondents reconsidered their options. The primary decision maker was Mr Holmsen, in conjunction with Ms Zrobek. Mr van Tuyll remained involved however.

104. Between 7 and 22 February 2023, HR were asked to draft a contract of employment for Mr Butler which named him as Country Head of Ireland, Head of Capital Markets in Ireland and EMEA Head of Loan Agency reporting directly to Mr Holmsen (1140).

105. At this time, a plan had been formulated for the Claimant to commence a performance improvement plan with Mr Doherty with a view to existing him from the business in mid March. It was also envisaged that Mr Holmsen would conduct the Claimant's performance appraisal for 2022 in February, at which the Claimant would be told that he that Mr Holmsen was unhappy with his progress in the area of Credit Loans (aka Loans Agency). This would be followed up with a further conversation in March where Mr Holmsen would informed the Claimant about Mr Butler's hire in the above roles.

106. This plan was set out in an email dated 13 February 2023 form Ms Zrobek to Mr Van Tuyll (1112 – 1113). In it she noted that the Claimant might resign triggered by the reduction in the scope of his role. She also noted that she and Mr Holmen were considering further action in June in relation to the Claimant, although her email does not specify the nature of the action. The email notes however that the plan was a work in progress between her and Mr Cato.

107. The same email also addressed the proposed termination of Mr Behan. It simply notes that R1's lawyer was producing paperwork over the weekend and that his strong recommendation was to offer 12 months compensation (PILON plus 6 months) as the first step to leave space for negotiation.

23 February 2023 - the Decision Taken that Day

108. By 23 February 2023, an offer had still not be sent to Mr Butler although he was expecting one. Several discussions took place on that day, which are reflected in emails sent that day.

109. At the start of the day, the plan was still to initiate a performance management process with Mr Doherty and to send Mr Butler the offer as set out above. However, by the end of the day this plan had changed. As a result of speaking to Ms Mohacs, Mr Holmsen changed his mind. According to an email he sent to Ms Zrobek at 12:10 pm that day Ms Mohacs had told him that the Claimant was unmotivated and just hanging on to his current position and she thought he would be better off leaving. Mr Holmsen said he wished to revert to "Plan A" and to speak to Ms Zrobek about this over the phone rather than deal with it by email (1177)

110. Following the telephone conversation, by the end of the day, it had been decided that Mr Butler would be offered the role of Head of Capital Markets Europe, namely the Claimant's service line role. He had been informed of this change and was happy with it and the change in plan had been approved by Mr van Tuyll. With regard to the Claimant's role as head of UK and Ireland, Mr Holmsen was considering offering this to Pradeesh Sriskandarajah. (1178 – 1180) There were to be no changes with regard to Mr Doherty's role and in fact, he remained employed by the Ocorian group at the time of the hearing.

Implementing the Decision

111. An offer for the role of Head of Capital Markets was duly sent to Mr Butler on 24 February 2023 (1188). He had some queries about the contract and needed to be formally vetting before the offer became binding. We note that it was not anticipated that his vetting would flag up any issues because of his previous association with Mr van Tuyll. The queries were resolved and Mr Butler returned a signed contract on 12 March 2023. His vetting had been confirmed as satisfactory on 10 March 2023.

112. Mr Holmsen continued to liaise with Ms Zrobek about Mr Bulter's start date and plans to have a conversation with the Claimant. Initially a start date of 3 April 2023 was envisaged. Ms Zrobek asked Mr Joy, the HR consultant who had drawn up the settlement agreement for Mr Hughes for assistance with this. There was also a need to resolve the question of who would take on the role of Head of the UK.

113. Mr Holmsen was on leave at the start of April and so planned to be in London to speak to the Claimant and introduce Mr Butler between 29-31 March 2023 (1186). A start date of 30 March 2023 was therefore agreed with Mr Butler and that he would be in London that day (1228).

114. On 1 March 2023, a Remco meeting took place at which the proposed termination arrangements for Mr Behan and the Claimant were reviewed. No minute was taken of the discussions, but we note that an updated slide deck was produced (1216 – 1218). No changes had been made to the proposed approach for the Claimant, but changes had been made regarding Mr Behan. Rather than approaching his position as a redundancy, it was recognised that his would be a "no fault dismissal." The slide deck records a settlement offer to be made to him of between 12 and 18 months' salary in addition to his notice entitlement. The proposed equity treatment was unchanged.

115. Mr Behan employment ended on 20 March 2023. We understand that a settlement in line with the proposal that went to Remco was agreed with him and that he signed a settlement agreement.

116. On 6 March 2024, Mr Joy emailed Ms Zrobek and Ms Justice outlining a plan for how to exit the Claimant (1197). He noted that the proposal to exit the Claimant "*out of hand*" meant that his dismissal would be unfair and that "*at this level, it happens*". We interpret this latter comment as meaning that

for employees in positions of seniority, such as the Claimant, commercial decisions are often taken to proceed with termination, despite the risk of unfair dismissal as this usually be settled. We note that Mr Joy observed, incorrectly as it transpired, that "*The reality is that neither Ocorian nor [the Claimant] will want to take a legal claim about this*". He suggested a starting sum of £50,000 to "*buy off the unfair dismissal*".

117. Mr Joy suggested that there be a meeting with the Claimant on 20 March 2023 where he be handed open and without prejudice letters and a settlement agreement. He said that the Claimant should stay in active employment until 3 April 2023, albeit that in practice they could expect not to see much of him, and then have 6 months' garden leave. He suggested that the gap between 20 March and 3 April 2023 would be used to give the Claimant a chance to say good bye to his team and for a respectful announcement to be made. We infer from this that Mr Joy's intention was that the Claimant would be involved in agreeing the wording of any announcement.

118. Mr Joy attached draft open and without prejudice letters addressed to the Claimant to his email. He also amended the settlement agreement he had drafted for Mr Hughes for the Claimant. He asked Ms Zrobeck and Ms Justice to speak to Mr Parkins about amending the Appendix to reflect the proposed share treatment for the Claimant as the current version contained the provisions relevant to Mr Hughes.

119. In addition, the Respondents firmed up their thinking about who would take over the role of Head of the UK. Ms Mohacs was asked to speak to Kristina Rowe, an existing member of the Ocorian executive board about it. She did this on 8 March 2023. By 15 March 2023, Ms Rowe had confirmed that she would do this, albeit that this was seen as a temporary measure with Ms Rowe working in identifying a successor in her first six months (1287).

2022 End of Year Performance Review

120. In the meantime, while the discussions about the Claimant's role were ongoing, Mr Holmsen prepared for his end of year performance review of 2022. As it transpired no final document was prepared, but a copy of a draft produced by Mr Holmsen was included in the bundle at pages 1014 to 1015. The Claimant and Mr Holmsen met to discuss the Claimant's performance on 21 February 2023.

121. Mr Holmsen did not tell the Claimant his rating at the meeting and so he chased Mr Holmsen for this information, first on 22 February and again on Friday 10 March 2023.

122. Mr Holmsen replied on Sunday 12 March 2023 at 6;25 pm saying he had uploaded his ratings on the system on 23 February 2023, but nevertheless set them out in the email. He explained that he had rated the Claimant as partially achieved against all four areas of assessment with an overall assessment of partially achieved.

123. In his email and document, Mr Holmsen highlighted the following negatives:

- The Claimant had failed to deliver a go-to-market strategy for Loan Agency expansion in the UK market
- There had been limited growth in the Capital Markets EMEA locations
- He had not met his budget for revenue for Capital Markets EMEA
- The cost involved in the Irish remedial exercise
- That he found the Claimant generally difficult to manage and engage with, including that he was quick to become defensive and very territorial rather than projecting "one Ocorian" values. He noted that the Claimant had talked negatively about him with others.
- He also noted that the Claimant often went around and above, rather than to his direct line manager, to raise issues and/or get support for projects and gave as an example the SWIFT project.

There were very few positives, other than a reference to the Claimant receiving positive feedback from staff under his leadership and his level of activity (although not outcomes) on client engagement.

124. In light of the plans to exit the Claimant from the business, we find that Mr Holmsen deliberately focussed on negative performance issues. We find it is likely that he would have raised some or all of these issues in any event, but that including them in the manner he did was part of the strategy to exit the Claimant. The concerns were not fabricated but genuine, although whether they justified the poor ratings is less clear. We did not need to resolve this question. The Respondent accepted that the performance and conduct issues would not have led them to be able to fairly dismissal the Claimant with immediate effect.

The Claimant's Grievance

125. In response to receiving the email from the Mr Holmsen on Sunday 12 March 2023, the Claimant emailed HR Managers, Heather Justice and Ms Zrobek at 7:52 pm. In his email, which forwarded the email he had received from Mr Holmsen earlier that evening, he described Mr Holmsen's ratings as "*Yet another example of his bullying tactics."* He went on to say, that the thought ratings were "*a classic case of bullying and engineering an exit*" and said he would like to request that HR fully engage in this case of bullying and to please take his email as him raising a case.

126. He added that he also felt obliged to notice the FCA as the UK regulator in respect of Mr Holmsen's conduct as a senior manager, which he said ranged from misogyny and sexism right through to bullying. He expressly said that he thought this was a "specific breach of our licences." (1260)

127. The Claimant also made an anonymous whistleblowing complaint to the FCA on the same date. The Claimant used his work laptop to do this, but we find that this did not come to light until after his dismissal.

128. We note that the Claimant did not say in his email that he believed Mr Holmsen's bullying of him was homophobic. We do not consider it a reasonable interpretation to infer that he intended this meaning.

129. On Monday 13 March 2023, Ms Zrobeck forwarded the email to Mr Van Tyll and Mr Holmsen with a message saying they would consult with a lawyer and meet the Claimant to head more about his allegations and then decide on next steps. Ms Zrobeck told Mr van Tyull and Mr Holmsen that they would keep them informed.

130. The Claimant attended a virtual meeting with Ms Justice and Ms Zrobek on 14 March 2024. He covertly recorded this meeting and a copy of the transcript was contained in the bundle. At the meeting the Claimant complained that Mr Holmsen's assessment of performance was unfair and that he felt targeted by him in terms of his behaviours and bullying tactics. He said that he felt he was being targeted for an exit. He gave some examples of comments in the performance review that he considered were inaccurate and lacked justification.

131. The Claimant also gave Ms Justice and Ms Zrobek examples of incidents that he felt demonstrated discriminatory behaviour by Mr Holmsen. The Claimant said that he had found one of the comments particularly offensive because he was a gay man with a partner and they were looking at surrogacy. The Claimant did expressly not say that he thought his sexual orientation was the reason for Mr Holmsen's behaviour towards him and only mentioned it in reference to this particular incident.

132. As mentioned in his email, the Claimant intimated that he was considering his obligations as a senior manager and whether or not a report to the FCA. He did not tell Ms Justice or Ms Zrobek that he had already done this anonymously. He also mentioned that he intended to make a subject access request.

133. Following the meeting, on 17 March 2023 the Claimant sent a follow-up email to Ms Justice and Ms Zrobek. In the email he summarised the discussions. He suggested the names of staff should be spoken to as part of an investigation. He also provided notes on the performance review highlighting which he thought were inaccurate and lacked justification. He again did not expressly say that he believed the reason Mr Holmsen was targeting him was because he was gay.

The Claimant's Dismissal

134. Ms Justice and Ms Zrobek sought advice from Mr Joy in connection with the Claimant's grievance.

135. He summarised the advice he had given them in various calls in an email on 22 March 2023. In that email he noted that the Claimant had told Ms Justice and Ms Zrobek that he was gay, which they had not known before. He explained that this meant that the Claimant could potentially pursue a claim of discrimination and so would not be limited to capped unfair dismissal compensation. His adjusted recommendation for an exit package was full pay for his notice period, intermediate leaver status for his shares plus between £75,000 and £97,000 for unfair dismissal, subject to negotiation.

136. Mr Joy recommended an approach in which R1 simultaneously issued the Claimant with notice of termination and offered to have a without prejudice discussion with him about how they could compensate him with for the careers disruption he would be caused (1359).

137. On 24 March 2023, Mr Joy sent Ms Justice and Ms Zrobek updated documents for the Claimant, which included an open letter, without prejudice letter and revised settlement agreement. In his email he outlined how the negotiation might proceed. He also noted that he had been asked to remove any mention of the Claimant's equity holding form the settlement agreement saying, "*All of the Equity paragraphs have been removed as you are going to deal separately with [the Claimant's] rights as a leaver. I think that is best*." (1421). Mr Joy also prepared talking points for Mr van Tuyll to use when meeting the Claimant (1459).

138. On 28 March 2023, Mr van Tuyll and Ms Zrobrek asked the Claimant to attend a call with them. The Claimant was in Ireland at the time because his brother was very unwell and about to have surgery. The Claimant assumed that the purpose of the meeting was to update him with regard to his grievance. He covertly recorded the meeting and a transaction was included in the bundle (855 – 860).

139. Following some opening pleasantries including asking the Claimant about his brother, Mr Van Tuyll turned to the business of the meeting. He said:

"*Okay, [Ms Zrobek] and - has obviously been keeping me abreast of discussions you and she and Ms Justice have been having, yeah?*

Um and obviously the er subsequent actions you've taken have also been reported to me, you know. And I really feel, Alan, er this, is, you know, burning bridges between us at a rate of knots, yeah, um no time for us to respond to anything. The relationship between you and your line manager is very clearly broken, yeah? Um and we're now sort of, you know, in a point where I just don't think the relationship between Ocorian and Alan Booth is going to work at all going forward, yeah? So you know, we have to bring this to a conclusion.

We can keep dithering about, yeah and you're not happy um, we're not happy, yeah? So er let's call it a day, yeah? I will initiative that process formally now by saying that I'm going to terminate your employment, yeah?

And we will send you, after this, the documentation. I respect the contribution you have made to the business. Um we hopefully will put forward a financial offer which reflects that, yeah? Um but you know, I feel really strongly that we've reached a point where there's sort of no return from this, yeah? Um and the relationship will, will never fix itself, yeah?

Obviously I had expected you to be here, you're not, so we'll send you the documentation by email and original copies if you want, but by email er so you can see where we're at. You'll no doubt want to consider those, yeah?

And then we can have a - well there'll no doubt be formal discussions coming in the days, weeks to follow, yeah? And I'm sorry it's at this time with your brother, but I just feel we can - there's never a right time for this, so I just want to get on and have this discussion, rather than for it to be continuing and essentially a strained relationship sitting within the middle of our organisation in one of my more important service lines."

140. The Claimant challenged Mr Van Tuyll saying that it appeared to him that following raising a legitimate concern with HR his employment was being terminated. Mr van Tuyll disagreed that this was the reason for the Claimant's termination. He said that the Claimant had a right to raise a concern, but that the working relationship between the Claimant and Mr Holmsen had "*not been okay for a very long time*." Mr van Tuyll said he thought the Claimant knew this. He added that as much as he had hoped that time would fix the problem, it had not. He then said:

"So um – and its nothing to do with what you filed a complaint about. It is a little bit, in my view, to me personally and therefore is not an Ocorian representation, yeah, how you did it without discussing it with me, yeah? Um but I do feel we now, you know, you can't tell me you've been happy in this situation, yeah? Um so let's move on and take the first step…"

141. When challenged on the point again, Mr van Tuyll subsequently emphasised that that the fact that the Claimant had raised whistleblowing concerns and/or reported matters to HR was not the reason that they were having the current conversation. Instead he said the reason for the conversation was a breakdown in the management around the Claimant. However, he also expressed the view that he wished the Claimant had come to him with his concerns about Mr Holmsen's behaviour. He added that those concerns would not be ignored despite the termination of the Claimant's employment.

142. The conversation concluded with Mr Van Tuyll saying he did not want to get into a protracted conversation and that Ms Zrobek would sent him the paperwork. Mr van Tuyll said he anticipated that the Claimant would want to have time to review it when his brother was recovered. Mr Van Tyll envisaged them speaking again, after the Easter break, on 14 April 2025.

143. When asked about what he meant by these comments during cross examination, Mr van Tuyll said the following:

"….You have to read the entire transcript, but I am very mindful we operate in a small world and a small industry, way he was going about whole thing, it was quite aggressive, no time to respond. In my role, if someone make an accusation about another in team, can't assume correct without doing investigation, the whole approach is too aggressive it's too small a world, too small industry for him to do be doing this, whether me or [Ms Justice], regardless of trying to paint me as a callous individual, brother in hospital, not a callous individual, very mindful of people, a decision I take. Regrettably for decision which had been taken there is almost no right day to do it."

144. Following the meeting, the Claimant was sent a letter confirming the termination of his employment. The letter informed the Claimant that he was being placed on garden leave and that his employment would terminate on 28 September 2023. The letter did not give a specific reason for termination other than saying:

"I write further to our meeting today at which [Ms Zrobek] was also present. It was my duty to inform you that your employment …is hereby terminated. The reasons were discussed at our meeting and I believe this step is necessary as we continue to realign the senior management team.

This is affirm and settled decision, albeit one that I appreciate will be unwelcome to you. However, I must act in the best interests of the business and occasionally that does require decisions to be implemented which adversely affect individual employees."

145. We do not know if the Claimant was made any form of cash settlement offer. It certainly appears to have been likely as Mr Van Tuyll suggested as much in what he said to him. If such offer was made, it did not include any preferential treatment of the Claimant's equity holding. We know this because the Claimant was also sent a leaver notice dated 28 March 2023 explaining the treatment of his shares on his exit on 28 September 2028. The notice informed him he would be treated as an Intermediate Leaver, although would be able to retain the investments that he had made on joining (1506 – 1509). A redemption notice was subsequently sent by Mr Van Tyll to the legal entity that holds the legal title to all shares and loans notes, confirming the treatment and giving a redemption date of 30 June 2023 (1701 – 1702).

146. There is a note in the minutes of the Remco meeting that took place on 7 September 2023 that the share treatment for the Claimant and Mr Behan was aligned to the treatment approved by the committee on 1 March 2023 and that it was being represented for minuting purposes only. The minutes also note that the Claimant's treatment had been escalated to the Main Board and was no longer a matter for Remco. We find that this was because by this date the Claimant had issued legal proceedings and it is likely that options for a cash settlement were being considered on an ongoing basis.

Announcements

147. The Claimant's termination letter informed him that a "respectful announcement" about his departure would be made to Ocorian staff. Two announcements were made that same day. A communications plan had been agreed the previous day that would combine an announcement about the Claimant leaving with one that announced the arrival of Mr Butler and Ms Rowe's new role. In addition to some written comments, two verbal announcements were made. Neither of these were discussed or agreed with the Claimant.

148. One was made by Mr Holmsen to members of the Claimant's management team (including Sally Gilding, Nick Bland, Juliette Challenger and Pradeesh Sriskindarajah). He told the team that the Claimant had left because he was

unhappy. He said that he believed it was true that the Claimant had been unhappy for a long time and that he felt this was a good approach to take which was less damaging to the Claimant's reputation than saying he had been terminated because of his poor performance and behaviour towards Mr Holmsen.

149. In addition, Ms Mohacs made a general announcement to the staff based in the London office. Although she could not recall also saying that the Claimant had left because he was unhappy, Ms Gilding told us that she recalled her saying something to the effect that they Claimant had been unhappy for a long time and there had been an irretrievable breakdown between him and Mr Holmsen which had come to ahead. She referred to Ms Mohacs describing the situation as a cross roads. Ms Gilding appreciated Ms Mohacs candour and that day told the Claimant that she had been kind about him, albeit that they did not speak for long because of the Claimant's personal circumstances involving his brother.

150. The word unhappy does not appear in Ms Mohac's handwritten notes prepared before the announcement. There is reference in them to a cross roads, however. In addition, Mr van Tuyll told us that he recalled that describing the claimant as unhappy been part of the agreed approach to the announcements.

151. Taking into account Ms Gildings evidence, the fact that, on her own admission, Ms Mohaks' memory of what she said was not reliable, Mr Van Tuyll's evidence and the fact that Ms Mohak believed the Claimant had been unhappy for a long time, we find that she did say this in her announcement.

Report to the FCA

152. On 30 March 2023, the Claimant made a further report to the FCA. He did it in his own name this time.

Treatment of Equity Holding

153. We have noted above what we knew about the equity treatment for the Claimant, Mr Behan and Mr Hughes. We were also told limited information about the position for some other leavers. The Respondent emphasised that the equity treatment decision for Mr Behan, a straight man, was identical to that for the Claimant.

154. Mr Van Tuyll said in his evidence that although the Investors had traditionally been generous about approving Good Leaver Status, this had changed in the latter stages of 2022 when there was a tightening up.

155. The last person who benefited from the generosity was Mr Zarmakoupis, Chief Financial Officer. An employee that Mr van Tuyll had brought into the group but for whom the transition had not been very successful. However, Mr van Tuyll did not think Mr Zarmakoupis had been culpable for this and it was more to do with him having been out in a position where he was out of his depth. Mr van Tuyll asked for approval for Mr Zarmkoupis to be treated

as good leaver, which was granted and he left on good terms in June 2022. We note that we were told that Mr Zarmkoupis is a gay man.

156. Another person we were told about was Marco Ronzi. Mr van Tuyll told us that he was granted Intermediate leaver status which was approved in March 2023. We were not provided with any corroborating evidence of this.

157. We were provided with copies of the minutes of a Remco meeting in Feb 2024 (1907). The minutes confirmed that Gavin James, Chief Financial officer and Anthony Tennant, Director were both granted good leaver status. Mr van Tuyll told us that this was because one of them had genuine health reasons that meant he had to leave and the other was a retirement.

Grievance Investigation and our findings

158. Following the dismissal meeting with the Claimant, Ms Justice conducted an investigation into the matters raised in his grievance. Interviews were conducted with Gail Greenwood, Lisa McLauchlan, Olivia Stuart, John Fox, Martin Reed and Nick Bland on 26 and 27 April 2023. These were all of the individuals identified for interview by the Claimant except for Mr Behan (because he had left the organisation by this time) and Sahar Haji, who was unavailable because of a deadline. She also considered earlier complaints that had been made by Hugo Smyth and Mr Haji.

159. Mr Holsen was not invited to comment as part of the investigation. This was because R1 wanted to speak to the individuals being interviewed on a confidential basis. The individuals who were interviewed were asked open questions rather than specifically about the allegations described by the Claimant.

160. A grievance outcome report was prepared by Ms Justice dated 11 May 2023 (1908 – 1911). Ms Justice made the following relevant findings:

- No-one other than the Claimant considered (or identified) that any of Mr Holmsen's actions would be interpreted as homophobic
- Mr Holmsen had a management style that was abrasive to the point of rudeness on occasions
- All who were interviewed found Mr Holmsen's style of approach unacceptable, particularly to more junior staff
- The feeling of being bullied bullying was experienced more by the more junior people interviewed they also happened to be women.
- The divide between bullying and sexist or misogynist behaviour was not clear cut
- The female colleagues interviewed felt that Mr Holmsen had a dismissive attitude to women in business.
- It was fair to say that Mr Holmsen demonstrated a low level of awareness when it came to making casual sexist comments in terms of the impact on others
- Mr Holmsen did not intend to intimidate his colleagues, but was nevertheless exhibiting behaviours that fell short of what Ocorian would expect.

161. We note that at least one woman had asked Mr Holmsen to be their mentee. This was Nik Lee, Head of Business Intelligence and Strategic Education. When responding to her positively, Mr Holmsen advised that she needed to be aware that he tended to be quite direct

Specific Grievance Allegations

162. Four of the matters investigated are allegations of harassment in this litigation and we are therefore required to make our own findings in respect of them. We have done so in the order they appear in the list of issues.

In circa. February/March 2022, during a bi-weekly Capital Markets meeting, Mr Holmsen said that Erik Sjoberg who was going on paternity leave, "is going off to grow a pair of tits and look after the child" (3 a List of issues)

163. The Claimant told us that this comment was made in a meeting at which he was present. He said that Mr Holmsen knew that he had overstepped the mark because at the end of the meeting he had sought to justify the comment by saying that he could say things like this to Mr Sjoberg because they had worked together for a long time.

164. In his evidence before us, Mr Holmsen admitted making this comment or something similar to it. He told us that it was directed at Mr Sjoberg with whom he had worked for a long time and considered a good friend. He explained that this was Mr Sjoberg's second period of parental leave and that the comment was intended to reference the fact that during his first period of parental leave, Mr Sjoberg had commented that he had found it frustrating that how he could not comfort his baby because his wife was breast feeding.

165. Mr Holsem also accepted that he had mentioned the comment at the end of the meeting. In addition he told us that later, privately, he apologised to Mr Sjoberg.

166. The Claimant said he was offended by the comment as were others of his colleagues. This is corroborated in the interview notes of the meetings with

In c. November 2022, during a Teams call attended by R3, Martin Reed and others, R3 put up an image on screen of a woman in a tight skin-coloured swimsuit showing the shape of her cleavage, nipples and vagina through the swimsuit

167. The Claimant told us that although he was not present to witness this incident, he was told about it by others who were at the meeting, including Mr Reed. Mr Reed confirmed this at the hearing when giving us his evidence. He also confirmed that he description in the list of issues matched what he saw at the time.

168. Mr Holsen denied this incident. He said that he had searched his computer and could not find any pictures like the image described.

169. Our finding is that this did occur. The picture did not need to be on Mr Holmsen's system for it to be displayed on his computer screen. We note that Mr Reed did not mention this incident when he was interviewed by Ms Justice. The most likely explanation for this is that he was not expressly asked about it.

170. Mr Reed explained to us that he had left Ocorian and now worked in a new company where he reported to the Claimant. We considered whether his loyalty to the Claimant may have led him to be dishonest with us about the picture, but we decided against this.

171. We also did not consider that there was any contradiction between what he said in his witness evidence and what he had said in a letter to the Respondents solicitor earlier. When this was out to him he provided an explanation that was consistent with the document.

172. The Claimant told us that he found Mr Holsen's behaviour extremely offensive to women and gay men.

In January 2023, during a bi-weekly Capital Markets meeting, R3 responded to Gail Greenwood's suggestion that R1 sponsor a "women in finance" event by laughing and saying, "well there are no women here"

173. The Claimant said he was present at this meeting and recalled this event. He had been the one that suggested that this particular event should be sponsored.

174. Mr Holmson accepted that there had been a discussion about sponsoring a women in finance (or similarly named) event, but denied that he had referred to it in a dismissive manner or laughed.

175. Ms Greenwood was interviewed by Ms Justice but did not mention this incident. It was however referred to by her colleague Ms Stuart who told Mr Justice that Mr Holmsen had said "something along the lines of there are no women here, insinuating as there were no women present to push for the event there was no point further discussing [it]." (1592) She added that he may have intended the comment to come over as a joke but she personally found it a distasteful remark and felt it was undermining to women.

176. We find that Mr Holmsen did make the comment as alleged.

177. The Claimant told us that he found the comments by Mr Holmsen offensive towards women as it demeaned and humiliated them and it created a poor environment.

On 6.2.23, during the bi-weekly Capital Markets meeting when Lisa McLauchlan was providing an update on sales activity, at each point she raised R3 shouted over her and challenged her level of knowledge in an aggressive tone

178. The Claimant says he was present and witnessed this incident.

179. Mr Holmsen accepted in his evidence that he had talked over Ms McLauchlan but he denied shouting at her or behaving aggressively towards her. He accepted however that he may have spoken in a raised voice.

180. Ms McLauchlan was interviewed by Ms Justice and referred to this incident. She describes the incident as one where she was trying to present to the Capital markets Leadership team but was unable to do so because Mr Holmsen kept talking over her (1590).

181. Mr Reed's impression of the incident was that Mr Holmsen berated Ms McLauchlan and was aggressive towards her.

182. We find that this incident did happen, save for the shouting as this is not corroborated. That said, there is not in out judgment, a material difference between shouting and having a raised voice. Both can be perceived as aggressive and we consider that is what occurred here.

Employment Tribunal Claims

183. The Claimant notified Acas of his proposed claims against R1 on 16 June 2023. Acas issued the early conciliation certificate on 28 July 2023 and the Claimant presented this claim on 10 August 2023. He subsequently initiated early conciliation against Mr van Tyull and Mr Holmsen on 18 December 2023. The Acas early conciliation certificate was issued on 19 December 2023 and he presented his second claim to the tribunal on 20 December 2023.

THE LAW

184. In this section we set out a summary of the relevant legal framework and principles to be applied in outline. We have not included those relevant to the claim of ordinary unfair dismissal.

Protected Disclosures

185. According to section 43A of the Employment Rights Act 1996 (ERA), a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H ERA.

186. Section 43B(1) ERA says a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

    (a) that a criminal offence has been committed, is being committed or is likely to be committed,
    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Disclosure of Information

187. There must be a disclosure of information. In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

188. The Court of Appeal has subsequently cautioned tribunals against treating the categories of "information" and "allegation" as mutually exclusive in the case of *Kilraine v London Borough of Wandsw*orth [2018] EWCA Civ 1436. At paragraphs 30 -31, Sales LJ says:

"*I agree with the fundamental point …….. that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. …….Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. ……*

On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision."

189. He goes on to say at paragraph 35:

"*In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection [43B](1).*"

190. A disclosure may concern new information, in the sense that it involves telling a person something of which they were previously unaware, or it can involve drawing a person's attention to a matter of which they are already aware (section 43L(3), ERA 1996).

191. It is important that we take into account what was said as a whole, rather than take a fragmented view of individual communications (*Norbrook Laboratories (GB) Ltd v Shaw* 2014 ICR 540, EAT).

Genuine and Reasonable Beliefs

192. The requirement for reasonable belief requires the tribunal to identify first what the claimant genuinely believed and then to consider whether it was

objectively reasonable for the Claimant to hold that belief. We must consider this question in light of the particular circumstances including the Claimant's level of knowledge. (*Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, EAT).

193. The test to be applied is whether a claimant reasonably believed (a) whether the information he disclosed showed a relevant failure had occurred, was occurring or was likely to occur and (b) whether his or her disclosure was made in the public interest. The Claimant does not need to demonstrate that the relevant failure actually occurred, was occurring or was likely to occur or that the disclosure was in the public interest. Our focus is on the claimant's beliefs. The reality is not entirely irrelevant, however, and can be taken into account when considering the objective reasonableness of a claimant's belief (*Darnton v University of Surrey* 2003 [ICR] 615, EAT; *Babula v Waltham Forest College* [2007] ICR 1026, CA).

194. The assessment should be made of the beliefs the claimant had at the time of making the disclosure and not with the benefit of hindsight (*Jesudason v Alder Hey Children's NHS trust* [2020] ICR 1226).

Public Interest Test

195. The leading case dealing with when the public interest test is met is *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979. The Court of Appeal confirmed that where a disclosure relates to a breach of a Claimant's own contract of employment, or some other matter under where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker. Each case will depend on its own facts and context.

196. Factors that may be helpful to consider include:

(a) The numbers of people whose interests may be impacted by the disclosure;

(b) The nature and extent of the interests involved and the impact

(c) The nature of the wrongdoing disclosed

(d) The identity of the alleged wrongdoer

197. The original version of section 43B ERA, in force until 24 June 2013, made no mention of the public interest test, but instead included a requirement that a disclosure be made in good faith. A worker's motivation for making a disclosure was considered as part of this.

198. The leading case on what was meant by making a protected interest disclosure in good faith was **Street v Derbyshire [2005] ICR 97 (CA)**. In which it was said that when considering the question of good faith, the tribunal can consider not only whether a protected disclosure was made honestly, in the sense that the claimant genuinely believed it, but also their motive for making it and whether they had an ulterior motive.

199. Although the good faith requirement was removed from section 43B in 2013, it has been kept when it comes to remedy. In a successful claim brought under the protected disclosure provisions, a tribunal has the power to reduce a claimant's compensation, by up to 25%, where it finds that the protected disclosure was not made in good faith. This is found in sections 49(6A) and 123(6A) ERA.

200. When considering the question of motivation in the case of *Chesterton.* Underhill LJ specifically observed (in paragraph 16) that the question of good faith was no longer relevant to the matter of liability. He also observed while a worker "*must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it, otherwise the new sections 49(6A) and 103(6A) would have no role."*(paragraph 30)

To whom must a qualifying disclosure be made in order to be protected?

201. Section 43C(1)(a) ERA 1996 confirms that a qualifying disclosure made to an employee's employer attracts protection.

Claims Based on Protected Disclosures under the Employment Rights Act 1996

202. Section 47B ERA 1996 gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Further information about the legal test as to what constitutes a protected disclosure is set out below.

203. Section 47B in full says the following:

> *(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
>
> *(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*
>
> *(a) by another worker of W's employer in the course of that other worker's employment, or*
>
> *(b) by an agent of W's employer with the employer's authority,*
>
> *on the ground that W has made a protected disclosure.*
>
> *(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker ….. is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

Section 47B ERA 1996 gives a Claimant the right not to be subjected to a detriment on the ground that he has made a protected disclosure. The term "detriment" is not defined in ERA 1996 and tribunals have therefore looked to the meaning of detriment established by discrimination case law (see below)

204. Where an employee is bringing a claim for a detriment against his employer, this is pursued under section 47B. However, where the detriment complained of is dismissal, the employee must pursue the complaint against his employer as one of automatic unfair dismissal by virtue of section 47B(2).

205. An automatic unfair dismissal claim pursued by an employee against their employer based on the making of a protected disclosure must therefore be pursued under Section 103A ERA. It provides that **"***An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*".

206. Claims based on the making of a protected disclosure can also be brought by employees against their work colleagues by virtue of section 47(1A) Employment Rights Act 1996. Section 47(1B) tell us that an employer is also

vicariously liable for the detriment meted out by any of its employees, subject to the provisions of sub-sections 47(1C) to (1E).

207. The additional sub-sections potentially give the employer and separately the work colleague a defence to being held liable. For the employer, the defence arises where it can show it took all reasonable steps to stop the work colleague from acting as they did. For the work colleague, the defence relies on them being able to say they were following their employer's instructions and it was reasonable for them to do so.

208. In a detriment case under section 47B(1) or (1A), the test is whether the employee's protected disclosure materially influenced the treatment of the employee, whether this the treatment by the employer or work colleague. The burden of proof is on the Claimant.

209. Where the claim is one of dismissal under section 103A, the test is whether the protected disclosure was the principal reason for the employer's decision to dismiss the claimant. This is a more onerous test. Again, the burden of proof is on the Claimant.

210. Where the detriment complained of against an individual respondent is dismissal, this continues as a detriment claim under section 47B(1B). The causation test that is applied is the less onerous test of material influence. There is a lack of clear settled law on the question of whether an employer can be held to be vicariously liable for dismissal brought as a detriment claim against a co-worker (*Timis and anor v Osipov (Protect Intervening)* [2018] RWCA Civ 2321 and *Wicked Vision Limited v Rice* [2024] EAT 29)

Claims under the Equality Act 2010

211. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. Direct discrimination because of a protected characteristic as defined in section 13.

212. Section 39(4) of the Equality Act 2010 prohibits an employer from victimising one of its employees by dismissing him or by subjecting the employee to a detriment. What constitutes victimisation is found in section 27 of the Equality Act 2010.

213. Section 40 of the Equality Act 2010 prohibits an employer from harassing one of its employees.

214. Subsection 212(1) of the Equality Act 2010, says that a detriment does not include conduct that amounts to harassment.

215. Section 4 of the Equality Act 2010 provides and that sexual orientation and sex are protected characteristics. Sex is dealt with further in section 11 which confirms that a reference to the protected characteristic of sex is a reference to whether a person is a man or a woman. Sexual orientation is dealt with further in section 12 which confirms that sexual orientation means

a person's sexual orientation towards persons of the same sex, the opposite sex or either sex.

216. Under section 109(1) of the Equality Act 2010, an employer is liable for the contraventions of the Equality Act 2010 by its employees (also known as vicarious liability). A similar provision applies as between principals and agents in section 109(2).

217. Individuals can also be personally liable for such contraventions. This can be in their capacity as employees or agents (section 110 (1) of the Equality Act 2010 or through the opeattion of sections 111 and/or or 112.

218. Section 136 of the Equality Act 2010 contains a shifting burden of proof that applies to any proceedings relating to a contravention of the Act.

Direct Discrimination

219. Section 13 of the Equality Act 2010 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'

220. The "because of" formulation in the statute is wide enough to encompass scenarios such that there is no need for B to have the relevant protected characteristic. The critical question is whether the reason for the less favourable treatment is the relevant protected characteristic, whether B has it, is perceived to have it, is associated with others who have it and more generally.

221. Section 13 is usually split into its different components for analysis purposes. There are no set rules as to the order in which this must be carried out. As observed by HJJ Taylor in the case of *Earl Shilton Town Council v Ms K Miller* EAT-2021-000196, LA, "*however the provision is split into its components it is also necessary to keep an overview of the provision as a whole and to consider whether the analysis in the particular case under consideration is consistent with its purpose*." (per paragraph 15)

222. Where necessary to consider separately whether the conduct complained of constituted a detriment pursuant to section 39(2)(d) of the Equality Act 2010, the test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 will apply. In that case a detriment arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work. Where there is a finding of less favourable treatment because of a protected characteristic, it will be rare for there not to have been a detriment (as per Elias LJ in Deer v University of Oxford [2015] ICR 1213, paragraph 26)

223. Section 13 refers to less favourable treatment rather than unfavourable treatment, thus calling for a comparison. It is possible to compare with an actual or hypothetical comparator. Under section 23(1), there must be no material difference between the circumstances relating to each case.

224. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

225. In most cases, we must consider whether the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

226. Allegations of discrimination should be looked at as a whole and not simply on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. We must "*see both the wood and the trees*": *Fraser v University of Leicester* UKEAT/0155/13 at paragraph 79.

227. Our focus "*must at all times be the question whether or not they can properly and fairly infer… discrimination*.": *Laing v Manchester City Council*, EAT at paragraph 75.

228. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of the relevant protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

229. Guidelines on how to apply the shifting burden of proof to direct discrimination cases were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258.* The decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

230. In the standard case, a two-stage process is appropriate. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

231. The Court of Appeal in *Madarassy*, states:

'*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*.' (56)

232. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

233. We do not always needed to follow the two stage process described above. It may be appropriate on occasion, for the tribunal to take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

234. In addition, there may be times, as noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, where we are in a position to make positive findings on the evidence one way or the other and the burden of proof provisions are not particularly helpful. When we adopt such an approach, it is important that we remind ourselves not to fall into the error of looking only for the principal reason for the treatment, but instead ensure we properly analyse whether discrimination was to any extent an effective cause of the reason for the treatment.

235. Useful recent guidance on the approach tribunals should adopt to the burden of proof and when can be found in paragraphs 41 to 45 of HJJ Tayler's decision in the case of *Field v Steve Pye and Co. (KL) Limited and others* EAT-2021-000357-LA.

Harassment

236. The definition of harassment is contained in section 26 of the Act and says:

> "A person (A) harasses another (B) if
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

237. Unwanted conduct is conduct that is unwelcome or uninvited. It can include a wide range of behaviour.

238. For a harassment claim to be successful, the unwanted conduct must be shown "to be related" to a protected characteristic. This does not means it need to be caused by a protected characteristic.

239. As confirmed in the EHRC Employment statutory code of practice, it includes where the conduct is related to a protected characteristics that B has personally, but is not limited to such situations. It also arises where the claimant does not personally have the relevant protected characteristic such as in the example where a white employee is offended by racist abuse by their manager towards a back colleague.

240. In some cases it will be obvious that conduct relates to a particular characteristic. In other cases, this will depend on the facts and circumstances.

241. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

242. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

243. It is not necessary for B to be present when the conduct takes place to succeed in a claim.

Victimisation

244. Section 27(1) of the Act provides that:

'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

245. The definition of a protected act is found in section 27(2) and includes:

(a) bringing proceedings under the Equality Act 2010;

(b) giving evidence or information in connection with proceedings under the Equality Act 2010;

(c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and

(d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010

246. A grievance can amount to a protected act under section 27(2)(d) without referring to the Equality Act 2010 and without using the correct legal language. It must however contain a complaint about something that is capable of amounting to a breach under the Equality Act 2010 (*Beneviste v Kingston University* EAT 0393/05).

247. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith (section 27(3)).

248. If the tribunal is satisfied that a claimant has done a protected act, the claimant must show any detriments occurred because he had done a protected act.

249. The analysis the tribunal must undertake is in the following stages:

(a) we must first ask ourselves what actually happened;

(b) we must then ask ourselves if the treatment found constitutes unfavourable treatment;

(c) finally, we must ask ourselves, was that treatment because of the claimant's protected act.

250. A detriment can encompass a range of treatment from general hostility to dismissal. It does not necessarily entail financial loss, loss of an opportunity or even a very specific form of disadvantage.

251. As referred to above, The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

252. The EHRC Employment Code, drawing on this case law, says: '*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage……. However, an unjustified sense of grievance alone would not be enough to establish detriment*." (paragraphs 9.8 and 9.9). Accordingly, the test of detriment has both subjective and objective elements.

253. The essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental

processes of the respondent to establish the underlying "core" reason for the treatment. In overt cases, there may be an obvious conscious attempt to punish the claimant or dissuade them from containing with a protected act. In other cases, the respondent may subconsciously treat the claimant badly because of the protected act. A close analysis of the facts is required. The shifting burden of proof will be relevant.

Time limits – Discrimination, Harassment and Victimisation claims

254. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

255. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

256. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

257. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

258. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the Claimant was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the Respondent's decision to instigate disciplinary proceedings against the Claimant created a state of affairs that continued until the conclusion of the disciplinary process.

259. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

260. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach *is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of British Coal Corporation v Keeble* [1997] IRLR 36.

ANALYSIS AND CONCLUSIONS

261. As can be seen from the list of issues, there was a degree of overlap in the Claimant's claim, with many of the same incidents being argued as complaints of direct sexual orientation discrimination, sex and race related harassment, victimisation and detriments because of protected disclosures.

262. To assist readers in navigating our decision we have included relevant extracts from the lists of issues in italics.

Liability of the Respective Respondents

263. Before dealing with the detail of the specific legal complaints, we note here the position with regard to the liability of the respective respondents.

264. It was not in dispute that under the Equality Act 2010, Mr van Tyll and Mr Holmsen were potentially liable as individual respondents and that R1 was vicariously liable for their acts. Mr van Tuyll was employed by R1 at the relevant times. Although Mr Holmsen was not, it was accepted that he was an agent of R1.

265. It was also not in dispute that the Claimant's claims for detriments (including his dismissal) against Mr van Tuyll and Mr Holmsen individually under section 47B(1A) done on the ground he had made a protected disclosure. Nor was it in dispute that R1 could be held to be liable for their actions under section 47B(1B), save in respect of the Claimant's dismissal. As we did not find that the Claimant's protected disclosures materially influenced the decision to dismiss him, the decision to dismiss him having been made well before he made any protected disclosures, this issue did not need to be resolved.

Harassment Allegations (Issues 3a to 3d)

266. We dealt first with the Claimant's complaints of harassment at 3(a) to 3(d) in the list of issues.

In circa. February/March 2022, during a bi-weekly Capital Markets meeting, Mr Holmsen said that Erik Sjoberg who was going on paternity leave, "is going off to grow a pair of tits and look after the child"

267. We found as a matter of fact that this occurred.

268. We considered that the comment constituted unwanted conduct related to sex. This was because it consisted of a man saying something to a man about growing or not being able to grow breasts in order to be able to breast feed. It is a clear reference to something that women can do and men cannot.

269. We did not find that the comment was directed at the Claimant. It was directed at Mr Sjoberg. However, we considered that it had the effect of creating an offensive environment for the Claimant.

270. The investigation notes reveal that some of the men that were interviewed by the Respondent and/or had made earlier complaints (Mr Reed and Mr Smyth) found the comment shocking even though it was not directed at them. They considered it was an inappropriate thing for Mr Holmsen to say in the context he said it, an ordinary work meeting.

271. We also consider that Mr Holmsen was aware that he had overstepped the mark when making the comment. This is why he sought to justify making it at the end of the meeting and why he later apologised.

In circa November 2022, during a Teams call attended by Mr Holmsen , Martin Reed and others, R3 put up an image on screen of a woman in a tight skin-coloured swimsuit showing the shape of her cleavage, nipples and vagina through the swimsuit

272. Our factual finding was that this incident occurred.

273. We considered that the incident constituted unwanted conduct related to sex. This is because the image on display was an image objectifying a woman which was shown without any justification given the work context. We did not consider it was related to sexual orientation, however.

274. We did not find that the unwanted conduct was directed at the Claimant. He was not present at the meeting and has not suggested he considered this to be the case. We did however find that, it created a offensive environment for the Claimant.

275. We gave careful consideration to this latter point, and particularly whether it was reasonable for the incident to have had the effect of causing the Claimant offence, when he was not present at the meeting where the image was displayed. We decided that it was reasonable for the Claimant to be offended for two reasons. Firstly, he told us that as a gay man he strongly to empathised with how other groups of people with protected characteristics facing every day discrimination felt, including women. He also felt a responsibility for the people in working in the London office as its Head.

In January 2023, during a bi-weekly Capital Markets meeting, R3 responded to Gail Greenwood's suggestion that R1 sponsor a "women in finance" event by laughing and saying, "well there are no women here"

276. Our factual finding was that this incident occurred, although the woman involved was likely Ms Stuart not Ms Greenwood.

277. We considered that the comments and conduct of Mr Holmsen constituted unwanted conduct related to sex. This was because of the topic that was being discussed and its link to women.

278. The comment and behaviour was not directed at the Claimant but he thought it was offensive to women and, in turn, was personally offended by it. The

conduct did therefore, in our judgment, create an offensive environment for the Claimant.

On 6.2.23, during the bi-weekly Capital Markets meeting when Lisa McLauchlan was providing an update on sales activity, at each point she raised R3 shouted over her and challenged her level of knowledge in an aggressive tone

279. Our factual finding was that this incident occurred.

280. We considered that the comments and conduct of Mr Holmsen constituted unwanted conduct related to sex. This was because Ms McLauchlan was targeted. R1's investigation into this incident linked it with a pattern of behaviour by Mr Holmsen towards women who held positions that were junior to him.

281. The comment and behaviour was not directed at the Claimant but he thought it was offensive to women and, in turn, was personally offended by it. The conduct did therefore, in our judgment, create an offensive environment for the Claimant.

Did the Claimant do any Protected Acts?

282. We next considered was whether the Claimant did a protected act as defined in section 27(2) of the Equality Act 2010. He sought to rely on three protected acts, namely his email of 12 March 2023, what he said in the meeting with HR on 14 March 2023 and the contents of his follow up email dated 17 March 2023.

283. On all three occasions, the Claimant communicated concerns that Mr Holmsen's conduct was sexist and that he was creating an offensive environment for his female colleagues. He also alleged that he had found a comment made by Mr Holmsen to had been offensive to him as a gay man.

284. In all three cases, we consider the communications meet the test for a protected act found in section 27(2)(d) Equality Act 2010. That section says that a protected act includes making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010. The Claimant did not expressly refer to any breach of the Equality Act 2010 in his communications, but he did not need to do so as this was sufficiently clear from what he said.

Did the Claimant make any Protected Disclosures?

285. At the same time, we considered whether the Claimant had made any protected disclosures. He sought to rely on the same communications as are referred to above.

286. It was not in dispute that all three communications were made to representatives of R1. The issue for us to determine was whether the communications disclosures were qualifying disclosures as defined in section 43B of ERA.

Disclosure of information – sufficiency of information test. Does the disclosure actually contain information that tends to show one of the matters set out in sub section 1 (a) to (f)?

287. In our judgment, all three relevant communications met the sufficiency of information test as they included information which tended to show that Mr Holmsen and/or R1 were failing to comply with a legal obligation to which they were subject.

288. The communications of 14 March and 17 March 2023 were detailed and included examples of conduct that the Claimant said he thought was discriminatory and hence unlawful conduct Mr Holmsen.

289. The initial email dated 12 march 2023 was less detailed. It made headline allegations of sexism and misogyny against Mr Holmsen rather than contained information as to what this was. The reason we have found that the test is met for the first communication is because the reference to bullying and engineering an exit, is more detailed. The Claimant forwarded his latest performance review rating and linked these allegations to it. He was not therefore simply making an allegation but disclosing information to support the allegation.

290. The Claimant did not allege that the bullying was homophonic, but he did not need to for the communication to be a qualifying a protected disclosure. Bullying in the work place can of itself be unlawful whether or not it is connected to a protected characteristic.

Did the Claimant reasonably believe the information he disclosed tended to show one of the matters set out in sub section 1 (a) to (f)?

291. When consider this we have applied a two stage test. We considered first what the Claimant believed at the time and whether it was a reasonable belief taking into account the circumstances and what he knew at the time.

292. We again find that this test is met for all three communications.

293. The Claimant genuinely believed that he was being targeted by Mr Holmsen for an unlawful exit. As it turned out he, he was entirely correct in that belief.

294. The Claimant also genuinely believed that Mr Holmsen's behaviour towards him and others had crossed a line in terms of what is acceptable behaviour in a work place. Based on the finings made by R1 when investigating Mr Holmsen's behaviour and our own our findings in relation to the four incidents we have considered in detail, we conclude such belief was reasonably held.

Did the Claimant reasonably believe that he was making the disclosure in the public interest?

295. When considering this issue, we again applied a two stage test, asking ourselves first what we considered the Claimant genuinely believed at the

time of making the disclosures and then whether this was objectively reasonable taking into account all the circumstances and his knowledge.

296. We did not consider whether the Claimant had an ulterior motive for making the disclosures at the time he made them and therefore whether they were made in good faith or not. We have explained our understanding of the relevance of motivation to the public interest belief test in the relevant section on the law and have followed that approach. We have instead adopted the approach set out in *Chesterton* including considering the four factors identified there.

297. We find that the Claimant genuinely believed his disclosures were in the public interest and that it was reasonable for him to do so.

298. Although one part of the concerns raised by the Claimant were about Mr Holmsen's treatment of him personally as an individual, he made it clear that he felt that he was not the only person Mr Holmsen was treating badly. His view was that Mr Holmsen was responsible for creating a toxic work environment that was impacting him and other colleagues in the London office. This was a therefore a concern raised on behalf of everyone in the London offices.

299. The Claimant was aware that UK entities within the Ocorian group were FCA regulated and that he himself was subject to the regulatory regime. He was aware that the FCA had issued a statement about sexual harassment in regulated entities and that this was an area of interest for the regulator. He therefore mentioned this as part of his disclosures. In our judgment, this context was sufficient for us to find that the Claimant believed that the matters he was raising were in the public interest. We also consider it was reasonable for him to do so, even though the reality was that Mr Holmsen most probably fell outside of the FCA's jurisdiction.

The Claimant's Dismissal (Issues 3.e, 5, 8, 12.a, 17 and 18)

300. The Claimant brought several claims in the alternative about his dismissal. The Tribunal was invited to find that the final decision to dismiss the Claimant was not taken until after he had done his protected acts / made his protected disclosures and that these were the reasons for his dismissal. In addition, and/or in the alternative we were invited to find that the Claimant was dismissed because of his sexual orientation. His "fallback" complaint was that his dismissal constituted harassment related to sexual orientation or sex. The sex-related harassment claimant depended on the success of the victimisation claim. There was also an ancillary aiding a contravention complaint.

301. We have set the chronology out in our finding of facts.

302. The Respondents were considering terminating the Claimant's employment as early as November 2022. Although their plans were fluid and not set in stone, we found that they reached a final decision that the Claimant would be replaced on 23 February 2023. On this date, it was agreed that Mr Butler

would be offered the Claimant's role as Head of capital Markets EMEA and that someone else would be asked to step into his role as Head of the UK.

303. It was at the point the decision to offer the Claimant's role of head of Capital Markets to Mr Butler was made (knowing already that he would agree and having got approval for his remuneration package) that the Claimant's fate was sealed and his employment was set to be terminated. This decision was made by Mr Holmsen. It required approval by Mr van Tuyll, but he had left it up to Mr Holmsen to make the decision.

304. There were some steps required to be undertaken to implement the key decisions, but it was not envisaged that any of the steps would lead to a different outcome. The steps were, on the whole, logistical and included working out how and when to communicate the termination to the Claimant, exactly who would be appointed as UK Head and finalising Mr Bulter's contract. Many of these steps were completed before Claimant's first protected act and protected disclosure in any event.

305. The Claimant's first protected act, which was also his first protected disclosure was not made until 12 March 2023. This was after the decision to dismiss him had been taken.

306. Applying the test in section 27 of the Equality Act 2010, the Claimant's dismissal cannot therefore have been because of his protected act.

307. The same is true when tests in section 47B and 103A of the Employment Rights Act 1996 are applied. The principal reason for the Claimant's dismissal cannot have been his protected disclosures. Those disclosures also cannot have materially influenced the decision to dismiss the Claimant.

308. Turning to the question of whether the reason for the dismissal was because of the Claimant's sexual orientation, we also reject this.

309. We consider that in relation to this question, we are in a position to make positive findings of fact in the evidence without reference to the shifting burden of proof. Having said that, we also analysed the facts using the two stage approach required when applying the shifting burden of proof to see if this would change anything.

310. Our positive findings of fact were that Mr Holmsen was the key decision maker in relation to the Claimant's dismissal. Although Mr van Tuyll needed to approve the decision, he left it to Mr Holmsen.

311. Mr Holmsen's genuine reasons for dismissing the Claimant were his concerns about the Claimant's performance and conduct, specifically the Claimant's conduct towards him as his line manager. The concerns were outlined in the draft document Mr Holmsen prepared when conducting the 2022 end of year appraisal with the Claimant. He also included some of them when sending the Claimant his justification for the rating the Claimant partially achieved.

312. We found that the concerns were genuine albeit that they did not justify a fair immediate dismissal.

313. We also found, as a matter of fact, that Mr Holmsen did not know that the Claimant was gay when making the decision to terminate his employment.

314. In relation to the burden of proof, we considered that there was insufficient evidence to shift the burden to disprove sexual orientation discrimination onto the relevant respondents (R1 and Mr Holmsen). Relevant to this was the fact that the Claimant never once complained to anyone that he felt that Mr Holmsen's behaviour towards him was influenced by the fact that he, the Claimant, is a gay man. It was particular striking that he did not do this when he emailed Mr McAvoy after the 11 February 2021 telephone conversation or when raising his grievance.

315. Finally, it follows from our decision making in relation to the victimisation and direct discrimination complaints that the harassment and ancillary complaints also fail.

Equity Treatment (Issues 3f, 5, 8 and 18)

316. The Claimant brought a number of different legal complaints about the treatment of his equity holding.

317. The way the complaint was put in the list of issues was that he was treated as an intermediate leaver rather than a good leaver. It is correct that he was treated as an intermediate leaver. Mr Parkins told us than when negotiating a an exit subject to a settlement agreement, there was potential to treat a leaver more favourable than an intermediate leaver without having to go as far as making them a good leaver. We therefore adapted this allegation slightly to allow for this possibility.

318. The first complaint we considered was that he was treated less favourably than others because of his sexual orientation. Although the primary decision maker in respect of his equity treatment, Mr Van Tuyll, was aware that the Claimant was gay, we were not persuaded by this argument. The Respondent provided evidence that the almost exactly same equity treatment was proposed and agreed in the case of Mr Behan, who was understood to be straight. Although another straight man, Mr Hughes, had received a more favourable treatment, this was also true of Mr Zarmkoupis who we were told was gay.

319. We were persuaded, however, that the way that the approach adopted by R1 and Mr van Tuyll to the Claimant's equity holding changed, to his detriment, once the Claimant submitted his grievance. Given that we have found that the grievance and subsequent conversations constituted protected acts and protected interest disclosures the Claimant's succeeds in respect of these claims.

320. The basis for this decision is that prior to the grievance, when plans were being made to exit the Claimant, the plan was to negotiate an exit package with the Claimant. The initial proposal was to be focused around a

termination payment, but based on the evidence provided by Mr parkin, once negotiations began, there was an option to do something more favourable around the equity position. The evidence we saw in the form of the email dated 6 March 2023 from Mr Joy was that the settlement agreement to be given to the Claimant would include reference to his equity treatment. In that email Mr Joy also outlined a proposed method of implementing the termination.

321. Following the Claimant having made his grievance, the proposed termination arrangements were changed. Mr Joy had proposed a meeting ahead of the Claimant's proposed termination date, but this did not occur and instead the Claimant was terminated on the same day as the meeting. The meeting was conducted by Mr Van Tuyll rather than Mr Holmsen and it took place remotely rather than in person.

322. We find that that the reason for the change in date was nothing to do with the Claimant's grievance. It was driven by the dates that Mr Holmsen was able to be in London and when Mr Butler was able to start his employment. This was set in train before the grievance.

323. The reason for the change to a remote meeting was also nothing to do with the grievance but instead was because the Claimant needed to be in Ireland to support his brother.

324. The change in people involved, i.e. the switch to Mr van Tuyll rather than Mr Holmsen, was a direct result of the grievance.

325. In addition, we find that attitude to the Claimant hardened as a result of his grievance such that there was to be no negotiation in relation to his equity treatment and reference to this was accordingly removed from the settlement agreement after he had presented his grievance, as recorded in the email of Mr Joy sent on 24 March 2023. Instead, the Claimant was issued with an open leaver notice on the day his employment was terminated that closed down the option of any difference being made to the treatment of his equity holding.

326. In our judgment, the decision to remove the equity holding from the negotiations was made as a direct result of the Claimant's grievance. The documentary evidence supports this conclusion, but is also corroborated by what Mr van Tuyll said to the Claimant when dismissing him and in his evidence to the tribunal. Although he did not say it expressly, we find that he intimated that by submitting his grievance, the Claimant 'burnt his bridges' with him and R1. There was never going to be a different outcome so far as the dismissal was concerned, but had the Claimant taken a different approach, we consider that Mr van Tuyll would have been minded to be more generous with regard to his exit package and to make a stronger case for this to the investors.

327. We considered there is sufficient evidence for us to make a clear finding of act conclude that the reason the equity holding treatment was taken off the negotiation table was because of the Claimant's grievance. If we are wrong

about this however, we fall back on the shifting burden of proof for the victimisation claim. The evidence shifted the burden to the relevant respondents to provide cogent evidence that our thinking was incorrect, btu they to do so. For the purposes of the detriments done on the ground of a protected disclosure, the legal test is that we have to be satisfied that the protected disclosure materially influenced, which we are.

328. Finally on this point we did raise with the parties the possibility of us making this finding of this nature during closing submissions and asked them if wanted us to decide what a more favourable negotiated settlement might have looked like. They both agreed that if we decided as we have, that they would want to consider this further including whether they would wish to call additional evidence and make further submissions.

329. As we upheld the legal complaints of victimisation and detriments done on the ground of a protected disclosure, we did not consider the alternative harassment complaints for this allegation.

Leaver Announcements (Issues 3g and 3h, 5, 8 and 18)

330. The final legal complaints concerned the leaver announcements that were made on the same day as the Claimant's employment was terminated. We have found that both Mr Holmsen and Ms Mohacs described the Claimant's reason for leaving as being because he was unhappy.

331. We gave careful consideration as to whether this description was to the Claimant's detriment and/or constituted unfavourable treatment of him. The Claimant feels that it was potentially detrimental to his reputation to describe in this way. We agree that it was not the right tone in the circumstances.

332. The Respondents explained that they used this description to avoid going into detail. They noted that it was also accurate that the Claimant was unhappy. We agreed that he was and but in our judgment, the use of the word unhappy was misplaced and an even more neutral explanation could and should have been identified.

333. Having decided that the description was to the Claimant's detriment, we did not consider that there was any evidence that the reason the Respondents chose this description was because of sex, the Claimant's sexual orientation or because of what he had said in his grievance. Therefore, even if the description was to his detriment, his legal claims fail.

334. Had the Respondents followed the initial advice of Mr Joy and allowed some time between presenting the Claimant a settlement agreement and his actual termination, there would have been an opportunity to agree wording with him and the Respondents. This would have enabled him to flag up that he objected to the description. That initial advice was not followed however in relation to the timings. This was not because of the grievance, but the timetable was set in place before that.

Time Issue

335. The Claimant's claim in respect of his successful complaint of victimisation/detriment done on the ground of a protected act was in time. His claim in respect of his successful complaints of earlier harassment (3 a – d) was out of time, although the delay was not more than a few months.

336. We considered whether there was a continuing act between the later complaint and the earlier complaints, but decided against this. The earlier complaints were complaints of harassment based on Mr Holmsen's behaviour. Mr Holmsen was not part of the decision making as to the Claimant's equity treatment. Given the different identities of the people involved, there can be no continuing act between the later complaint and the earlier ones, although there is a continuing act linking the four earlier harassment complaints together.

337. Instead, we granted the Claimant a just and equitable extension of time. In reaching the decision to do this we took into account the Claimant's reason for not bringing a claim earlier. The timing of his claim was understandably driven by the timing of his termination. The prejudice of allowing the late claims to the Respondents was limited in our judgment, given that they were able to rely on a recent investigation by way of evidence and call the person accused as a witness.

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Employment Judge E Burns
4 February 2025

Sent to the parties on:
4 February 2025
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For the Tribunals Office

Appendix – Initial agreed list of issues

Jurisdiction – time limits

1. In respect of any acts or failures alleged to have occurred prior to 17.3.23 (C having notified ACAS of his proposed claims against R1 on 16.6.23) on which C relies as harassment, discrimination or victimisation:

    a. Did they form part of conduct extending over a period that ended on or after 17.3.23?

    b. If not, would it be just and equitable to extend time?

2. In respect of any such acts or failures alleged to constitute whistleblowing detriment:

    a. Did they form part of a series of similar acts or failures that ended on or after 17.3.23?

    b. If not, was it reasonably practicable for C's claim to be presented in time in respect of those acts?

    c. If not, was C's claim presented within a reasonable period thereafter?

Harassment

3. Did the following alleged incidents occur? Each of these claims is brought against R1, and R2/R3 as indicated below:

    a. In c. February/March 2022, during a bi-weekly Capital Markets meeting, R3 said that Erik Sjoberg who was going on paternity leave, *"is going off to grow a pair of tits and look after the child"* (AGoC 31A, 10(a), FBPs 5(a), R3 admits making this statement) – sex & sexual orientation;

    b. In c. November 2022, during a Teams call attended by R3, Martin Reed and others, R3 put up an image on screen of a woman in a tight skin-coloured swimsuit showing the shape of her cleavage, nipples and vagina through the swimsuit (AGoC 31A, 10(c), FBPs 5(c)) – sex & sexual orientation;

    c. In January 2023, during a bi-weekly Capital Markets meeting, R3 responded to Gail Greenwood's suggestion that R1 sponsor a "women in finance" event by laughing and saying, *"well there are no women here"* (AGoC 31A, 10(b), FBPs 5(b), R3 admits making this statement) – sex;

    d. On 6.2.23, during the bi-weekly Capital Markets meeting when Lisa McLauchlan was providing an update on sales activity, at each point she raised R3 shouted over her and challenged her level of knowledge in an aggressive tone (AGoC 31A, 10(d), FBPs 5(d)) – sex;

e. R2 and/or R3 dismissed C (this decision was communicated to C at a meeting on 28.3.23, with effect on 28.9.23) (AGoC 30(c), 30A(a), 31(c)) – sex & sexual orientation;

f. R2 and/or R3 decided to treat C as an "intermediate leaver" rather than a "good leaver" for the purposes of his shares (this decision was communicated to C by a letter of 28.3.23) (AGoC 30(c), 30A(a)), and/or instructed, caused or induced others to do so (AGoC 30A(b)), namely the members of the Stanford Holdco Ltd remuneration committee and Stanford Holdco Ltd Investor Director (FBPs 8(b)) – sex & sexual orientation;

g. On 28.3.23, R3 told members of his management team C had left R1 because he was unhappy (AGoC 31B, 23(a), FBPs 6(a)) – sex & sexual orientation;

h. On 28.3.23, Tania Mohacs, acting on the instructions of R2 and/or R3, told c. 200 UK-based R1 employees that C had left R1 because he was unhappy (AGoC 31B, 23(b), FBPs 6(b)) – sex & sexual orientation.

4. If so, in respect of any such conduct:

a. Was it unwanted by C?

b. Was it related to sex and/or sexual orientation, as indicted above?

c. Did it have the purpose of violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

d. Alternatively, did it have that effect, taking account of: (i) C's perception; (ii) the other circumstances of the case; and (iii) whether it is reasonable for the conduct to have that effect?

Direct discrimination

5. Did R(s) treat C less favourably than they treat or would treat others because of his sexual orientation and/or others' sex? C relies on his dismissal and the detriments alleged in paras 3.e to 3.h above (AGoC 30(a)-(b), 30A, 31(a)-(b), 31B, 23; FBPs 6).

Victimisation

6. Did C do a protected act? C relies on:

a. His grievance by email of 12.3.23 (AGoC 7, 30);

b. The concerns he raised regarding the behaviour of R3 during his grievance meeting on 14.3.23 (AGoC 10, 30); and

c. His email to HR of 17.3.23, in which he provided the names of people he felt HR should speak to and notes of the concerns he had raised during the meeting on 14.3.23 (AGoC 13).

7. In particular, did C thereby:

   a. make an allegation (whether or not express) that R1 or another person had contravened the EqA 2010; or

   b. do any other thing for the purposes of or in connection with the EqA 2010?

8. If so, did R(s) subject C to a detriment because:

   a. C did a protected act; or

   b. R(s) believed he had done, or may do, a protected act?

   C relies on his dismissal and the detriments alleged in paras 3.e to 3.h above (AGoC 30(d), 30A(a), 31(d), 31B, 23; FBPs 6).

Instructing, causing or inducing a contravention

9. Did R2 instruct, cause or induce:

   a. R3, the members of the Stanford Holdco Ltd remuneration committee and/or Stanford Holdco Ltd Investor Director to treat C as an "intermediate leaver" rather than a "good leaver"; and/or

   b. Ms Mohacs to tell staff C had left R1 because he was unhappy as alleged in para 3.h above,

   because of C's protected act(s) or a belief C had done or may do a protected act; C's sexual orientation and/or others' sex? (AGoC 30A(b), 31B(b); FBPs 8(b)(ii), 9(b))?

10. Did R3 instruct, cause or induce:

    a. R2 to dismiss C (AGoC 30A(b), FBPs 8(a)(ii));

    b. R2, the members of the Stanford Holdco Ltd remuneration committee and/or Stanford Holdco Ltd Investor Director to treat C as an "intermediate leaver" rather than a "good leaver"; and/or

    c. Ms Mohacs to tell staff C had left R1 because he was unhappy as alleged in para 3.h above,

    because of C's protected act(s) or a belief C had done or may do a protected act; C's sexual orientation and/or others' sex (AGoC 30A(b), 31B(b); FBPs 8(b)(ii), 9(b))?

11. Was the relationship between R2/R3 and the person so instructed, caused or induced (**"B"**) such that R2/R3 was in a position to commit a basic contravention in relation to B (s. 111(7) EqA 2010)?

Aiding a contravention

12. Did R2 and/or R3 knowingly help:

    a. each other to dismiss C;

    b. each other and/or others, namely the members of the Stanford Holdco Ltd remuneration committee and/or Stanford Holdco Ltd Investor Director, to treat C as an "intermediate leaver" rather than a "good leaver", because of C's protected act(s) or a belief C had done or may do a protected act; C's sexual orientation and/or others' sex (AGoC 30A(b), FBPs 8(a)(ii), 8(b)(ii))?

Ordinary unfair dismissal

13. R1 admits C's dismissal was unfair under s. 98 ERA 1996 (AGoC 31(f), GoR 55).

Automatic unfair dismissal

14. Did C make a protected disclosure? C relies on the following statements:

    a. His grievance by email of 12.3.23 (AGoC 7, 30(e));

    b. The concerns he raised regarding the behaviour of R3 during his grievance meeting on 14.3.23 (AGoC 10-11, 30(e)); and

    c. His email to HR of 17.3.23, in which he provided his notes of the concerns he had raised during the meeting on 14.3.23 (AGoC 13, 30(e)).

15. In respect of each such statement:

    a. Did C disclose information?

    b. Did C believe any such information tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject?

    c. If so, was that belief reasonable?

    d. Did C believe the disclosure was made in the public interest?

    e. If so, was that belief reasonable?

16. It is agreed that C made those disclosures to his employer, R1, for the purposes of s. 43C(1)(a) ERA 1996.

17. If so, was the sole or principal reason for C's dismissal that he made one or more of those protected disclosures (AGoC 31(e))?

Protected disclosure detriment

18. If C made a protected disclosure (see paras 14 to 15 above), did R(s) subject C to a detriment by any act, or deliberate failure to act, done on the ground he made a protected disclosure? C relies on his dismissal and the detriments alleged in paras 3.e to 3.h above (AGoC 30(e), 30A(a), 31B, 23; FBPs 6).