Case No: 2206656/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms Ping Jiang

Respondent: James Durrans & Sons Ltd

Heard at: London Central **On:** 21–25, 28-30 November, 1-2 December 2022

Before: Employment Judge H Grewal
Ms S Plummer and Mr P Secher

Representation

Claimant: Ms S Garner, Counsel

Respondent: Mr M Palmer, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The claim for equal pay under sections 64-70 of the Equality Act 2010 on the basis that the Claimant's work was like the work of Mr Armitage and Mr Jentsch is not well-founded.

2 The complaint of direct sex discrimination in respect of Mr Durrans saying to Mr Armitage in May 2021 that he would not look at the Claimant's concerns about the level of her pay because he was comfortable with the level of their combined house income is well-founded, and the Respondent is ordered to pay the Claimant compensation in the sum of £4,000.

3 All the other complaints of direct race, sex and marital status discrimination and harassment related to race, sex and marital status are not well-founded.

4 The complaints of victimisation under the Equality Act 2010 are not well-founded.

5 The complaints of unauthorised deductions from wages are not well-founded.

REASONS

1 In case number 2206656/2021, presented on 13 October 2021, the Claimant brought complaints of breach of the equality clause (equal pay), direct race, sex and marital status discrimination/harassment, unauthorised deductions from wages and failure to give a written statement of the changes to her terms and conditions within one month. That claim was amended on 18 March 2022 to include complaints of victimisation. In case number 2204358/2022, presented on 6 July 2022, the Claimant complained of constructive unfair dismissal, based primarily on matters set out in the first claim but also some acts of discrimination thereafter.

2 The claims of equal pay were based on "like work" and "work of equal value." It was decided at earlier preliminary hearings that the claim based on "work of equal value" would be stayed pending resolution of the other claims. At a preliminary hearing on 28 October 2021 the parties agreed that the first hearing, in addition to dealing with all the complaints made in the first claim form (other than the equal value claim) would also make findings of fact on all parts of the Claimant's constructive unfair dismissal claim (with the exception of the equal value claim) but would not determine the legal question of whether those matters amounted to a dismissal in law. That issue would be determined at a second hearing after the equal value question had been determined. So far as was practicable, the same Tribunal would hear both parts of the claim.

3 That did not appear to us to be a satisfactory way of dealing with the two claims. We decided that we would only determine the complaints made in the first claim form (other than the equal value claim) and would only deal with later alleged acts of discrimination to the extent that they assisted us in determining the complaints of discrimination before us. Any findings of fact made and conclusions reached by us on the first claim would be binding on the Tribunal hearing the second claim. The second claim would not have to be heard by the same Tribunal.

The Issues

4 It was agreed that the issues that we had to determine were as follows.

Equal Pay

4.1 Whether in her role as Deputy Managing Director of JDT the Claimant's work was like the work of David Armitage or Andreas Jentsch.

4.2 If it was, whether the Respondent had shown that any difference between her terms and their terms was because of a material factor, reliance on which did not involve direct or indirect sex discrimination and, if it did amount to indirect sex discrimination, that it was a proportionate means of achieving a legitimate aim.

Direct race, sex and/or marital status discrimination/harassment

4.3 Whether the following acts occurred:

(1) On 30 March 2021 C Durrans said that the Claimant had "*spoiled"* members of staff and that she was "*mothering"* them;

(2) On 20 May 2021 C Durrans, in a discussion with D Armitage, rejected the suggestion that the Claimant's pay was low and said that her and Mr Armitage's pay as a "*combined household is more than enough."*

(3) On long haul flights during her employment the Claimant travelled economy class whereas her white male comparators flew business class;

(4) Failure to appoint the Claimant a director of the Respondent, or to raise her possible appointment as a director at the Respondent's Board meetings, either in October 2015 or 2019 when she requested it or at any time thereafter;

(5) Failure to invite the Claimant to attend the Respondent's Board meetings;

(6) The treatment of the Claimant and the comments made on 6 September 2021 at the grievance appeal hearing by C Durrans to her, including that it was a great achievement for "*a lady, a Chinese lady to come through the ranks of the company."*

(7) Up to and including January 2022 (apart from November 2021) the Respondent delivered the Claimant's payslip to her in an envelope addressed to her husband.

4.4 If they did, whether:

4.3(1) amounted to harassment related to sex;

4.3(2) amounted to direct sex or marital status discrimination/harassment;

4.3(3) amounted to direct sex or marital status discrimination;

4.3(4) and (5) amounted to direct sex or race discrimination;

4.3(6) amounted to direct race and/or sex direct discrimination/harassment;

4.3(7) amounted to direct race and/or sex discrimination or harassment related to sex and/or marital status.

<u>Victimisation</u>

4.5 Whether the following are protected acts:

(a) The Claimant's informal grievance on 18 June 2021;
(b) The Claimant's formal grievance on 8 July 2021;
(c)The allegations of discrimination raised at the Claimant's grievance appeal on 6 September 2021;
(d) The claim form presented on 6 October 2021.

4.6 Whether the following acts occurred and, if they did, whether they amounted to a "detriment":

(1) In an email dated 26 October 2021 from the Respondent and in a letter dated 10 November from the Respondent's solicitor the Claimant was told to provide complete or detailed information and evidence regarding the work she had carried out to

support her claims for additional hours worked whereas previously nothing had been required;

(2) Failure to respond adequately or at all to the Claimant's Subject Access Requests dated 16 September 2021, 17 November 2021 and 16 December 2021;

(3) On 20 October 2021 the Respondent instructed Mr Armitage to instruct the sourcing team, managed by the Claimant, not to copy the Claimant into emails regarding their work;

(4) Failure to supply a copy of the recording of the grievance appeal meeting on 6 September 2021

4.7 If they occurred, whether the Respondent did any of the acts at paragraph 4.3(6) or 4.6 (above) because the Claimant had done any of the protected acts at paragraph 4.5 (above).

Jurisdiction

4.8 Whether the Tribunal has jurisdiction to consider complaints of discrimination, harassment or victimisation about any acts or failures to act that occurred before 18 May 2021.

Unauthorised deductions from wages

4.9 What were the wages properly payable to the Claimant between 1 June 2016 and 13 October 2021:

4.10 Whether the Claimant was paid less than what was properly payable to her and, if so, what was the difference;

The Law

5 Section 65 of the Equality Act 2010 ("EA 2010") provides,

> *"(1) … A's work is equal to that of B if it is –*
> *(a) like B's work,*
> *(b) rated as equivalent to B's work, or*
> *(c) of equal value to B's work.*
>
> *(2) A's work is like B's work if –*
> *(a) A's work and B's work are the same or broadly similar, and*
> *(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.*
>
> *(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to –*
> *(a) the frequency with which differences between their work occur in practice, and*
> *(b) the nature and extent of the differences".*

6 When considering whether a woman is employed on "like work" with a man, the Tribunal should look not only at what each of them does but also at the circumstances in which the jobs are carried out, and responsibility is a factor to be properly taken into account (**Eaton Ltd v Nuttall [1977] 3 All ER 1131**).

7 Section 66 EA 2010 provides,

> "*(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.*
> *(2) A sex equality clause is a provision that has the following effect –*
> *(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as to be not less favourable;*
> *(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term."*

8 Section 69 EA 2010 provides,

> "*(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –*
> *(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and*
> *(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.*
>
> *(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.*
> *…*
> *(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's case."*

9 Section 13(1) of the Equality Act 2010 ("EA2010") provides,

> "*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".*

Sex, race and marriage are protected characteristics (section 4 EA 2010). On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case (section 23(1) EA 2010).

10 Section 26 EA 2010 provides,

> "*(1) A person (A) harasses another (B) if –*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *…*

(4) In deciding whether conduct has the effect referred to in subsection (!)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

11 Section 27 EA 2010 provides,

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

(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

12 Section 123 EA 2010 provides,

"*(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of –*
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the tribunal thinks just and equitable.

…
(3) For the purposes of this section –
(a) conduct extending over a period is to be treated as done at the end of that period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

Section 140B EA 2010 provides for extension of time limits to facilitate Early Conciliation before the start of proceedings.

13 Section 136(2) and (3) EA 2010 provides that if there are facts from which tribunal could decide, in the absence of any other explanation, that a person (A) contravened

a provision of Equality Act 2010, it must hold that the contravention occurred unless A shows that A did not contravene the Act. We had regard to the guidance given by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** and **Madarassy v Nomura International plc [2007] ICR 867** and the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** on the application of section 136.

14 In **The Law Society v Bahl [2003] IRLR 640** Elias J restated the principles to be applied in establishing direct discrimination as follows,

> "*First, the onus lies on the claimant to establish discrimination in accordance with the normal standard of proof.*
>
> *Second, the discrimination need not be conscious; sometimes a person may discriminate on these grounds as a result of inbuilt and unrecognised prejudice of which he or she is unaware.*
>
> *Third, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a 'significant influence' …*
>
> *Fourth, in determining whether there has been direct discrimination, it is necessary in all save the most obvious cases for the tribunal to discover what was in the mind of the alleged discriminator. Since there will generally be no direct evidence on this point, the tribunal will have to make appropriate inferences from the primary facts which it finds …*
>
> *Fifth, in deciding whether there is discrimination, the tribunal must consider the totality of the facts … Where there is a finding of less favourable treatment, a tribunal may infer that discrimination was on the proscribed grounds if there is no explanation for the treatment or if the explanation proffered is rejected …*
>
> *Sixth, it is clear from the structure of the statutory provisions that the need to identify a detriment is in addition to finding less favourable treatment on the prohibited ground … The test for establishing detriment is in general easily met. It was defined by Lord Hope in the Shamoon case as follows … Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment".*

Elias J then dealt with the relationship between unreasonable treatment and finding discrimination. He said,

> "*There is clear authority for the proposition that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably …*
>
> *The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend on why it had rejected the reason that he has*

given, and whether the primary facts it finds provides another and cogent explanation for the conduct."

The Evidence

15 The Claimant, David Armitage (the Claimant's husband and former Director of the Respondent and former Chairman and Managing Director of the Chinese subsidiary) and Hu Xiadong (expert on Chinese law) gave evidence on behalf of the Claimant. We read the witness statements of Adam Wang (Director and Deputy General Manager of the Chinese subsidiary), Wang Qiang (former director of Tanggu District Construction Engineering Trading Management Centre) and George Xi (former Director and Deputy General Manager of the Chinese subsidiary). Those witnesses live in China and permission had not been granted for them to give evidence from China. Consideration was given as to whether they should be asked to provide written answers to written questions. The Respondent's counsel indicated that he did not wish to ask them questions. The following witnesses gave evidence on behalf of the Respondent – Christopher Durrans (Managing Director, Respondent), Nicholas Durrans (Director of the Respondent and James Durrans Holdings Ltd and Managing Director of the German subsidiary), Graham Hooper (Finance Director of the Respondent and Director of JD Holdings Ltd) and Andreas Jentsch (employee of the German subsidiary and Carbon International Ltd (another subsidiary) and Director of Carbon International and JD Holdings Ltd). The documentary evidence in the case comprised a hearing bundle (1500 pages), a bundle of WeChat messages produced by the Claimant (1500 pages). Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

16 The Claimant is a Chinese woman who was born and brought up in China.

17 From September 1981 to December 1987 she worked for China Minmetals Corporation in its Head office in Beijing in the Training Section of its HR Department and in the Overseas Enterprises Section of its Development Department. From 1984 to 1987 the company sponsored her to obtain a degree from the University of International Economics and Business in Beijing.

18 From December 1987 to December 1992 she worked for Minmetals UK Ltd in London. She was a Manager in the Minerals and Chemicals Department. Her responsibilities included liaison between European and Chinese entities, contract negotiation and administration, drafting official and commercial documentation and using her knowledge of Chinese law and regulatory procedures. She dealt with a variety of minerals. In that role she developed a good knowledge of and relationship with Chinese suppliers.

19 During 1993 she worked for a subsidiary of China Minmetals in Hong Kong. In December 1993 she returned to the UK and worked for two different companies that bought a variety of goods from or traded with China.

20 The Respondent is a family business founded and run by the Durrans family. It produces primarily carbon and refractory products for the automotive, chemical and foundry markets worldwide. It has a number of subsidiary companies, some of which are 100% owned by the Respondent and others 50% owned by the Respondent. The

100% owned subsidiaries are Carbon International Ltd ("CI UK"), James Durrans (Tianjin) Coatings Ltd ("JDT") (Chinese subsidiary), Carbon International Holdings (Pty) Ltd (South African subsidiary) and James Durrans GmbH (German subsidiary). The Group's Head Office is in Penistone, South Yorkshire. It has four manufacturing plants in the UK and others in France, Germany, China, India and South Africa. JDS (the Respondent) and CI UK Board meetings were held jointly.

21 Prior to the Claimant commencing employment with the Respondent in 1998 she did some work for the Respondent which mainly entailed assisting in sourcing materials, negotiating contracts and accompanying Mr Durrans' father and John Toole (Financial Director) to Canton Trade Fairs.

22 On 2 February 1998 Mr C Durrans offered the Claimant a role as a Director of a new Trading Department at an annual salary of £25,000 a year and an annual bonus subject to Group profitability. The offer letter set out her duties as being the co-ordination of all business activities to and from China, liaison with suppliers in China, including shipping, contractual matters, document procedures and banking, seeking other business opportunities on behalf of Group companies and third parties in China and Middle and Far East countries and acting in an advisory capacity by consultation to any clients in those areas. She was expected to set up her own office in London with assistance from the Respondent in setting up the necessary communications systems.

23 The Claimant commenced employment with the Respondent on 14 April 1998. Her contract stated that she was employed as Far East Trading Manager. When the Claimant started she was given on the job training by Dr Moore (Technical Director), John Toole and Chris Norman about the Respondent's friction and coating products and its ways of operating. The Claimant's responsibilities were sourcing from China raw materials (industrial minerals) and finished or semi-finished products for the Respondent, its subsidiaries and its customers in various parts of the world and selling the Respondent's foundry coating products to China.

24 The Respondent was paid in US dollars for the goods that it sold in China. As there was tight foreign exchange control in China at the time, the Respondent's customers had to follow a complicated process to make their payments. Delays were also caused by goods having to clear Chinese customs. The Respondent also discovered that a Chinese intermediary that it used was selling its products at a huge profit. The Claimant and Mr C Durrans discussed the possibility of the Respondent setting up a company in China to produce the coatings products in China. At that time, however, any foreign company operating in China had to be a joint venture with a Chinese company with the foreign company's shareholding not exceeding 49%. Mr C Durrans did not want to set up a business in China on that basis and the matter was not pursued at that time.

25 On 1 March 2002 David Armitage commenced employment with the Respondent as Operations Director. He was also appointed statutory director of the Respondent. Mr Armitage had 15 years' experience working in coatings and was an expert in the field. Prior to joining the Respondent, he had worked for two of the biggest producers of coatings. He introduced new technology and production processes to the Respondent and its subsidiaries. His salary was £45,000 p.a. plus a bonus and he was given a company car or cash equivalent of £7500.

26 In 2002 the Claimant's salary was £32,593 and she received a bonus of £500. In 2003 her salary was £38,110 and she received a bonus of £2,500

27 In 2003 while on a trip to South Africa Mr C Durrans had contact with a company called Allied Minerals. They told him that they had set up a business in China which was 100% owned by them and that there was no longer a requirement to have a Chinese partner. They gave him the contact of their company in China. Mr C Durrans and the Claimant went to China together to look for sites. While they were there they visited Allied Minerals who had a site in Tianjin. Tianjin is a large port city and the area surrounding it is the centre of mineral processing. Allied Minerals advised them that there were sites available in Tianjin with some tax incentives to locate there. Mr Durrans decided to set up a subsidiary company in China and to lease a site in Tianjin. The Respondent's Board approved that.

28 In the course of 2003 Mr C Durrans, the Claimant and Mr Armitage made several trips to China to find a site, lease the site, set up and equip the factory to carry out the production process, set up the company and set up bank accounts. The Claimant used her language skills and contacts and local knowledge to deal with the bureaucracy of setting up the business and to find the professionals to provide various services, such as international lawyers, accountants, insurance companies. Mr Armitage was responsible for setting up the factory, identifying what was required, acquiring the equipment and setting up the production process. He was the only person who had the technical knowledge to do that.

29 James Durrans (Tianjin) Coatings Ltd ("JDT") was incorporated in China in December 2003. Prior to the establishment of the company, Mr C Durrans asked the Claimant to be the Managing Director, the "legal person" in China, as she was Chinese and spoke the language. The Claimant did not wish to take that responsibility and Mr Durrans became the Managing Director. After the company was formed, Mr Armitage became the Managing Director and the Claimant was the Deputy Managing Director. Mr Armitage, the Claimant and Mr C Durrans were all statutory directors of JDT. The first person JDT recruited was George Xi, the Claimant's brother-in-law. The Claimant and George Xi recruited staff for the factory and Mr Armitage trained them. The Claimant and Mr Armitage both spent long periods in China doing work for JDT. However, they also continued with their roles with the Respondent and remained employees of the Respondent.

30 After the establishment of JDT the Claimant spend about 75% of her time doing work for JDT and about 25% of her time on her work for the Respondent (JDS). The Claimant's work for the Respondent reduced substantially reduced because the bulk of the sourcing of materials from China and the selling of coatings to China was done by JDT. In addition to being Managing Director of JDT, Mr Armitage continued in his role as the Respondent's Operations Director and as a statutory director of the Respondent. In addition to being responsible for the factory in China, he was also responsible for the Respondent's factories in Penistone and Bilson in the UK. On all three sites he was responsible for production, quality assurance, health and safety, research and development, costing product development, marketing and sales. He also advised on and supervised the installation of new Volrath mixers in the Respondent's subsidiaries in South Africa and Germany. He targeted the Chinese automotive industry for selling coatings in China, which led to the growth of JDT. Mr Armitage worked closely with the customers to make tailor made products for them. The Claimant sourced the raw materials which Mr Armitage wanted, dealt with the

authorities and banks in China, and managed HR and the administrative side of the running of the business. She also acted as a translator for Mr Armitage.

31 In 2004 the Claimant was paid £39,063 and received a bonus of £6250.

32 In 2005 the Respondent offered the Claimant and Mr Armitage long term incentive plans whereby they would receive 5% of the net value of the company in the event of the company winding up or being sold (provided they were employed by the company at the time) or their employment ending in certain circumstances. The Claimant met with Mr C Durrans to discuss it. She said that she did not think that she would benefit from the plan. She said that she was committed to make JDT successful but that she felt that her salary package should be reviewed to reflect her responsibilities. Mr C Durrans said that he would look into it. He wrote to her shortly after the meeting. He said that he had looked at the levels that she had been paid since she started and was comfortable that the company had increased her pay as her responsibilities had changed. He saw no reason to change her pay. The percentage in Mr Armitage's long term incentive plan was then increased to 10%.

33 Between 2005 and 2013 the Claimant's salary and bonus payments increased every year. In 2005 her total remuneration (pay and bonus) was £50,315, in 2008 it was £61,644, in 2009 £71,412, in 2010 £81,412 and in 2013 £92,541 (salary £62,541 plus bonus of £30,000)

34 In 2007 the Respondent gave approval for JDT to purchase land and build a new factory. The land was acquired in 2008 and the building of the factory was finally concluded in 2010. The Claimant, George XI and Mr Armitage were all involved in the purchase of the land, negotiations with the builders and the architects and various difficulties that arose with the builders and sub-contractors during the construction of the factory.

35 On 1 October 2013 Andreas Jentsch commenced employment with the Respondent's German subsidiary, James Durrans GmbH, as Sales Director. His salary was 106,000 Euros per annum. On 1 January 2014 Mr Jentsch was appointed European Sales Director of Carbon International Ltd (CI UK), wholly owned subsidiary of the Respondent. He was employed to work three calendar days per month and was paid 15,000 Euros per annum plus a bonus every six months He was also statutory director of CI UK and Carbon International trading Pty Ltd ("CI Couth Africa).

36 Mr Jentsch had a Masters in Foundry Engineering. At the time that he joined the Respondent he had over 20 years' experience in carbon production and sales. He had worked for 12 years for Superior Graphite Europe Ltd in Sweden, initially as a Sales Engineer and Sales Manager and later as Vice President and Sales Marketing. He had also been a Company Officer of the company. He had also worked for five years as Sales and Business Development Manager for a large German company. He had also been a Company Officer of that company.

37 CI UK buys carbon from CI South Africa, customises it and then sells it to the iron and steel industry mainly. Mr Jentsch's main focus was to direct the sales of CI UK. That role was more technical than commercial. Carbons have two properties – the chemical compositions and physical properties. Mr Jentsch had to go to the customers to establish what their requirements were with regard to the different

properties of carbons. The technical knowledge was essential to ensure that the customer received what it required for its purpose, There were three teams in CI UK – production, quality and customer service/logistics. The three individuals who headed those team reported to Mr Jentsch. As statutory director of CI UK he attended Board meetings with the Respondent. He spent 50% of his time working for CI UK.

38 CI South Africa is a subsidiary of CI UK and based in South Africa. It was established in 2020. In his role as director of that company, Mr Jentsch worked very closely with the Managing Director of the company, who was locally based, and he was involved in product development, strategy and sales controls. He negotiated with the suppliers who provided the company with raw materials and was responsible for the sale and technical application of the products and product development.

39 JD GmbH produces refractory coating which is then sold to industries that require carbon. It also processes carbon. Mr Jentsch was strategically involved in purchasing the raw materials and selling the carbon products produced by the Group which were distributed through JD GmbH. He set the pricing strategy, decided on the market to be targeted and did the risk analysis of customers.

40 In 2012 the Chinese tax authorities started an investigation into Mr Armitage's tax liability in China for a period of five years when he had resided in China for more than 183 days per year. At that stage the Claimant and Mr C Durrans resigned as statutory directors of JDT. The Respondent paid the tax and the penalty that the Chinese tax authority demanded from Mr Armitage. Subsequently, George Xi, Adam Wang and Wang Hong Wei were appointed statutory directors of JDT. George Xi was promoted to deputy general manager. Mr Armitage became the executive director and legal representative of JDT. The Claimant and Mr Armitage's day to day responsibilities and remuneration did not change.

41 From 2013 the joint JDS and CI UK board meetings were attended by Mr C Durrans (Managing Director), Mr N Durrans, Mr D Armitage (all directors of JDS) and Mr A Jentsch (director of CI UK). Mr Hooper attended as the Company Secretary.

42 The Claimant and Mr Armitage got married on 28 August 2014.

43 The parties calculated JDT's contribution to the profit of the JDS Group in different ways. We found Mr Hooper's methods of calculation and figures to be more reliable than those of the Claimant, save in one small respect. His calculations are based on JDT's and the Group's profits before tax. The only disagreement that we have with his figures relates to the amounts that he has subtracted from the JDT profits to reflect 100% of the Claimant's salary and 70% of Mr Armitage's salary. Both of them were paid by the Respondent and both of them carried out some work for the Respondent as well as for JDT. We do not disagree with some reduction being made, but we consider that it should be for 75% of the Claimant's salary and approximately 60% for Mr Armitage's salary. Doing the best that we can, it appear that between 2015 and 2021 JDT contributed between 16% and 30% to the Group profits (around 20% being the average).

44 In 2015 the Claimant received a salary of £65,448 and a bonus of £30,000. Between October 2015 and March 2016 the Claimant received a salary of £32,724 and a bonus (payable at Christmas) of £30,000. In the same period Mr Armitage

received a salary of £42,618 and a bonus of £45,000. Mr Jentsch received two sets of remuneration – a salary of £6,003.50 and a bonus of £45,000 from CI UK and a salary of 45,000 Euros and other benefits of 6,693 Euros from JD GmbH.

45 On 18 February 2016 the Claimant, who was aged 63 at the time, sent Mr Durrans a letter in which she said,

> "*I would like to give you my three month notice of retirement from 1st June 2016.*
>
> *Thank you, your family and colleagues in James Durrans for all the support over the years. I have enjoyed my times at Durrans immensely and will take many fond memories with me."*

46 Mr C Durrans met with the Claimant on 5 April 2016 to discuss her email. He asked the Claimant whether she would be prepared to continue doing some work as a consultant while the staff in China gradually took over her responsibilities. There was a discussion about her working about five days a month. Having looked into her pension, the Claimant sent Mr C Durrans an email that she would prefer to work as a part-time employee and have her salary paid directly into her pension fund. She said that she agreed that she would work five days a month, would receive 25% of her salary for that and that if she travelled to China or more working days were required she would be paid extra. She asked Mr C Durrans to put the offer in writing to her.

47 Mr Durrans replied in writing on 18 April 2016. He said that they had agreed that the Claimant would become a part-time employee from 1 June 2016 and would be paid £16,356 per annum (25% of her salary). He continued,

> "*We would expect you to be available to assist our activities in China working 5 days per month. This does not have to be 5 exact full days and we are happy for you to allocate the time working for us to suit your personal need and activities in China.*
>
> *If and when we require you to work in excess of 5 days per month (For example a business trip to China) then you should record these extra days (including travel days) and you will be paid extra to cover the additional days per month at a rate of @ £180 per day* [sic]*."*

The Claimant responded to accept that and said that one of the reasons that she wanted to work-part time was to "*see everyone of Durrans Tianjin working independently before I am phasing out entirely."*

48 On 1 June 2016 the Claimant started working part-time. The arrangement for being paid for any extra days worked by the Claimant was that at the beginning of every month the Claimant would inform Mr Hooper of the number of extra days that she had worked in the previous month. She was not required to provide any breakdown or any proof of work done in respect of the number of days claimed. The number of extra days claimed by the Claimant ranged from 0 to 12 a month. She was always paid for the number of days she claimed.

49 In the tax year April 2016- March 2017 the Claimant was paid a salary of £24,624, £7,380 for the additional hours that she worked and a Christmas bonus of £35,000

(total £67,004). In the same period Mr Armitage was paid a salary of £85,662, a Christmas bonus of £65,000 and a spring bonus of £50,000 and additional benefits of £6,135 (total £206,797). Mr Jentsch wad paid a total of £118,528.880 from CI UK and a total of 103,794.96 Euros by JD GmbH. The Christmas bonus was paid to all employees of the company. The spring bonus was only paid to statutory directors of the Respondent.

50 In 2017 Nick Zhao was promoted to director of JDT.

51 In the tax year April 2017-March 2018 the Claimant was paid a salary of £16,846.50, £5,400 for the additional hours and a bonus of £35,000 (total £57,246.50). Mr Armitage received a salary of £87,786 and bonuses of £65,000 and £60,000 and additional benefits of £5,297 (total £218,083). In the same years Mr Jentsch received £139,686.71 from CI UK and 103,892.31 Euros from JD GmbH.

52 In 2018 Mr Armitage signed a revised long-term incentive plan which provided that he would receive a payment of £78,540 at the end of each year provided certain conditions (such as him being employed by the company and being a statutory director) were satisfied.

53 In the tax year April 2018-March 2019 the Claimant was paid a salary of £17,421, £7,830 for additional hours and a bonus of £16,500 (total £41,751). In the same period Mr Armitage was paid a salary of £90,819, two bonuses of £125,000, a long-term incentive payment of £39,270 and additional benefits of £1,411.71 (total £260,538.14). Mr Jentsch received ££140,240.86 from CI UK and 104.824.32 Euros from JD GmbH.

54 In 2019 George Xi retired. He and the Claimant recommended that Nick Zhao take over his role. That was accepted by Mr Durrans and Mr Armitage, and George Xi and the Claimant ensured that Mr Zhao was provided the necessary training to assume the role.

55 In August 2019 Mr Armitage reduced the number of days he worked. He was contractually obliged to work 3 days a week but was paid for 4 days a week. Mr Armitage's evidence was that Mr C Durrans told him that he knew he would continue working 5 days a week.

56 On 2 September 2019 A Buckle commenced employment with the Respondent as General Manager at the Pennistone site. Mr Buckle is Mr C Durrans' son-in-law. His annual salary was £65,000 and he was entitled to a bonus and a company car. In September 2019 he was paid a bonus of £5,000.

57 Steve Sherry was employed by the Respondent for many years as a Sales Manager selling friction materials and lubricant. Although he was not a statutory director, he was from April 2016 to March 2020 paid a Christmas and a spring bonus. In the tax year April 2016-March 2017 he was paid a salary of £59,574 and two bonuses which added up to £40,000. In addition, he was paid a car allowance of £12,000 and additional benefits of £1,316.46. In the years up to March 2020 his basic salary increased by a small amount every year, and by March 2020 it was £64,428. The other benefits remained the same. In the tax year April 2020 – March 2021 his salary was reduced to £51,005.33 and he was paid only one bonus of £5,000.

58 In the tax year 2020-2021 the Claimant was paid a salary of £18,003, £1,980 for the additional hours that she worked and a bonus of £16,500 (total £36,483). Mr Armitage was paid a salary of £64,360.53, two bonuses which added up to £125,000, £78,540 under the long-term incentive plan and additional benefits of £1,473.12 (total £269,373.65). Mr Jentsch received £135,678.71 from CI UK and 99,998.88 Euros from JD GmbH.

59 Following a heated exchange on the telephone with Mr C Durrans on 2 March 2021, Mr Armitage sent him an email giving him three months' notice to terminate his employment. On 4 March the Claimant sent Mr C Durrans an email about steps they would need to take to cover Mr Armitage's duties when he left. She said that the JDT Board would need to appoint a new legal person and provide the supporting documents to the Chinese authorities, they would need someone to provide technical support to the production team and the customers and to deal with daily management and the main issues at that time. She suggested that all the above be done by one person to whom Nick Zhao, the person in charge at that time, and the technical sales people could speak on a daily basis. She added,

> "*Please also consider the replacement of my supporting role to JDT on sales, admin, HR, legal side."*

Mr C Durrans asked the Claimant whether that meant that she wanted to retire at the same time as Mr Armitage on 31 June 2021. She responded that she did. Mr C Durrans contacted people in China who he thought might be able to replace the Claimant and Mr Armitage.

60 Mr N Durrans spoke to both his brother and Mr Armitage. He could not understand why they had fallen out and tried to resolve matters between them. On 22 March Mr N Durrans spoke to Mr Armitage who agreed that he would stay until his retirement date in mid-2023 but with a clear view/strategy to finding succession to his various roles. Mr N Durrans suggested that they should set up a meeting with the Claimant once they had had a response from Nick Zhao in China about the structure of the company.

61 On 23 March 2021 Nick Zhao wrote to Mr N Durrans about the structure of JDT. He said,

> "*As you know, Adam Wang and myself work together with different responsibilities. Adam is responsible for the production, EHS and equipment maintenance etc. I am responsible for admin, purchase, financial, sales and other daily affairs. We work together as a good team. We also have monthly management meeting to discuss the day-to-day affairs in each department.*
>
> *We report or copy all the issues which are either important or difficult/emergencies at work to David and Jian Ping and seek technical support and advice. The collective leadership mechanism formed over the years has proved to be a good choice. We are very happy for the current structure in Durrans Tianjin."*

62 The Durrans brothers spoke to the Claimant on 30 March 2021 about her retirement at the end of June 2021. The Claimant said that she wanted to fully retire at the end of 2021. In the course of that conversation Mr C Durrans made a comment

about the staff in Tianjin being "spoiled" by the Claimant and her "mothering" them. Mr Durrans' view was that the Claimant was very protective of them and indulged them and that made them too reliant on her. The Claimant's view that was that providing pastoral care to the staff was a cultural requirement. She felt the comment was an insult to her and the JDT team in China.

63 On a couple of occasions after 2016 Mr Armitage commented to Mr C Durrans that the Claimant was working more than five days a month and should be paid more. Mr Durrans' response was that all she had to do was to claim for the additional hours that she was working and she would be paid it. Alternatively, she could contact him about it. The Claimant had claimed and been paid for working the following number of additional days:

2016-2017: 41 days
2017-2018: 30 days
2018-2019: 43.5 days
2019-2020: 25 days
2020-2021: 11 days

From 2020 onwards, because of Covid, the Claimant and Mr Armitage had not travelled to China.

64 The Claimant and Mr Armitage both worked from their home address rather than at one of the Respondent's sites. Normally, payslips for the employees were sent in sealed envelopes to the sites where they worked, and were given personally to the individuals at the site. Once the Claimant and Mr Armitage were married and lived at the same address in London, their individual payslips were each placed in a sealed envelope, and the two sealed envelopes were then put in a single envelope which was sent to them. The larger outer envelope was addressed to Mr Armitage. Each payslip was also sealed with a perforated edge and could only be accessed if the perforated edge was torn off. The Claimant never complained about this at the time.

65 In May 2021 the Claimant asked Mr Armitage to raise the level of her salary with Mr C Durrans. Mr Armitage was uncomfortable about doing so, but did as she asked. Mr Durrans' response was that he was comfortable with the level of their combined household income. Mr Armitage said to him that he needed to talk to the Claimant about the level of her salary. Mr Armitage informed the Claimant what Mr Durrans' response had been. The Claimant's evidence was that she discovered what Mr Armitage was being paid shortly after this conversation. We consider that it is more likely that she discovered it shortly before this conversation.

66 On 18 June 2021 the Claimant sent Mr C Durrans an email about her pay. She began by saying that on 20 May Mr Armitage had raised with him the inadequacy of her remuneration for the work that she did for the Respondent. She said that her remuneration should reflect her value and significant contribution, particularly in so far as it related to the success of JDT. She said that that was irrespective of the fact that her husband also worked for the Respondent. The work that she did and her remuneration had never correlated but since 2016 the gap had become "so unreasonably acute" that she had felt compelled to raise it with him. She continued that since she had gone part-time in June 2016,

> "*In practice … with the exception of a substantial reduction to my salary, little else has changed. I am on call to deal with the company's matters on a daily basis and, with George and then Nick Zhao, take part in decision-making concerning its on-going running. I fully understand why Nick Zhao has written to you asking that I should not retire. He cannot deal on his own with all the issues that arise daily. Capable as he is, he needs guidance and direction, someone suitable he can discuss problems with and who can provide him with assurance and guidance."*

She concluded that she still carried out most of the responsibilities she had when she was a full-time director of JDT. She asked to meet with a view to agreeing a mutually acceptable figure.

67 Mr Durrans responded suggesting a face to face meeting to discuss her email. They agreed to meet on 2 July at Penistone. On 1 July the Claimant said that she understood that the meeting was informal and her intention was simply to listen to what she had to say. However, in order to enable her to reflect on what was said, she felt strongly that minutes should be taken. She said that if he could not arrange it, she would bring someone with her for that purpose.

68 Mr Durrans responded that the meeting was informal and between friends, with a question mark after the word "friends". He said that his intention was to listen to her and not the other way round. He said that he was not prepared to have the meeting recorded or witnessed and did not understand why she was asking for that. The Claimant replied that it was clear from her email what was troubling her and that she had suggested that they had a discussion to agree a figure. She also did not understand why an informal meeting between friends should exclude a record and she still felt strongly that minutes should be taken. In light of those matters she thought it was better to have a meeting as part of a formal grievance procedure. Mr Durrans tried to persuade the Claimant to attend the meeting so that they could discuss maters face to face. The Claimant replied that she felt that she needed to be accompanied as English was not her first language and that the best way forward was to use the company's grievance procedure. Mr C Durrans then told her to address her grievance to his brother, Mr N Durrans.

69 On 8 July 2021 the Claimant sent a formal grievance to Mr N Durrans. The Claimant said that her grievance was made up of two elements – the first was her pay which was unreasonably and unfairly low and the other was race and sex discrimination. In respect of her pay, the Claimant said that after June 2016, she had continued to work every day of the week just like before and her workload had increased rather than decreased. Her responsibilities had remained the same but her remuneration had been cut back drastically. When Mr Armitage had raised the matter with Mr C Durrans he had responded that their "*combined household income is more than enough".* The Respondent had known that she was working far beyond what had been agreed in 2016 and had been happy for her to continue. In respect of sex and race discrimination, she said that she and Mr Armitage did the same work and their difference in their pay was discriminatory on the grounds of sex, race and martial status. She said that Mr Durrans' comment about household income had been discriminatory. She also complained about race and sex discrimination about Mr Jentsch being a statutory director and earning more than her although they were at the same managerial level and his performance fell far short of hers. She said that the Respondent had no female statutory directors and men had been given watches

for long service and she had not. She concluded that she had been treated less favourably because she was a woman and/or Chinese.

70 Mr N Durrans arranged to meet the Claimant on 12 July to discuss her grievance, Prior to that he sent her an email in which he raised some questions and made some comments about what she had said in her grievance. He said that he did not understand why she said that the comment about the combined household income was sexist. He did not agree that the difference between her and Mr Armitage's pay package was discriminatory and was not sure what Mr Jentsch had to do with her grievance. He accepted that she should be given a watch and said that they had told her and Mr Armitage to get one. He said that the Claimant's concluding remark was "*grossly unfair and accurate."* It is clear that Mr N Durrans did not understand that his role was to investigate the grievance, and not to defend or respond to it.

71 The grievance hearing took placer remotely on 12 July 2021. Mr Durrans did not take any notes at the meeting.

72 After the hearing Mr N Durrans sent his brother the Claimant's grievance. Mr C Durrans sent his brother his comments on the Claimant's grievance. He said that he rejected any allegation of sex discrimination. The Claimant had said that she had wanted less work. He did not know how many hours she had worked after that. It was up to her to claim for the number of hours that she had worked. If she had said that she had worked 20 days a month he would have paid her for 20 days a month. He denied that he had made the comment about their combined household income being enough. He then set out how well they had treated the Claimant over the many years that she had worked for them and said "*she was/is family."* Mr N Durrans said that he would call him the following day to discuss how to proceed.

73 On 13 July Mr N Durrans sought the advice of an external HR advisor, G Smith, to respond to the Claimant's grievance. Mr Smith asked him whether he had had a meeting with the Claimant to discuss her grievance and made the point that she could be represented at the meeting by a work colleague. He also sought some information from Mr N Durrans about the work carried out by Messrs Armitage and Jentsch and for the differences in pay. Mr Smith drafted a response for him which Mr N Durrans amended. Prior to sending it to the Claimant, Mr N Durrans asked his brother if he was happy with it.

74 On 14 July Mr N Durrans sent the Claimant the grievance outcome. He said that no instances of discrimination had been set out in her grievance other than in relation to pay. Hence he would deal with the pay issue. In respect of Mr Armitage, he said,

> "*I agree that it is irrelevant to the issue of pay that you are married to Dave. My findings are that he is a Board Director, working a minimum of three days per week, with considerable global responsibility and duties. His remuneration package further benefits from his shareholding in JDT. You decided to cash in your equal shareholding in JDT and therefore do not continue to enjoy this benefit. You also say that you were Dave's deputy when you worked in China which is a further objective difference. You say that you actually had more responsibility than him but I have seen no evidence that this is the case."*

He said that Mr Jentsch worked full time and was a Board Director with responsibility for CI sales in the UK and globally and was a Director of the CI Trading production

facility in South Africa. His was a global role with extensive travel. He pointed out that the Claimant worked five days a month whereas the comparators worked more days. In respect of the Claimant's claim that she worked that she worked more days than what she claimed, he said,

> "*Your view that you are paid in days but work in hours is confusing as it would be relatively simple to add up the total hours over a period and divide by the length of a working day."*

He said that the Claimant was entitled to a watch and he believed that she had been told to purchase one and had been offered other opportunities to celebrate her service with the company. He found that there were justifiable reasons for the differences in pay between her and the comparators that had nothing to do with race or sex. He said that he was happy to discuss her days and hours of work and whether she wished to adopt any additional and available responsibilities. He advised her of her right to appeal his decision.

75 The Claimant appealed on 23 July 2021. The Durr1ans brothers sought advice from Mr Smith on how to deal with the appeal. On 26 July Mr N Durrans informed the Claimant that the appeal would be heard by Mr C Durrans and the Claimant could be accompanied by a work colleague or a trade union representative and that minutes would be taken.

76 On 17 August 2021 the Claimant commenced Early Conciliation.

77 On 31 August 2021 the Claimant sent Mr Hooper claims for the extra days that she had worked between May and August 2021. She set down the number of extra hours that she had worked each month and then divided the number of hours by 8 to claim the number of days that she had worked. She claimed for a total of 96 hours (12 working days).

78 The grievance appeal hearing took place on 6 September 2021. There was a note-taker at the hearing and the hearing was recorded to assist the note-taker in drafting the minutes of the meeting. The Claimant was accompanied by a work colleague, Cliff Butcher. The Claimant asked what the agenda of the meeting was, and Mr C Durrans said that there was no agenda, the purpose of the hearing was for the Claimant to explain what she thought was wrong with the decision made by his brother. The Claimant asked what investigation what Mr N Durrans had conducted and Mr C Durrans replied that he did not know, On occasions Mr Durrans asked the Claimant whether she was listening, because he could see that she was looking at documents when he was speaking to her. Mr Durrans said that he had huge respect for the Claimant but he did not understand her grievance. He said that he understood her fundamental charges to be low pay and sexual discrimination. On 16 April 2016 she had said that she wanted to step back and he had agreed. He continued,

> "*The salary you were on, up until April 16 2016, to when you were fully employed, was the highest salary you may not know this, of any other member of staff apart from the members of the main board, And that was the reflection of your work and your professionalism. You earnt £95,000 in the year to 2015 and your salary was adjusted on the basis of your agreement. The one person to address the second charge, I will hold up as a person who has, as a lady and a Chinese lady, come through the ranks of this company to achieve what*

> *you have achieved for us and yourself is you. So on that basis, I don't understand why you feel that you were discriminated as being a woman or a Chinese lady. No one was even close to, including some of the people you were asked to talk about, and I don't want to discuss salaries, was anywhere near as well paid as you. Apart from the board, the main board."*

He said that if the Claimant was working more, she should claim more overtime. That was in the agreement. He said that if she felt that she had been underpaid because she had failed to claim the correct amount, she should send them the claim. He said that in the company there had always been a difference between the main board and senior members of staff, including those who were on subsidiary boards. The Claimant said that she had asked to be a main board director and Mr Durrans denied that. He said that if she had asked, he would have discussed the matter at a Board meeting. The Claimant said that his comment about the combined household income was discriminatory. Mr Durrans denied saying that and denied that he had ever discriminated against her. He said that he had taken legal advice about that allegation and it was discrimination against him. He continued,

> "*And I have a case for you calling me "my young boss", age discrimination and the other thing is that you are called the chief bully, you are a bully, is that factually true, because if you are a bully that is also discrimination. So while we go down this road, you need to be really careful when you throw allegations of a personal nature at me. Because I take it very personally. When I say that you "mother" sometimes the people in China, it is a sign of love and affection because you are a woman. I've told you that I love you, is that discriminatory, that's why I am so upset about it. And this might not finish very well. I would ask you just to step back and think. Because some of these things in here are very hurtful to me. Very. And to this business."*

79 The Claimant was sent the minutes of the meeting and asked to correct anything that she thought was wrong. The minutes were an accurate reflection of what had been discussed at the hearing and contained the comments quoted in paragraph 78 (above). On 9 September the Claimant said that in some places the minutes were inaccurate/wrong and/or incomplete and/or difficult to follow perhaps for lack of context. She asked for the recording in order to decide whether to agree the minutes or not. Mr Durrans responded that the purpose of the recording was to assist the note-taker and refused her request.

80 On 14 September 2021 he sent the Claimant the grievance appeal outcome. G Smith had helped him to draft it. He said that her contribution to JDT over the years was not in question but it was not true, as she claimed, that she alone had established the Chinese business. He said that her two comparators were both main Board members and that she had never been on the main Board. They had wider duties and greater legal obligations and responsibilities. She did not undertake sufficiently similar duties or carry greater legal obligations or responsibilities. There were not appropriate comparators. He said that her salary had been reduced to 25% in 2016 because they had agreed that she would work one day a week (that is not accurate, they had agreed she would work five days a month). Within that agreement there had been a facility for her to claim extra salary for time worked over and above the five days a month, and she had used that facility. Furthermore, her contribution had been recognised in the bonus paid to her, which had not been reduced in spite of her working part-time. He said that she had indicated that she had not claimed for all

the extra time that she had worked, but he did not see that as a failing of the company. He then dealt with her other grounds of appeal and allegations of discrimination, and explained why he rejected them. The appeal was dismissed and the Claimant was advised that it marked the end of the process.

81 On 17 September the Claimant sent her amendments to the minutes. Jayne, the note-taker, did not agree with the amendments made by the Claimant. Mr C Durrans asked Mr Butcher to listed to the recording with Jayne to verify the accuracy of her minutes. On 22 September Jayne sent Mr Durrans and the Claimant the minutes that she and Mr Butcher had agreed after listening to the recording. Some of the Claimant's amendments were accepted, others were not.

82 On 16 September 2021 the Claimant made a Subject Access Request. On 20 September 2021 Early Conciliation was concluded.

83 At a Board meeting on 23 September Mr C Durrans informed the Board that Claimant was taking her claim to the Employment Tribunal, and that she was complaining of race and sex discrimination and that she had been paid less than male employees within the organisation. He said that she also claiming that she had been underpaid since 2016 when she had become part-time as she had actually been working full-time from 2016 to the present time.

84 On 6 October 2021 the Claimant sent Mr Hooper an email to which was attached a claim for back pay from June 2016 to September 2021. The Claimant said that she had been invited by Mr C Durrans at the appeal hearing on 6 September to make such a claim. What she did was to work out for each month from June 2016 to September 2021 the number of working days in the month, subtract from that the number of days for which she had been paid and to claim £180 a day for the rest of the working days in that month. She was claiming in essence that she had continued working full-time after she had agreed to work part-time. Her claim was for £152,370 for having worked an additional 846.5 days.

85 On 11 October Mr C Durrans sent an email to Mr Armitage. He said that as Mr Armitage knew the Claimant had gone part-time at her request in 2016 to work five days a month. That had appeared to work well for all sides. He said that he had never disputed any of her expense claims/overworking time and had frequently said to him that if she was working more she should contact him or claim the time. He continued,

> "*Suddenly she has now claimed she has never worked 5 days per month and has claimed for full back pay from the time our mutually agreement started to today?* [sic]
> *As a director of the company and her husband I have to ask you to verify this claim. We will need proof from you that she has indeed worked full time and if so why has she only raised this now."*

86 Mr Armitage said that he had always said that the Claimant "*certainly puts her hours in"* but he could not be precise as to exactly what she had worked every day during that period. He said that as a rule, the Claimant worked at the computer from 8 a.m. to 11 a.m. five days a week and on almost daily basis would receive a number of calls until 2 p.m. She might then, depending on the urgency spend time in the evening drafting replies for staff in China and quite often worked weekends. Mr

Durrans then had further communications with Mr Armitage in which he said it might be possible to reach an agreement if the Claimant was to ask for a number of additional days for each month. He was prepared to pay on the basis that she had worked 50% of the time, i.e. he would pay her for the difference between what she had been paid and what she would have been paid had she worked 50%. The Claimant was not prepared to accept any such compromise.

87 On 13 October 2021 the Claimant presented her claim to the Tribunal. It was served on the Respondent on 5 November 2021.

88 On 19 October 2021 Mr C Durrans informed the Claimant that they had retrieved all the data that she had requested in her SAR. He said that there was a massive amount of data and that it would be sent to her on a memory stick sometime that week. The memory stick was sent by recorded delivery and was delivered to the Claimant's representative at the time on 22 October 2021. On 17 November the Claimant sent Mr C Durrans an email that the UBS stick contained a list of the documents which contained data on her but not the actual documents. She asked for the data to be provided within 14 days. She chased it up on 16 December 2021. **1**Mr Durrans' response was that she should take up any matters that did not relate to the day to day business of the Respondent with its lawyers.

89 On 20 October Emma, working in JDT in China, sent an email to Mr Jentsch in relation to something that she was dealing directly with him. Her email was copied to the Claimant. Mr Jentsch sent Mr Armitage an email that he did not see any need for the Claimant to be copied in to that email. He also said that he did not think that it was a good thing because it could be construed as the Claimant working overtime as a result of receiving such emails. Mr Durrans also made the point that after all these years Emma was capable of working directly with UK staff. Mr Armitage responded that if Emma had copied the email to the Claimant as her supervisor, she must have felt that she needed her guidance and assistance on the matter. Mr Jentsch's response to that was,

> "*Ah, ok, I was not aware that Ping still has that role."*

90 On 26 October 2021 Mr Hooper responded to the Claimant's email of 6 October 2021. He said,

> "*I have taken a preliminary look at the overtime claim. As you have already claimed overtime for some of these periods, can you please supply me with details of the work you did on the days you are now claiming, in order that I can consider your request."*

The Claimant sought clarification from Mr Hooper as to what information he wanted. He responded that he wanted a detailed list of the work that she had done on each day for which she was claiming overtime and evidence to prove that she had worked on those days. **T**he same point was made in a letter from the Respondent's solicitors to the Claimant's solicitors.

91 The Respondent had no written policy or rules about flights for business trips. Those who flew on business trips booked their own flights which were paid for by the Respondent. It was generally understood that only statutory board directors (of JDS and CI UK) could fly first or business class, unless it was a long haul flight. As far as

long haul flights there was a discretion, and if the business need required it, i.e. the need to attend a meeting very soon after the flight, anyone could be authorised to fly first or business class. The Claimant almost always travelled Economy class. She considered it a waste of money to travel Business or First class. She never asked to travel First or Business Class and never complained about it to anyone. The Claimant's evidence was that on an occasion when she flew with Mr Armitage, he flew Business class while she travelled in Economy with Chris Norman, a white male employee of the Respondent.

Conclusions

Equal pay

92 We considered first whether the Claimant's work was the same or broadly similar to the work of Mr Armitage. The reasons for recruiting them and the roles to which they were recruited were directly linked to their respective areas of their experience and expertise. The Claimant's experience covered four main areas – commercial (a degree from the University of International Economics and Business and experience of contract negotiation and drafting commercial documentation), fluency in Mandarin, knowledge of Chinese law and regulatory procedures and relationships with Chinese suppliers of minerals. Mr Armitage's expertise lay in a much more technical area - the production and sale of coatings. That involved the different technological process for producing coatings and the knowledge of different types of coatings for different purposes.

93 The Claimant was recruited to the Respondent to utilise her skills and experience to source minerals and other related products from China for the Respondent, its subsidiaries and its customers and to sell the Respondent's coating products to China. The former involved liaising with suppliers in China, negotiating terms, drawing up the necessary documents and arranging shipping and banking. Mr Armitage was recruited as Operations Director and was responsible for the production of coatings at the Respondent's two factories and its subsidiaries which involved research and development, costing product development, quality assurance, health and safety, marketing and sales. Soon after joining he introduced new technology and production processes to the Respondent and its subsidiaries. He was a statutory director of the Respondent.

94 The Claimant and Mr Armitage played different roles in setting up JDT. The Claimant used her language, knowledge of Chinese laws and regulations and her contacts in China and found the necessary professionals to set up the company, lease the site, get all the necessary permissions, arrange insurance cover and recruit staff. Mr Armitage used his technical expertise to decide whether the site was suitable, equip the factory, set up the production process and to train staff in the production process.

95 They were both statutory directors of JDT initially but they played very different roles. Mr Armitage was responsible for production, quality assurance, health and safety, research and development, costing product development, marketing and sales. He worked closely with customers to make bespoke coatings for the needs of their businesses. He targeted the Chinese automotive market for selling coatings in China. He told the Claimant what raw materials to source for China. The Claimant sourced the raw materials and dealt with the suppliers. She dealt with the authorities

and banks in China, she dealt with all HR issues and the other administrative aspects of business. She also acted as a translator for Mr Armitage. The work that she did at JDT was very different from the work that Mr Armitage did.

96 Following the establishment of JDT the Claimant's work was primarily with JDT because her responsibilities for JDS were largely (but not wholly) carried out by JDT. Although Mr Armitage also devoted the majority of his time to JDT he still retained important functions for the rest of the Group. He was the Operations Director of the Group and a statutory director on the main Board. As such he was responsible for the strategy of the Group. He was still responsible for coatings production in the rest of the Group. He advised on and supervised the installation of Volrath mixers in China and in other subsidiaries. They were both paid by JDS for the work that they did for JDS and for JDT. Mr Armitage had a much wider role in the Group than the Claimant did.

97 The Claimant's work, both at JDT and in the Group as a whole, was very different from the work that Mr Armitage did. On a day to day basis they did different things requiring different skills and expertise and had responsibility for different areas of the business. The fact that they were both statutory directors of JDT does not in itself mean that their work was the same or broadly similar. We concluded that the Claimant's work was not like Mr Armitage's work.

98 We then considered whether the Claimant's work was the same or broadly similar as the work of Mr Jentsch. Mr Jentsch's experience and expertise is very different from that of the Claimant. He had a masters in Foundry Engineering. He had over 20 years' experience in carbon production and sales, having worked in senior Sales positions for large companies. He had the technical knowledge to produce the carbon that the customers required. At the Respondent he was involved in the production and marketing of carbon at three different companies - CI UK, CI South Africa and JD GmbH. As statutory director of CI UK he also attended the main Board meetings. The work that he did was very different from the work that the Claimant did. The Claimant's work was not like Mr Jentsch's work.

99 As the Claimant's work was not like the work of her comparators, her claim for equal pay based on like work fails.

Discrimination/Harassment

100 We have found that at the meeting on 30 March 2021 Mr C Durrans made a comment about the staff in Tianjin being "spoiled" by the Claimant and her mothering them. Mr Durrans did not deny making the comment. We considered whether it amount to harassment related to gender. The comment was made in the context of discussions about when the Claimant wanted to retire and the impact of that on the staff in Tianjin. It was a comment about her management style and her relationship with them. We accept that it was related to gender as Mr Durrans would not have said to a male manager who was lenient and indulgent that he was "mothering" the employees. The Claimant's evidence was that she felt that the comment was insulting to her and the JDT team in Tianjin. We concluded that it did not have the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It was not the Claimant's evidence that it had that effect on her. If that had been her evidence, we

would have concluded that it was not reasonable for it to have had that effect. The use of an inappropriate phrase or word is not inevitably an act of harassment.

101 We have found that in May 2021 when Mr Armitage raised with Mr C Durrans that the Claimant felt that the level of her salary was low, he responded that he was comfortable with the level of their joined household income. Mr C Durrans denied making that comment. We then considered whether it amounted to direct sex or marital status discrimination or harassment. We concluded that the Claimant was subjected to a detriment because her complaint about her level of pay was not considered on its merits. It is clear from the reason given for not dealing with it that Mr Durrans' view was that a married woman cannot challenge her level of earnings if her husband is a high earner. That is a view that is inherently discriminatory against women. Mr Durrans has always denied responding in that way. In the absence of any explanation from Mr Durrans for not considering the Claimant's complaint about her level of pay at that stage and the inherently discriminatory nature of the comment that he made, we concluded that in not considering the Claimant's complaint he treated her less favourably on the grounds of sex.

102 We have found that there was no rule or policy in respect of what class people travelled in on long haul flights. There was a discretion. The Claimant never asked to travel business or first class. The Respondent never told her that she could not travel in Business or first class. We concluded that the Respondent did not subject the Claimant to a detriment because it did not tell her that she had to travel in economy. If she was subjected to a detriment, it was because she was not a main Board director, and not because she was a woman or a married person.

103 We have not found that the Claimant ever asked to be appointed a main Board director or to attend the main Board meetings. Nor was her possible appointment to or attendance at the main Board ever raised by anyone or discussed at the Board meetings. JDS and CI UK had joint Board meetings and they were attended by a very small group pf people – the two Durrans brothers, Mr Armitage and Mr Jentsch as director of CI UK. Mr Armitage was a director of JDS. It is not surprising that he was appointed director of JDS and the Claimant was not. In addition to being Managing Director of JDT, he was also Operations Director for JDS and was responsible for the production processes in the Respondent's two factories in the UK and in its subsidiaries. His role was much wider and more strategic to the Group's business than the Claimant's role. Mr Jentsch was a statutory director of CI UK and CI South Africa (both 100% owned subsidiaries of the Respondent). He was also Sales Director of the Respondent's 100% owned German subsidiary. The Respondent's production and sales of carbon business was conducted by those three entities, with Mr Jentsch at the helm. He played a very important and strategic role in the Group. The Claimant was not appointed to the Board or asked to attend the meeting because her involvement in the business of the Group was much more limited. It had nothing to do with her race or sex.

104 We concluded that by sending the payslips in the way that it did the Respondent did not subject the Claimant to a detriment and that it did not amount to harassment as defined in section 26 of the Equality Act 2010. The Claimant's payslip was in a sealed envelope and could not be seen by Mr Armitage. Even if Mr Armitage was not present, she could access her payslip without having sight of his. The manner of sending it did not disclose her pay to Mr Armitage and did not prevent her accessing it in her absence. The fact that the outer envelope was addressed to him rather than

to her or both of them did not disadvantage her in any way, not did it have the effect set out in section 26. Our view that it did not do either of those things is reinforced by the fact that the Claimant never raised the matter or complained of it until she presented her claim.

105 We then considered the Claimant's complaints about the conduct of the grievance appeal hearing. Mr Durrans' comment about the Claimant's achievements as a Chinese woman, when viewed in the context in which it was made, does not amount to race or sex discrimination/harassment. He was not saying that her achievements were surprising because she was a Chinese woman or that she had done well in spite of that being a disadvantage or that she was being paid enough for a Chinese woman. Any of those would be offensive and related to race and gender. What he was saying was the he could not understand her complaint of race and sex discrimination in relation to pay (on the grounds of her being a Chinese woman) in circumstances where she was the highest paid member of staff apart from the Board members. We accept that toward the end of that meeting Mr Durrans made counter-allegations of discrimination against the Claimant and threatened that he would raise them if she pursued her allegations of discrimination on the basis of what he had said. That behaviour was unacceptable. However, he did not react in that way because the Claimant was Chinese or a woman. He did so because he found the personal allegations against him to be hurtful. He was too personally involved in it to remain detached and was perhaps not the best person to have heard the grievance appeal. We concluded that his conduct at the hearing did not amount to direct race and/or sex discrimination or harassment.

Victimisation

106 The Claimant's complaint on 18 June 2021 was that she was not being remunerated adequately for the work that she did, and that the situation had become worse after she went part-time in June 2106. She did not suggest that the reason for that was her gender, nor did she complain about being paid less than men doing the same kind of work. We concluded that there was no complaint of discrimination at that time and that that complaint was not a protected act.

107 In the formal grievance on 8 July 2021 the Claimant made complaints of race and sex discrimination, and that was clearly a protected act. The same applies to the grievance appeal hearing on 6 September 2021 and the claim form presented on 6 October 2021. The claim form was received by the Respondent on 5 November 2021.

108 It is not in dispute that Mr Durrans refused to provide the Claimant with the recording of the grievance appeal hearing on 6 September 2021. However, the minutes of the meeting sent to the Claimant accurately reflected what had been said at the hearing, including the comments about which complaint was made in this case. Furthermore, Mr Butcher, who had accompanied her at the hearing, was given the opportunity to listen to the recording with the note-taker and then agree the minutes with her on the basis of what he heard. It is difficult to see in those circumstances, how the Claimant was subjected to a detriment by the recording not being provided to her at that time. Nor was there any evidence from which we could conclude that if the grievance had made different complaints (i.e. not complaints of discrimination) that Mr C Durrans would have provided the recording of the hearing.

109 On 20 October Mr Jentsch sent an email to Mr Armitage in which he commented that he did not seen any need for Emma to copy her response to him to the Claimant. It is clear from what he said in that email that the reason he raised that issue was because he was aware that the Claimant was claiming that she had worked full-time since 2016 and was entitled to considerable more overtime than she had claimed. He thought that the Claimant might construe the receipt of such an email as contributing to her overtime. He was aware at this time that the Claimant was bringing a claim of discrimination in the Tribunal because he had been at the Board meeting at which Mr Durrans had informed the Board of that fact. He did not say what he did in the email because the Claimant was bringing complaints of race and sex discrimination. He did so because the Claimant was claiming for a large amount of overtime which she had not claimed before.

110 The Respondent did not fail to respond at all to the Claimant's Subject Access Requests. They made an attempt to retrieve the data of which they said there was a great volume. They believed that they put that on a UBS stick and sent it to the Claimant on 22 October 2021. They responded to the Claimant's inquiries as to how to access it. The Claimant later claimed that the UBS stick only contained a list of documents but not the documents themselves. It was not clear to us whether that was the case or the Claimant was simply unable to access the documents. In either case, it matters not a great deal. What is clear is that the Respondent tried to respond to the request and believed that it had done so. The Claimant's email of 16 December 2021 was not ignored. Mr Durrans responded that it should be pursued with the solicitors. It was not clear whether the matter was thereafter pursued with the Respondent's solicitors. To the extent that the request was not responded to adequately, we concluded that that was not deliberate and it was not for lack of trying.

111 It is correct that on 26 October 2021 the Respondent and thereafter its solicitor asked the Claimant to provide a breakdown of the extra hours that she had worked and evidence to support that. It is correct that it had not done so before. The reason that it did so on 26 October and 10 November was because there had been an agreement between the Claimant and the Respondent in June 2016 that she would work 5 days a week and how she would claim overtime payments for any work in excess of those 5 days. Every month the Claimant had made claims for overtime and they had been paid without any breakdown or evidence. The Respondent had trusted her. The Claimant had done that for five years. In October 2021 the Claimant had suddenly claimed that she had in fact continued working full-time after June 2016, had worked an additional 846.5 days for which she had never claimed before and that she should be paid an additional £153,370. It is not surprising that in those circumstances the Respondent was sceptical about her claim and sought a breakdown and evidence to support it. It did not ask for that because she had made complaints of race and sex discrimination. It did so because it found her claim that she had continued to work full-time but had only claimed for some of the extra hours not to be credible.

112 We concluded that none of the Claimant's complaints of victimisation were well-founded.

Unauthorised deductions from wages

113 In April 2016 the Claimant's contract was varied with effect from 1 June 2016. The Claimant and the Respondent agreed that she would work five days a week and would be paid £16,356 p.a. It was agreed that if she worked any extra days she would be paid £180 a day for that. The process for claiming for the extra days was that at the end of each month the Claimant would tell Mr Hooper how many extra days she had worked. The Claimant did that and she was paid for the extra days. The amount properly payable to the Claimant at the end of each month was 25% of her salary plus £180 a day for the extra days that she had claimed for that month. In each of those months the Claimant was paid those amounts. There was, therefore, no unauthorised deductions from her wages in any of those months in that five year period. The Respondent was only contractually obliged to pay the Claimant for the extra hours that she claimed. It did that.

114 The Respondent was not contractually obliged in October 2021 to pay the Claimant the sum of £152,370 because she said that over the preceding five years she had worked 846.5 hours more overtime than she had claimed for over those five years. The Claimant knew how she had to claim overtime and she did so for a period of five years. The Claimant cannot suddenly after a period of five years decide that she wants to claim the overtime on a different basis. There is no explanation of why she did not claim all those additional hours if she worked them at the time. The Respondent was not contractually obliged to pay the Claimant £152,370 in October 2021. It is outside the agreement that she made with the Respondent in April 2016.

Remedy

115 The only complaint that we have found to be well-founded is the complaint of direct sex discrimination in respect of Mr Durrans' reaction in May 2021 to Mr Armitage raising the point that the Claimant felt that her level of pay was not sufficient remuneration for what she did. It is a matter that the Respondent did look at subsequently when the Claimant raised complaints about the level of her pay. It considered her complaints and did not consider them to be well-founded. We concluded that the only award to be made for that discrete act of direct sex discrimination is one for injury to feelings. We concluded that this was a one off act of direct sex discrimination. The Claimant's evidence was that she had been very upset and angry that Mr Durrans had used that as an excuse to avoid her paying her that to which she was entitled. The effects of it were short-lived because in July the Respondent did consider the Claimant's complaints about her level of pay. We concluded that it fell within the lower Vento band and that the sum of £4,000 was the appropriate award to make for injury to feelings in respect of that reaction.

Employment Judge - Grewal

Date: 08/03/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

08/03/2023

FOR THE TRIBUNAL OFFICE