EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Roberts**

First Respondent: **Kapia Partners Limited**

Second Respondent: **Mr G Hankic**

Heard at Leeds Employment Tribunal **On:** **18, 19, 20, and 21 March 2024**
17, 18, and 19 July 2024
22 August 2023 (in Chambers)

Before: **Employment Judge Brain**
Members: **Mr J Howarth**
Mrs J Hiser

Representation

Claimant: **Mr K Harris, Counsel**
Respondent: **Mr R Clement, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

Unfair Dismissal

1. The claimant was an employee of the first respondent within the definition in section 230(1) of the Employment Rights Act 1996.
2. Upon the first respondent's concession recorded in the annex to the case management order of 19 September 2023 ('the Order'), the claimant was unfairly dismissed.
3. Remedy shall be determined at a subsequent hearing.

Wrongful Dismissal

1. The claimant was an employee of the first respondent.
2. Upon the concession recorded in the annex to the Order, the wrongful dismissal complaint succeeds.
3. Remedy shall be determined at a subsequent hearing.

Claims brought under the Equality Act 2010

1. The claimant's complaints were brought within the limitation period in section 123 of the Equality Act 2010 ('the 2010 Act').
2. In the alternative, it is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the complaint numbered 1 in the 'list of alleged unlawful conduct' in the annex to the Order ('the List'). (All of the complaints in the List numbered 4 to 19 upon which the claimant has succeeded (in whole or in part) are in time in any event).
3. The claimant was in employment with the first respondent within the definition in section 83(2) of the 2010 Act working under a contract of employment or alternatively under a contract to do work personally.
4. By reason of the finding in paragraph 3, pursuant to paragraph 1 of schedule 6 to the 2010 Act, there is no jurisdiction to consider the claimant's claims brought as a personal office holder within the meaning of section 49(2) of the 2010 Act.
5. In the alternative to paragraphs 3 and/or 4, with effect from 26 September 2022 the claimant was a personal office holder of the first respondent within the meaning of section 49(2) of the 2010 Act.
6. The complaints of harassment related to sexual orientation and of direct discrimination because of sexual orientation are dismissed following withdrawal.
7. By reference to the List:
    7.1. The claimant's complaint against the second respondent of harassment related to the protected characteristic of sex brought pursuant to section 26(1) of the 2010 Act succeeds in relation to complaint numbered 1 only. The remaining complaints of harassment related to sex in the List numbered 2 to 19 stand dismissed.
    7.2. The complaint numbered 1 in the List that the second respondent subjected the claimant to harassment by way of unwanted conduct of a sexual nature brought pursuant to section 26(2) of the 2010 Act succeeds.
    7.3. The complaints against the second respondent numbered 4 to 11 inclusive, and 15 to 17 inclusive brought pursuant to section 26(3) of the 2010 Act succeed.
    7.4. The complaint against the respondents numbered 12 and 18 in the List brought pursuant to section 26(3) of the 2010 Act succeeds.
    7.5. The complaints numbered 1, 2 and 3 in the List brought against the second respondent and those numbered 13, 14 and 19 against the respondents pursuant to section 26(3) of the 2010 Act fail and stand dismissed.
    7.6. The complaints against the second respondent numbered 2 and 3 and against the respondents numbered 13, 14, and 19 in the List, of less favourable treatment because of sex pursuant to section 13 of the 2010 Act fail and stand dismissed.
    7.7. The complaints numbered 1, 4 to 11 inclusive, and 15 to 17 inclusive brought against the second respondent and 12 and 18 brought against the respondents pursuant to section 13 of the 2010 Act fall to be dismissed pursuant to section 212(1) of the 2010 Act.

8. By consent, the claimant's grievances of 15 November 2022 and 9 December 2022 are protected acts within the meaning of section 27(2)(c) and (d) of the 2010 Act.
9. The claimant's complaints that she was victimised by being subjected to a detriment by the respondents by reason of her doing the protected acts fail and stands dismissed.
10. By reference to the alternative finding in paragraph 5 and in the alternative to the judgment in paragraphs 7, 8, and 9 the judgment upon claimant's complaints brought pursuant to sections 49(6)-(8) of the 2010 *is mutatis mutandis* those in paragraphs 7, 8, and 9 (except for those in paragraphs 7.1 and 7.2 which fail and stand dismissed as they arise from events which pre-date 26 September 2022).
11. The respondents are jointly and severally liable to the claimant in respect of those complaints which have been upheld.
12. Remedy shall be determined at a subsequent hearing.

REASONS

Introduction and preliminary matters

1. On 19 July 2024 at the conclusion of this eight days' hearing, the Tribunal reserved judgment. The Tribunal deliberated in Chambers during the remainder of the sitting day on 19 July 2024 and then on 22 August 2024. The Tribunal now gives reasons for its judgment.
2. The first respondent is a recruitment company. It was incorporated on 11 September 2020. The second respondent was a director of the first respondent. He was appointed to that office on 15 February 2021. His appointment as director was terminated on 27 March 2023. The claimant was appointed as a director of the first respondent on 11 September 2020. Her appointment to that office terminated on 22 December 2022.
3. The claimant and the second respondent are each a shareholder of the first respondent. The shareholdings have changed from time-to-time as will be seen in these reasons.
4. The claimant's case is that as well as being a director and shareholder, she was also an employee of the first respondent. She also contends that the second respondent is (or at any rate was until at least the end of December 2022) also an employee of the first respondent and that while she held the office of director of the first respondent she was under his direction.
5. Upon this basis, it is the claimant's case that she has status to pursue the complaints which she brings before the Tribunal. These complaints were identified at a case management hearing which came before Employment Judge Cox on 19 September 2023. A copy of Employment Judge Cox's Order *('the Order'*) is in the hearing bundle at pages 132 to 136. The annex to the Order sets out the list of issues. This is reproduced in paragraph 205 below. For now, it suffices, in this introductory section of the reasons, to identify the types of complaint made by the claimant.

6. She claims that she was unfairly dismissed and wrongfully dismissed from her employment with the first respondent. These are complaints which may be brought only against the first respondent. To pursue the complaint of unfair dismissal, it is for her to show that she was an employee falling within the definition in section 230(1) of the Employment Rights Act 1996 (pursuant to which statute the unfair dismissal claim is brought).

7. The wrongful dismissal complaint is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. This confers jurisdiction upon an Employment Tribunal to hear a contractual claim brought by an employee which arises or is outstanding on termination of the employee's employment. This therefore gives rise to the same issue as on the unfair dismissal claim as to whether the claimant was employed by the first respondent under a contract of service.

8. The claimant also pursues claims against the respondents pursuant to the Equality Act 2010. It is for the claimant to show that she has the necessary standing to pursue these complaints. She seeks to do so upon the basis that she was in the employment of the first respondent within the definition in section 83(2) of the 2010 Act and/or that she was a personal office holder of the first respondent under the direction of another person pursuant to section 49(2) of the 2010 Act.

9. The complaints brought under the 2010 Act are of direct discrimination, harassment, and victimisation. The annex to the Order lists 19 allegations of unlawful conduct *('the List'*). The first of these concerns an incident alleged to have taken place on 3 September 2022. This claim is brought against the second respondent as an allegation of direct discrimination upon the grounds of the protected characteristic of sex, harassment related to sex, and as harassment by way of conduct of a sexual nature.

10. All the remaining 18 allegations in the List are brought against the second respondent and those numbered 12, 13, 14, 18, and 19 are brought also against the first respondent. These are all brought as complaints of direct discrimination upon the grounds of sex or alternatively as harassment related to sex. In the further alternative, they are brought as complaints of harassment under the quasi-victimisation provisions in section 26(3) of the 2010 Act as less favourable treatment of the claimant because she rejected the conduct of a sexual nature the basis of allegation numbered 1.

11. Section 212(1) of the 2010 Act provides that a detriment does not include conduct amounting to harassment. Harassment and direct discrimination claims are usually mutually exclusive because the kind of conduct that could amount to harassment is usually of the kind of conduct which amounts to a detriment for the purposes of bringing a direct discrimination claim. That does not of course preclude a complainant pursuing direct discrimination and harassment in the alternative. However, where harassment claims succeed, it follows that a complaint of direct discrimination brought upon the same factual basis cannot succeed.

12. Finally, the claimant pursues complaints of victimisation. The protected acts are her grievances of 15 November 2022 and 9 December 2022. Both are accepted by the respondents as protected acts within the meaning of section 27(2)(c) and (d) of the 2010 Act. The claimant says that she was subjected to detriment in terms of the alleged unlawful conduct numbered 12 to 19 inclusive in the List (in

the case of the grievance dated 15 November 2022) and 18 and 19 (in the case of the grievance dated 9 December 202).

13. On the first morning of the hearing held on 18 March 2024, the Tribunal confirmed that the list of issues in the Order remained current. The remainder of the first day was utilised for the Tribunal's reading into the case.

14. On behalf of the respondents, Mr Clement accepted (on the second day of the hearing) that on a fair reading of the claimant's claim form and grounds of claim, the first complain in the List was one brought as both as harassment related to sex and as harassment by way of conduct of a sexual nature. On behalf of the claimant, Mr Harris withdrew the complaints numbered 1 to 19 in the List as claims of harassment and direct discrimination relating to the protected characteristic of sexual orientation. Those complaints therefore stand dismissed upon withdrawal.

15. In the Order, Employment Judge Cox recorded a concession on the part of the first respondent that were the Tribunal to decide that she is an employee (as she worked under a contract of service with the first respondent) then the claims of unfair dismissal and wrongful dismissal will succeed. On the second day of the hearing, an application was made by the first respondent to withdraw that concession. This application was refused.

16. In ruling on this issue in the hearing, the Tribunal observed that the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are silent on the question of withdrawing admissions. In **Nowicka-Price v Chief Constable of Gwent Constabulary UK EAT/0268/09** it was held that tribunals will be assisted in deciding an application to withdraw a concession or admission by the provisions in Part 14 of the Civil Procedure Rules. By application of these factors, the Tribunal found that permission for the first respondent to withdraw the concession should be refused for the reasons which follow in paragraphs 17 - 19 below.

17. Following the hearing before Employment Judge Cox on 19 September 2023, there were two further case management hearings held on 19 December 2023 and 8 March 2024 at which the first respondent was represented by Mr Clement. The application to withdraw the concession made in September 2023 could have been made on either occasion. Instead, the application was left until this hearing. The granting of the application would inevitably result in the loss of the trial window as the parties would need to re-visit the evidence to be called upon the question of whether there was a termination of the claimant's employment on 22 December 2022 or (as the first respondent was now seeking to contend) the claimant resigned her position. This would cause significant prejudice to the claimant.

18. Further, the contention that the claimant resigned in December 2022 appeared to the Tribunal (before hearing the evidence) to have little merit. There was no letter of resignation from her and in a letter to the claimant of 9 January 2023, at pages 798 to 800 of the bundle, the first respondent's solicitor refers to the claimant as having been *"removed as a director by the shareholders by way of resolution on 22 December 2022."* The claimant was reminded by the solicitor of post-termination restrictions as set out in the shareholders' agreement entered into between the parties. (We shall look in further detail at the shareholders' agreement in due course). Nothing in that letter comes close to suggestion of the claimant's resignation in any of her capacities.

19. Taking into account: the weak grounds for seeking to withdraw the concession, that the first respondent was not contending this to be based upon any new evidence not available when the concession was made, the first respondent's conduct in leaving the application to the trial window, the significant prejudice to the claimant if the matter were to be adjourned, and the interests of the administration of justice (in particular making the best use of tribunal time), the Tribunal held that the application to withdraw the admission stands dismissed.

20. When discussing the list of issues, the Tribunal directed that the hearing would focus upon merits only, save in respect of any question of conduct pertaining to the unfair dismissal claim and the application of the principles in **Polkey v A E Dayton Services Limited [1988] ICR 142, HL** to the unfair dismissal claim and of **Abbey National Plc v Chagger [2010] ICR 397, CA** to the complaints under the 2010 Act upon the likely longevity of the claimant's employment with the first respondent.

21. When the Tribunal came to chambers deliberations, it was noted that neither counsel had addressed these issues either in written submissions or in oral submissions before the Tribunal. This is not to make any criticism of counsel. This is a difficult and highly emotive case. It gives rise to a number of difficult liability issues. Counsel can therefore be forgiven the oversight in not addressing these matters. They can, of course, be addressed at the remedy hearing. As an additional feature pertaining to **Polkey/Chagger**, Mr Clement said (when the matter resumed on 17 July 2024) that he had additional documents which he wished to admit into evidence. This was to do with another company taking over the first respondent's business. It is easy to see how this may be relevant to the **Polkey/Chagger** question. The Tribunal directed that this documentation should be considered at remedy stage.

22. Given that some of the claimant's claims have succeeded, the Tribunal will give directions for a remedy hearing in due course. The parties should note the direction in the final paragraph of these reasons.

23. During the hearing, additional material was produced by the parties from time-to-time. There was no objection to the admission of the additional documentation. A small supplemental bundle was compiled for ease of reference.

24. The Tribunal heard evidence from the claimant. She also called evidence from:

    24.1. Victoria Pinks. She is a friend of the claimant.

    24.2. Karen Dalloway. She is the claimant's mother.

    24.3. Rachel Whitehouse. She is a former work colleague of the claimant.

    24.4. Scarlett Sawbridge. She is an employee of the first respondent.

25. The Tribunal heard evidence from the second respondent. The respondents called evidence from:

    25.1. Oliver Chalkley. He was a director of the first respondent. He resigned from that office on 25 March 2024.

    25.2. Elisabeth Betteridge. She says in her witness statement that she is a director of the first respondent. In fact, looking at Companies House records, it now appears that she is the sole director of the first respondent. (Mrs Betteridge got married in November 2022. Hence, in the

contemporaneous documents, she features by her maiden name of Hawkins).

26. We shall refer to the claimant throughout in that capacity and likewise with the first respondent. We shall refer to the second respondent now as '*GH.'*

27. We shall now make our factual findings, then, we will look at the issues in the case by reference to the list of issues drawn by Employment Judge Cox. We shall then set out the relevant law before going on to apply the law to the facts to arrive at our conclusions on the issues.

Findings of fact

The formation of the first respondent and events to the end of 2021

28. It is necessary to set out some background to the events to which we are principally concerned. Although there is a significant amount of factual dispute about those events, happily, there is little dispute about the background leading to the incorporation of the first respondent and the first 18 months or so following incorporation.

29. The claimant and GH met while they were both working for CSG Talent Limited. GH held the post of managing consultant for the life sciences division. The claimant was a junior recruitment consultant in the life science team specialising in animal health and nutrition. The claimant was well regarded within CSG Talent and in 2018 won the best newcomer award.

30. The claimant moved from her team to work in GH's team. (The Tribunal was not told exactly when this move took place). She remained in that team until the end of her employment with CSG Talent.

31. GH had ambitions to set up his own recruitment company. There were tentative discussions between GH and the claimant about this and then in 2019 they agreed to pursue the proposition more seriously.

32. Prior to working with CSG Talent, GH had worked for Invenia Group. There, GH met Paul Rodwell and James Chippendale. He initiated discussions with them about the prospect of investing in a new recruitment company. Within the bundle at pages 202 to 204 are emails in November 2019 passing between Mr Rodwell and GH about the setting up and funding the new venture. GH expressed the wish in the email of 3 November 2019 (page 204) for him and the claimant to have an equal interest in the new business.

33. The claimant resigned from CSG Talent in January 2020. She became an employee of Invenia. The, she resigned from Invenia in September 2020 upon the incorporation of the first respondent on 11 September 2020. The Companies House documentation at pages 633 to 657 shows the date of the incorporation and that the claimant was the sole director and shareholder. The issued share capital consisted of one share, vested in the claimant who declared that she had overall control. She was paid a salary by the first respondent from around the date of incorporation. Page 714 shows that she received remuneration through the PAYE system from 1 November 2020. She was given an employee PAYE reference number by the first respondent. She was issued with payslips which contained an employee ID number. Page 1053 to shows that a wage was paid to her, alongside a dividend payment in November and December 2020. She was paid a wage and a bonus in January 2021. She received wages in varying amounts until 30 April 2021, when she began to be paid a regular sum of £736.67.

This became the regular monthly wage paid to her. A regular dividend payment of £2763.33 was paid to GH and the claimant from February 2021. This increased to £5930 from March 2022 until August 2022 (save for April when the payment reverted to £2763.33). Between September 2022 and December 2022, the dividend payment was in the sum of £3430. Ad hoc additional dividend payments and bonuses were paid from time-to-time.

34. GH resigned from CSG Talent on 9 September 2020. He handed them a sick note for the duration of his notice period. It is agreed that GH was working for the first respondent "*unofficially"* (as he puts it in paragraph 20 of his witness statement). GH then became a director of the first respondent on 15 February 2021.

35. On 16 March 2021, there was an increase in the share capital. 1000 shares were issued divided into four classes (one class for each of the claimant, GH, Mr Rodwell, and Mr Chippendale). Mr Rodwell and Mr Chippendale were issued 165 shares each. GH and the claimant were issued 335 shares each. Mr Rodwell and Mr Chippendale also invested £50,000 into the first respondent.

36. All concerned were nervous about restrictive covenants in their contracts of employment with CSG, hence the rather tentative way in which the first respondent was incorporated and developed in the initial stages.

37. In paragraph 16 of his witness statement, GH refers to the claimant making a placement with a Serbian company specialising in animal nutrition. He says, *"The placement itself was incremental as it meant putting Kapia Partners Ltd in a financially stable point before it had even been created officially. Due to this the claimant had the responsibility for the entirety of setting up the company from logistics, marketing, to inception. My involvement was wholly verbal at this time."* In evidence given in cross-examination, GH accepted that he had wanted the claimant to join the first respondent because of her specialism in animal health and animal nutrition. The reasoning behind GH's strategy was vindicated by the placement with the Serbian company.

38. In paragraph 9 of her witness statement, the claimant says that Mr Rodwell and Mr Chippendale were responsible for setting up bank accounts, filings with Companies House, dealing with accountants, and matters of that kind. She said that she never had any control over the bank accounts which were set up nor spoke to the accountants directly. The Tribunal accepts that the claimant, as sole director, and shareholder, was effectively fronting the first respondent and that others (in particular GH, Mr Rodwell and Mr Chippendale) had an interest in the success of the business being carried out by the first respondent. Others also had an involvement. Mrs Whitehouse, for example, was responsible for marketing and she supported brand management for the first respondent.

39. That said, the letters from the firm of accountants engaged to act were addressed to the claimant (pages 221 to 229). The same firm of accountants were also instructed to deal with the claimant's personal tax affairs (pages 213 to 220). The letters show that it was the claimant who instructed the accountants. The letters of engagement would not have been sent otherwise. As has been said, it was always GH's intention that the claimant would have an equal say in the running of the first respondent. The shareholding allocation in March 2021 reflects that. The Tribunal therefore does not accept the claimant's evidence that, at least at this stage, she was in any kind of subordinate position to GH. There was no

compulsion upon her to resign her position with CSG Talent or Ivenia or to embark upon the venture with GH, Mr Rodwell and Mr Chippendale at all.

40. On 26 September 2020 the claimant got married. GH attended the wedding of the claimant and her wife. There are a couple of wedding photographs at pages 116 and 117 of the bundle. Unfortunately, this was a short and unhappy marriage.

41. On 29 June 2022, the claimant informed GH that her wife wanted to end the relationship (page 332). They separated at the end of July 2022. The claimant says in paragraph 19 of her witness statement that she, *"had become suicidal which I shared with Goran [GH] during the summer of 2022 (page 326)."* There is no dispute that the claimant was profoundly affected by the breakup. To her credit, she has never shied away from the impact this had on the business and that she was not performing as effectively in her role because of it.

42. Before the marital difficulties manifested themselves, the claimant and GH worked very well together, and the first respondent's business thrived. GH is complimentary about the work that the claimant did in the early months in setting up the first respondent's business. He says in paragraph 21 of his witness statement that, *"From January 2021 my billings began to flow in, for the record that year I did £375,000 of my personal billings and the claimant had also done around £250,000."* GH goes on to say in paragraph 22 that, *"The year of 2021 was a great year as our markets respectively flourished, and additionally we had grown our headcount from 3 to 10."*

43. In paragraph 14 of her witness statement, the claimant says that *"By the end of 2021 Kapia had a gross turnover of over £1.2 million for that year and were into double figures of employees. Both Goran and I were actively recruiting and generating significant billings to enable us to grow. We were both at this stage recruiting while running the company."*

44. The claimant and GH were remunerated by way of wages paid under the PAYE system and by dividends. As already noted, they were each paid a monthly wage through PAYE of £736.67. In the claimant's case, this sum was paid from 30 April 2021. In GH's case it was paid from 28 May 2021, with a payment of wages in a different sum between February and April 2021. These payments are described as wages in the first respondent's bank statements and in the 'bulk payment payroll uploads' at pages 894 to 904. This arrangement is corroborated by the claimant's personal tax computation for the tax year ended 5 April 2022 at page 909. This shows her income as from employment and dividends. The Tribunal was not taken to any similar documentation for GH.

45. Amongst those taken on in the first respondent's recruitment drive mentioned by the claimant in paragraph 14 of her witness statement was Mrs Betteridge. She was employed as office manager from 6 April 2021 until 6 July 2022. With effect from the latter date, she held the post of head of people and operations. She was co-managed by the claimant and GH.

46. It is not in dispute that GH and the claimant agreed to buy out the majority of Mr Chippendale and Mr Rodwell's shareholding. GH and the claimant agreed to do this in the summer of 2021 on the back of the increasing success of the first respondent. There is also no dispute that at the same time GH and the claimant agreed to divide responsibilities for the management of the first respondent. GH took on the responsibility for sales, key account management, and marketing.

The claimant was to focus on managing the recruitment managers that had been taken on, operations and finance. Consequently, the claimant's billing declined. GH fairly accepted this to be a consequence of the division of labour.

47. Ultimately, the plan to buy out Mr Chippendale and Mr Rodwell's shareholdings came to fruition. This culminated in the shareholders' agreement dated 16 May 2022 (pages 174 to199).

48. Before moving on to this, the Tribunal needs to address an unfortunate incident which occurred on 13 November 2021. GH made a homophobic remark directed at the managing director of another company. This was a message posted on a LinkedIn in connection with a charity football tournament being organised by the first respondent. GH wrote, in response to an expression of interest by the other company in putting up a team to play in the tournament, *"Mate, come back to me when your managing director isn't a bender."* This generated a complaint from the managing director in question.

49. The claimant wrote to him on 1 December 2021 (page 1118). She offered apologies and assured him that the matter was being investigated. An investigation meeting took place on 13 December 2021 (pages 1119 and 1120). Those in attendance were GH and Mrs Betteridge – (her name was recorded in the minutes as Liz Hawkins). GH took full responsibility for his actions. Mrs Betteridge prepared an investigation report (pages 1121-1122). At page 1122, it is recorded that Mrs Betteridge took the view that no further action was required but that *"relevant disciplinary procedure measures will be strictly followed"* in the event of any recurrence.

50. The claimant met with the managing director on 16 December 2021 to discuss the issue. From the WhatsApp messages between Mrs Betteridge and the claimant at pages 278 and 280, it is evident that the claimant did not relish the prospect of meeting with him.

51. Notwithstanding the homophobic nature of the LinkedIn post, it is clear from the contemporaneous evidence that the claimant bore GH no ill will as a result. In a WhatsApp exchange dated 11 December 2021 each declared the other to be their best friend. This was after the claimant had been made aware of the homophobic post on LinkedIn (and before she met with the managing director on the first respondent's behalf). GH thanked her for resolving the issue with the managing director by presenting her with a gift (page 287).

Events from early 2022 to August 2022 and the shareholders' agreement

52. GH's case is that from January 2022, problems began to emerge. We shall consider the evidence which he presents about this presently but before doing so we will address the issue of the shareholders' agreement. This was entered into between the first respondent, the second respondent, the claimant, Mr Rodwell, and Mr Chippendale. It is to be noted that GH entered into this agreement in May 2022 notwithstanding the problems to which he alludes in the early part of 2022. This suggests the Tribunal that the problems to which he mentions in his witness statement were not as serious as he now seeks to portray them.

53. The first respondent's accountant, Andrew Sankey, recommended Richard Newstead, solicitor to act in the preparation of the shareholders' agreement. This recorded the 1000 issued shares in the first respondent. These were now to be re-allocated as to 475 each for the claimant and GH, and 25 each for Mr Rodwell and Mr Chippendale.

54. Clause 5.6 is headed *"cessation of employment".* It reads:

> *"**5.6.5** This clause 5.6 shall apply only to GL [the claimant] and GH. In the event that either GL or GH ceases to be an employee and/or director of the company [the first respondent] or any company within its group for whatever reason, within 30 days of such cessation of employment, the company and either GL or GH shall have the option to require the existing shareholder to sell their shares ("the option"). Thereafter, the directors acting as agents of the company may serve an option notice on the existing shareholders stating that the company (providing it has sufficient reserves to fund such purchase) requires the existing shareholders to sell all (but not some only) of their shares."*

The shareholders' agreement also contains a declaration that the shareholders are not in partnership with each other. There was no like declaration to the effect that none of the shareholders are employees of the first respondent.

55. In paragraph 17 of her witness statement, the claimant expresses concern that the way in which the shareholders' agreement was drafted and that it created a loophole which was exploited later in 2022. She was concerned about an imbalance of power vested in the *"three dominant males"* (as she put it in paragraph 17 of her witness statement). The claimant makes a valid point that she was left vulnerable by the terms of the shareholders' agreement by having a shareholding of less than 50% of the issued share capital. The same may of course be said on behalf of GH. The way the shareholders' agreement was structured left GH and the claimant dependent upon Mr Rodwell and Mr Chippendale to form a majority.

56. There was no evidence that any other solicitor was involved in the drafting of the shareholders agreement. It appears to be the case that Mr Newstead acted for the first respondent on the instructions of GH and the claimant and for GH and the claimant. The Tribunal was not told whether Mr Rodwell and Mr Chippendale obtained independent legal advice. Whatever the position, the Tribunal is satisfied that the shareholders' agreement was drafted upon the instruction of GH and the claimant. This was a professionally drafted agreement prepared by a solicitor on the instruction of parties (in the case of GH and the claimant) who held an equal shareholding.

57. In the event, as we shall see, the structure worked against the claimant when Mr Rodwell and Mr Chippendale exercised their votes (alongside GH) upon a resolution to remove the claimant as director. As has been said, had matters turned out differently GH was equally vulnerable to such a vote. There was no evidence that, in May 2022, matters were set up in this way deliberately to disadvantage the claimant. The Tribunal's finding therefore is that at the time that the shareholders' agreement was entered into, GH and the claimant were of equal bargaining power. As we shall see, this assumes significance upon the question of the claimant's employee status.

58. We now revert to the issue of GH harbouring concerns that matters were taking a downward turn in the early part of 2022. He lists his concerns about the claimant in paragraph 24 of his witness statement. The first issue which he raises at paragraph 24(a) is that *"The claimant had a bad temper, frequent mood swings, and demeaning nature, not just towards me but other members of our team (pages 262, 286, 293, 297, 298 and 332)."*

59. Pages 262 and 286 are WhatsApp messages from the claimant acknowledging that she had behaved in a tetchy manner. The first such message was on 28 May 2021. The second was on 17 December 2021. Page 293 is a message with an apology from the claimant for *"taking over".* Page 297 is a message of 14 February 2022 where the claimant apologises for appearing stressed due to *"house stuff".* Page 298 is a message of 16 February 2022 in which the claimant says that she is *"super stressed."* Page 332 is the message of 29 June 2022 to which we referred earlier in paragraph 41 above.

60. The claimant accepted, in evidence under cross-examination, that she had *"good and bad days because of my personal circumstances."* The claimant had insight as she apologised for appearing stressed (page 297). Likewise, she apologised for an incident involving an employee on 16 February 2022. GH rebuked her for *"shooting him down"* before giving him a chance to speak. The claimant replied, "*yeah fair".* We refer to page 299.

61. In the Tribunal's judgment, there is little merit in GH's complaint in paragraph 24(a) of his witness statement. He managed to cite half a dozen or so examples spanning a period between December 2021 and June 2022. This was in the context of the claimant's difficult personal circumstances and the running of a very busy new business. This does not strike the Tribunal as in any way excessive or burdensome. Crucially, this did not stop GH in May 2022 from embarking upon a buyout of Mr Rodwell and Mr Chippendale using the first respondent's resources in agreement with the claimant and vesting himself and the claimant with significant equal shareholdings. The claimant's behaviour was not so intolerable as to prevent him from continuing his business venture with her and making a significant investment in it. GH was keen to emphasise to the Tribunal the high-pressured environment in which the parties work. It would be surprising if, in those circumstances (coupled with a pending marital breakup) signs of stress would not manifest themselves from time-to-time.

62. GH also complains (in paragraph 24 (b)(i) of his witness statement) that on several occasions the claimant brought personal issues into the workplace. He refers to Mrs Betteridge having to comfort the claimant when she was discovered crying at her desk in work and about her wishing to discuss her marital situation with GH and Mrs Betteridge. The claimant accepted in evidence during cross-examination that Mrs Betteridge had had to take her into a personal space to comfort her on that occasion. She also did not disagree with Mrs Betteridge's evidence that there were regular catch ups (the claimant says about once a week) which became focused upon the claimant's personal issues.

63. Mrs Betteridge's evidence was that matters reached the stage where GH had to email the claimant to request her not to bring personal issues into work. GH did email the claimant to this effect on 7 November 2022. By this stage, as we shall see, relations between GH and the claimant had deteriorated significantly. Mrs Betteridge said that that was not the email which she had in mind and that she was referring to ne from earlier. This was not produced for the Tribunal.

64. Notwithstanding that the email in question could not be traced, the Tribunal accepts that Mrs Betteridge and GH were justifiably concerned about the amount of time that the claimant was taking up in dealing with her personal issues. That said, we have little hesitation in finding that until early September 2022 GH was very supportive of the claimant. We find that Mrs Betteridge was supportive

throughout. As we have said, the claimant acknowledged on several occasions that her personal issues were affecting her performance.

65. GH was also critical of the claimant's involvement in the respondent moving to larger premises which entailed a significantly increased rent. He cites this as further evidence of issues arising in early 2022. In paragraph 24(vi)(ii) of his witness statement, GH says that this was at the claimant's insistence. The claimant's account is that GH agreed to the move because the expansion had led to the operation being short on space in their original premises. It is her case that GH in fact negotiated the terms of the lease and that Mrs Betteridge was present during the negotiations. In evidence given by him in cross-examination, GH accepted that he had negotiated with the chief executive of the landlord. He accepted that at the time he had raised no objection to the move. The claimant had sourced the new premises. GH accepted that he, the claimant, and Mrs Betteridge were present in the meeting with the chief executive of the landlord, but (as noted already) he had taken the lead in negotiating terms. His account therefore chimed with that of the claimant. This being the case, there is little merit in GH's criticism of the claimant's handling of the office move. Regrettably, this unfounded criticism does GH little credit.

66. GH gives evidence about the claimant's handling of the respondent's finances in paragraph 24(vi)(b) of his witness statement. By way of background, he observes that in May 2022 after having paid Mr Rodwell and Mr Chippendale for their shares, the first respondent had £110,000 in the bank. He then goes on to say that there was a pending corporation tax bill in that amount. Arrangements were made to sort out a monthly payment plan with HMRC. GH takes credit for resolving the issue. He says that he *had "remembered this in time and called our accountant to sort out a monthly price plan which Mrs Betteridge then communicated on [our] behalf. It was agreed that the claimant would call HMRC to activate this."* GH goes on to say that *"Following the issue with the tax bill I called a meeting on 4 July 2022 with Elisabeth Betteridge and the claimant to say that this neglect could not happen. The claimant and Elisabeth Betteridge agreed, and the meeting was adjourned."*

67. In fact, the corporation tax bill was hardly a surprise to GH. It was mentioned in a WhatsApp exchange between him and the claimant on 10 January 2022 (page 288). The suggestion was made in those WhatsApp exchanges of taking out a loan to pay the corporation tax bill - (£110,000 was due in July). Although not entirely clear, it appears to the Tribunal that the suggestion of taking out the loan emanated from the claimant. Even if we are wrong on this, and it was GH who suggested taking out a loan, the claimant agreed. In other words, there was an agreed plan to defray the tax bill six months ahead of the due date. On 30 May 2022, GH sent a WhatsApp message to Mr Sankey asking when the corporation tax bill is due. This may be thought surprising given the exchange between the claimant and GH in January 2022. GH appears to have forgotten the arrangement reached. On 20 July 2022 there is a WhatsApp exchange between the claimant and GH in which she informs him that the corporation tax issue had been sorted out upon the basis of monthly payments of £16,000. GH replied, "*wonderful".*

68. That there was a meeting to discuss the claimant's performance on 4 July 2022 was a point of great contention between the parties. It was of significance for the respondents' case that performance issues had been raised with the claimant

both before and after 2 and 3 September 2022. The claimant denied that there was such a meeting. GH said that one did take place.

69. There was no mention in any of the contemporaneous documents about a meeting held on 4 July 2022. Elisabeth Betteridge does not say that she participated in such a meeting within her witness statement. From the documentation generated at the time, GH was pleased with how the claimant had handled the matter in organising the loan to meet the tax bill. If anyone was remiss, it appears to the Tribunal that it was GH in having to be reminded by Mr Sankey as to how much the tax bill was and when it was due in circumstances where in January 2022, he and the claimant were clear about the plan to deal with it going forwards.

70. On balance, therefore, the Tribunal prefers the claimant's account that no meeting took place on 4 July 2022 at which performance issues were discussed nor, for that matter, was there any letter, email or WhatsApp communication from GH expressing any disquiet as to how this matter had been handled. As with the issue around the lease, the Tribunal observes that, regrettably, GH's attempt to construct a performance issue around the corporation tax bill does him little credit. Against a backdrop of contemporaneous WhatsApp messages contrary to the respondents' case, an undocumented meeting seems to the Tribunal to be a small peg upon to which to hang the heavy coat that the respondents harboured significant performance concerns about the claimant before 2 and 3 September 2022 and were proposing to take action against her.

71. To his immense credit, GH was very supportive of the claimant to the end of August 2022 during the time of her marital difficulties. Several examples will suffice. On 21 May 2022, GH sent a message to the claimant, *"I wanted to say you are my best friend and if you ever want to talk please tell me. I know you've got a lot going on. Don't internalise anything."* The claimant replied with an appreciative message to which GH responded with a heart emoji. On 5 June 2022, the claimant sent a message to GH to say, *"I'm sorry I haven't been there for you and been a burden."* GH replied, "*It's fine! Let's move on and get some shit done."* On 29 June 2022, the claimant sent a message to GH to apologise for being "*miserable."* He replied, *"Don't apologise. How are you?"* On 29 July 2022, the claimant sent a message to GH to say that she was "*not in a very good space ATM, I don't really want to talk about it but I have barely slept so if don't seem on it today that's why."* GH replied, *"understood. Holler if you need owt pet."* The claimant replied, "*yep will do."* GH said, *"anything you need let me know x."*

72. There was also supportive message from Mrs Betteridge. Some late-introduced screenshots were included at page 341A to 341C in which the claimant apologised to her for going *"MIA"* [missing in action] and missing a meeting with Mrs Betteridge's father, Andrew Hawkins (who had a consultative role with the first respondent).

73. There are also some WhatsApp messages passing between the claimant and GH on 23 and 24 August. She said that she might be *"MIA"* the next day. GH replied, *"no worries at all G – let me know if you need anything sorting for today."* This was in the context of a message from the claimant to the effect that her wife *"is driving me up the wall."* She was proposing to drive down to see her mother (who lives in Sussex). The issue of concern at this time was around what to do with the matrimonial home.

74. In paragraph 5 of his witness statement, Mr Chalkley says that he observed the claimant frequently looking at the Rightmove website and doing little work. Mr Chalkley denied in cross examination that he was exaggerating the extent of the claimant's scrolling through Rightmove with a view to assisting the respondents.

75. We shall come to it in due course, but Mr Chalkley's credibility was affected by his account of the claimant's appearance at a lunchtime work drink on 20 September 2022. Upon this basis, therefore, in our judgment there is some merit to Mr Harris' suggestion that Mr Chalkley had a tendency against the claimant and was exaggerating the extent of the time that she was looking at Rightmove. That said, the claimant fairly accepted that she was looking at that website as she was in the process of trying to sell the matrimonial home. The Tribunal therefore finds that the claimant was looking at Rightmove some of the time. She was not performing effectively in role. However, that is not the same as saying that she was not performing at all. As we shall see, there was effective work undertaken by her in September 2022. The Tribunal therefore cannot accept Mr Chalkley's account that she was spending long periods of time looking at Rightmove and not working.

76. On 25 August and continuing into the early hours of 26 August 2022 the claimant and GH exchanged a series of WhatsApp messages. These are at pages 349 to 396. The claimant was at her mothers' home in Sussex. GH was in Croatia. The opening remarks were around GH making plans to travel with the claimant to Florida to celebrate her birthday in October.

77. The claimant asked for permission to stay at GH's home after the Otley Run: (it should be clarified that the Otley Run is a pub crawl in Leeds). The claimant was living in York at the time. GH lives in Leeds. Plainly, therefore, it was convenient for her to stay in Leeds on the night of the Otley Run rather than having to travel back to York afterwards.

78. The claimant expressed relief about being out of the relationship with her wife. She thanked GH for being a "*rock for me".* He replied, *"of course. Always have and always will be."*

79. The messaging turned flirtatious. The claimant said, *"I tend to fall in love with a person rather than their gender."* She said to GH, "*do you know I fancy both."* GH replied, *"no".* The messaging then turned to the subject of sex with mention of the erotic fiction book *Fifty Shades of Grey.'* GH introduced the topic (page 374). The claimant did not shut down this part of the discussion and willingly participated in it.

80. Later in the messaging (at page 387) GH said that he thought that a line had been crossed in the conversation with which the claimant agreed. The claimant asked, *"can you look at me in the same way again?"* GH replied, *"if you could see my face right now."* The claimant messaged, *"I'm a bit turned on"* to which GH replied, *"me too".* The claimant messaged, *"sleeping right now is going to be difficult."* To which GH replied, *"I'm actually very frustrated right now."* The claimant said, *"I'm sure there are things both of us can do in the comfort of our own personal space."*

The party held on 2 and 3 September 2022

81. We now turn to the events of 2 and 3 September 2022. GH introduces the issue in paragraph 27 of his witness statement. He said, "*On 2 September 2022, we*

had planned an end of period activity within the company, this was an Otley Run." He then names those within the respondent who were present. GH says, "*We began the Otley Run and then decided it would be better to continue the celebration at my home, so we went in separate cars, and stopped at Sainsbury's to buy alcohol and snacks. This was around 5pm. Between 5pm and around 10pm we all enjoyed the weather, food and drinks till around 10pm when we ventured inside my home. We played music, talked, and sang until the early hours of the next morning."*

82. From this evidence, it is plain that the Otley Run was a work event. No issue is raised by the respondents that this event was not one undertaken in the course of employment.

83. GH says in paragraph 27 of his witness statement that the last two people left the party between 5 and 6am. He says that after they left*, "I slept downstairs during this period and then went upstairs when I heard that the claimant was already up and getting ready. After which I went into my own bed. This was after the hours of 10am. Scarlett Sawbridge came in the morning to collect some items she had left. She found me in bed by myself and Georgina getting ready to go [and] meet her friend. In the morning the claimant and I said goodbye to each other, and she did not raise any concerns regarding my alleged behaviour."*

84. The friend to whom GH refers is Victoria Pinks. It is not clear what GH means by, *"I slept downstairs during this period and then went upstairs."* It seems that he is saying that he slept downstairs after the last two guests left, and then went upstairs to get into his own bed once he heard the claimant moving around.

85. The claimant gives quite a different version of events. She says that she went to bed at around 1.30am (on the morning of 3 September 2022). She says in paragraph 24 of her witness statement that, "*I was not made aware that Goran was expecting me to sleep in his bed as there was no alternative arrangements. I therefore messaged Goran about sleeping arrangements (page 406). I did not sleep well as the music was loud and it had been a really warm night."*

86. She then says this (also in paragraph 24):

"Around 5.30am he climbed into bed and hugged me from behind waking me up. I had no intention of any sexual relationship with him. I was still processing the breakdown of my marriage, he was drunk, I was exhausted, overheated and his behaviour up until I'd gone to bed was not his usual intoxicated behaviour. I shrugged of his sexual advances. Goran continued to try and hug me from behind and grabbed my breasts, and as I was visibly not interested, I did this by continuing to shrug his arms off me, he asked me what was wrong. I told him I was too hot and that I did not want him on top of me. Goran was visibly frustrated by this and left the bed; he started pacing and then left the bedroom. He was in his boxers. His behaviour still concerned me however as Goran had left the room and I was confident in my ability to deflect any potential further advances. We have been friends for a long time and I would never expect him to act in an appropriate manner as I told him no, as I was not interested in him sexually. Therefore, I went back to sleep alone."

87. At pages 397 to 405 is a series of WhatsApp message between the claimant and Miss Pinks. At 22.50 (on 2 September) the claimant sent a WhatsApp message to Miss Pinks that she was, *"At Goran's and everybody is bloody taking cocaine like its normal. Not my bag, no pun intended."* GH accepted in evidence that he

had taken cocaine that evening. Around an hour later, she messaged Miss Pinks to say that she *"Defo wouldn't be able to go out with Goran in real life. His music taste drives me up the wall. And the cocaine. No go."* Just before midnight on 2/3 September 2022 the claimant and Miss Pinks exchanged mutually appreciative messages of their close friendship. (The Tribunal did raise with the respondents' counsel the issue of self-incrimination and that the ingestion of cocaine by GH would be placed on the public record in these reasons absent any steps otherwise. No privilege was asserted, or application made by or on behalf of GH).

88. Page 406 contains WhatsApp messages between GH and the claimant from that evening. At 00.55 on 3 September 2022, the claimant sent a message to GH asking, *"Which side do you sleep on"* accompanied by a laughing emoji. Five minutes later, she messaged, *"Also do you want me sleeping on the sofa or so just chuck me off the bed when you come in."* This was accompanied by three laughing emojis. GH replied *"Don't worry"* at 02.21.

89. From this, we accept the claimant's account that she retired to bed at around 1.30am on the morning of 3 September 2022. This is consistent with the time that she asked GH about the sleeping arrangements. We find that the claimant was expecting to share a bed with GH. She asked him about which side of the bed she should sleep on, which suggests that sharing the bed was her expectation.

90. Miss Pinks' account is that the claimant visited her at her home in Leeds on the morning of 3 September 2022. The claimant, according to Miss Pinks, confided in her about GH's behaviour that morning. Miss Pinks says that the claimant *"described how she had finished drinking and went to bed alone, the only bed available belonging to Goran."* She then gives an account in similar terms to that of the claimant about what happened when Goran got into bed with the claimant. Miss Pinks then goes on to say that "*Having an understanding of Georgina's sexual preferences, and her relationship with Goran up to that point, there is no doubt for me that Georgina did not instigate or participate in anything that would give Goran the impression that this was something she wanted."* She goes on to say that *"this advance in itself wasn't serious enough for her to be overly concerned or to warrant further action. It became clear to me from our conversations after those events that Goran had started treating her differently."* Much else of what Miss Pinks says in her witness statement is a hearsay account of workplace events relayed to her by the claimant.

91. In cross-examination, Miss Pinks said that she and the claimant decided that the situation could be handled. Miss Pinks said that GH "*had taken it as a no, and that ended it."* Mr Clement put it to her that there was no mention of the incident in contemporaneous WhatsApp messages. Miss Pinks said that she *"would not put that in a text, we spoke about it."*

92. Miss Sawbridge says in paragraph 4 of her witness statement that she left the party at around 2am. She knew that the claimant was staying at GH's house to avoid having to travel to York. Miss Sawbridge says that the claimant had retired to bed before she left. This further corroborates the Tribunal's finding that the claimant retired for the night at the time which she says of 1.30am. Miss Sawbridge had cause to return to GH's house the next morning because she had left behind a pair of shoes. Miss Sawbridge says that "*Georgina was at the house getting ready to leave. Goran was in his boxers in his bed."*

Miss Sawbridge says that she returned to GH's house to collect her shoes at 8am.

93. There is an inconsistency between GH and Miss Sawbridge in the timing of Miss Sawbridge's return to GH's house. He has her going to the house and finding him in bed after he had got into his own bed at 10am. The Tribunal attaches little significance to this discrepancy. It is the kind of timing discrepancy which arises when people are asked to recall events some months later.

94. The Tribunal prefers the claimant's account of the events of 2 and 3 September 2022. The claimant did drink during the evening. Her own witness, Victoria Pinks says as much when recounting what the claimant had told her had happened (in paragraph 3 of Miss Pinks' witness statement). However, there was no suggestion by any of the witnesses from whom we heard that the claimant was so intoxicated that the amount of drink which she had ingested would affect her recollection of events. In contrast, GH was under the influence of drink and cocaine. He accepted that he was intoxicated in evidence given in cross examination. This is bound to impair his recollection of events.

95. Further, Miss Pinks was, in our judgment, a very credible witness. She has never worked for the respondent. It is difficult to see why she would make up an account of the claimant telling her what had happened in those terms. (It is of course possible that Miss Pinks was simply relaying what the claimant had told her and that the claimant was telling an untruth to Miss Pinks. However, the Tribunal finds the claimant's account more credible because of the level of GH's intoxication and for the reasons in paragraphs 96 -105 below).

96. GH was very defensive in cross examination upon this issue. His responses consisted of bare denials. He did not advance a positive case in evidence during cross examination of his actions that evening.

97. Most significantly of all, in our judgment, GH's treatment of the claimant (as we shall see) fundamentally altered from what it had been prior to the events of that night. There is quite simply no other rational explanation for this change given how supportive GH had been of the claimant to the end of August 2022 about her matrimonial difficulties and that there was no change in the claimant's performance before and after that time. (The claimant accepted her performance in role as sub-standard before and after).

98. Further, and again to his immense credit, GH had even suggested paying a significant amount of money to help towards the costs of the claimant's stepfather's cancer treatment. GH and the claimant were planning a celebration for the claimant's birthday in Florida. They enjoyed afternoons out together (as we can see at page 1124 which is a picture of them enjoying a boat trip in Knaresborough on 21 August 2022). The claimant accepted that her performance up to the end of August 2022 was sub-standard. GH was nothing but supportive of her.

99. After 3 September 2022, as we shall come to, GH's deportment towards the claimant changed significantly. His attempts to explain this away as performance related are, as we shall see, unconvincing. For us to accept GH's case requires us to be satisfied that the event of 3 September 2022 did not take place as alleged. If that event did not take place, then in the absence of a significant further deterioration in the claimant's performance or a conduct issue of some kind (and we find there to be none) or for some other reason, GH's change

towards the claimant otherwise has no rational basis. A change of demeanour without cause is highly unlikely given the very close friendship which GH and the claimant enjoyed before 3 September 2022. Absent any other explanation or cause, therefore, this leaves only the claimant's rejection of GH's sexual advances that night as the cause of his change in attitude towards her.

100. The Tribunal drew counsel's attention to the *Crown Court Compendium*, in particular chapter 20 dealing with the issue of sexual offences. The Tribunal raised this simply to draw attention to the fact that a mere delay in reporting the matter (or indeed not reporting the matter at all) does not necessarily equate to an event not having occurred. The *Crown Court Compendium* advises that in such cases people react differently and there is no one classic response. Counsel were invited to make supplementary submissions upon this issue. The claimant declined to do so. The respondents accepted the invitation.

101. Mr Clement submitted that the reason why the claimant raised the issue about the events of 2 and 3 September 2022 (for the first time) in the submission which she made to shareholders on 9 December 2022 (which is the second protected act) was to try to prevent her removal as a director. She had not raised the issue in the grievance of 15 November 2022 (which was the first protected act). He suggests therefore that her motive was to prevent her removal as a director and had there been no such proceedings in train the allegation would not have been raised at all. Mr Clement suggests that the delay between 3 September and 9 December 2022 coupled with the claimant's motivation for making therefore it point in the direction of the alleged incident having not taken place.

102. We must consider these submissions against the evidence which we heard. The claimant was asked why she had not raised the issue earlier. She said in cross-examination that she *"put it down to a drunken mistake. We'd always managed to talk things out, I assumed we'd discuss it."* This somewhat stoic attitude on the part of the claimant is corroborated by the evidence of Miss Pinks. The claimant also said that the *"transition"* as she puts it (in GH's attitude towards her) occurred between September and October 2022 and was not clear cut. It could not be pinpointed to a certain day. From this, we conclude that the claimant was hoping that she and GH could put the matter behind them, considering the support which GH had given to the claimant arising from her personal difficulties and in the interests of the business.

103. We accept Mr Clement's point that the claimant did raise the issue in the letter of 9 December 2022 in an attempt to avoid being ousted as director. However, for the Tribunal to accept GH's position would be to have the Tribunal find that the claimant lied about the incident in raising a serious allegation against GH simply to save her own position. This would have been an irrational and frankly extraordinary step for the claimant to take given that she had, in any case, strong evidence by way of rebuttal of the several allegations of poor performance levelled at her by GH (to which we will come).

104. Further, to accept that the claimant invented her account for the first time in December 2022 comes with it the imputation that the claimant and/or Miss Pinks both were untruthful before the Tribunal about a discussion on the morning of 3 September 2022 and that they had concocted their accounts. There was no suggestion that they had. Such would be a very serious matter with possible implications beyond the proceedings in the Employment Tribunal. The improbability of Miss Pinks and the claimant embarking on such a course of

conduct when weighed against GH's defensiveness in cross examination, the circumstantial evidence in the claimant's favour, and that she hoped that they could work matters out between them persuades the Tribunal that the delay in her reporting matters to the first respondent does not detract from a finding in the claimant's favour on this central issue.

105. Mr Clement's submissions about the delay in the claimant raising the issue in writing and only then for an ulterior motive do not weigh the balance in GH's favour when set against the fact of GH's intoxication that evening (impacting upon his reliability as a witness), the strength of Miss Pinks' evidence corroborative of the claimant's case, and the lack of any other rational explanation for the change in GH's attitude to the claimant after that day.

106. The Tribunal reminded itself that to constitute a cause of action, the conduct in question (which we find to have been of a sexual nature) has to be unwanted conduct. The claimant was expecting GH to share a bed with her. We refer to the WhatsApp message at page 406. Him getting into bed with her therefore was not unwanted conduct.

107. What was unwanted was the sexual advance towards the claimant. We get insight into the claimant's mindset that this was unwanted from her message to Miss Pinks that she would not be able to "*go out with GH in real life"* and her distaste for his music and drug habit. Subjectively the Tribunal can see that GH may have been encouraged by the mutual flirtatious messaging the week before (on 25 and 26 August 2022) in which the claimant effectively told him that she is bi-sexual. However, it is clear from the contemporaneous message which the claimant sent to Miss Pinks that the claimant was not seriously entertaining a relationship with GH. This, we accept therefore that his first pass at her was unwanted conduct. Even if we are wrong on that, then we accept the claimant's account that an unwanted second pass at her was made after she had made the position clear.

The events post - 3 September 2022

108. The next week, GH was away on a business trip. The claimant complains that the calls between them were curt in contrast to previous occasions when one or the other had been away. The claimant was then away on annual leave in Portugal.

109. While she was away, a management meeting took place on 16 September 2022. She found about this through Mrs Betteridge rather than through GH. Mrs Betteridge gave the claimant quite a detailed account of the meeting in the WhatsApp messages at pages 410 to 430. These messages included a photograph taken by Miss Betteridge of post-it notes placed upon the meeting room wall on which people recorded their ideas.

110. Mr Chalkley says in paragraph 7 of his witness statement that the claimant expressed relief at having not been present at the meeting of 16 September 2022. He said that because of that remark he lost a lot of respect for the claimant. The claimant did not deny that she had said words to this effect but said it in the context of performance meetings being uncomfortable. This was difficult evidence to understand given that the performance meetings are at the beginning and end of the month whereas the meeting of 16 September was of course right in the middle of it.

111. In the WhatsApp messages between Mrs Betteridge and the claimant of 16 September 2022 the claimant remarked at page 419, *"Sorry I have been useless with everything recently. This divorce shit and the house has knocked me for six then going away and Barca [Barcelona] booked."* She also said, *"I feel a little overwhelmed with everything at the moment."* Mrs Betteridge replied, *"Do not apologise, you've been so strong."* This further corroborates our earlier finding of the support given to the claimant by Mrs Betteridge.

112. Given the sentiment in these messages, the Tribunal therefore accepts that the claimant did express relief at not being present at the meeting of 16 September 2022. It would simply have added to the stress that the claimant was feeling. It is understandable that this did influence Mr Chalkley's respect for the claimant. However, against that, the claimant was going through a difficult time personally and in respect of which she had had significant support from Mrs Betteridge and GH. No action was taken against the claimant. She was not of course due to attend the meeting anyway as she was on annual leave.

113. GH says in paragraph 28 of his witness statement that, *"Our industry suffered a blow around September 2022".* The Tribunal was not enlightened as to the nature of this blow which appears to have been the catalyst for meeting of 16 September 2022. GH did not give any satisfactory explanation as to why matters could not have awaited the claimant's return from annual leave.

114. The claimant returned to work on 20 September 2022. GH said in evidence that she would expect to be involved in significant decisions around the business. GH said that that the claimant would expect to be involved if she was "*in sound mind".* Mr Harris asked GH when he had taken the view that the claimant was not of sound mind. GH said this started when she was going through her divorce. He then said that this, *"really culminated from the end of September to the beginning of November 2022."*

115. The evidence about GH's opinion that the claimant was not *"in sound mind"* was omitted from his witness statement. This serves to further undermine GH's explanation for the way in which he dealt with the claimant from the beginning of September 2022. The explanation given in his witness statement is her poor performance. This different explanation (of lack of mental capacity) emerged in cross-examination. This was in our judgment GH attempting to shore up a weak case around the issue of poor performance. A further difficulty with this line of course is that he had been very supportive of the claimant before 3 September 2022 when (it is accepted by her) the claimant's mental health was significantly affected by the matrimonial breakdown yet his approach to her changed after that date. (Mental health issues are not necessarily indicative of a lack of mental capacity). As has been said, other explanations lacking credibility, the rejection of GH's advances on the night of 3 September 2022 provides the explanation for his treatment of her.

116. Upon her return to work on 20 September 2022, Mrs Betteridge told the claimant that she did not need to attend the management meeting that was being held that day. This proposal appears to have been accepted by the claimant without demur.

117. Later that day, a directors' lunch was held attended by the claimant, Mr Chalkley, Miss Sawbridge, and GH together with two others. GH and Mr Chalkley complained that the claimant turned up to the lunch looking worse for wear and that her top was covered in dog hairs. The claimant does own a dog. Page 19

of the supplemental bundle is a photograph of the event. Miss Sawbridge had this photograph on her phone. She kindly allowed the Tribunal to view the original photograph on her phone as, obviously, the resolution on the phone is significantly better than in a black and white photocopy. As best as the Tribunal can tell, the claimant's top was not covered in dog hairs. The claimant appears to be dressed no less smartly than the others at the event. Mr Chalkley was also wearing a top (which he claimed to have been smart on the basis that it had a collar). The two other women and two other men pictured are wearing blouses and shirts.

118. It was suggested to Mr Chalkley that his evidence that the claimant's top was covered in dog hairs was an exaggeration. In evidence given in cross-examination, he retreated from his evidence in chief (in paragraph 7) that the claimant turned up in a T-shirt *"covered in dog hairs"* to saying that he detected *"a couple"* on her top. It was this exaggeration which persuades the Tribunal (per paragraph 75 above) that Mr Chalkley exaggerated his account about the amount of time that the claimant was spending scrolling the Rightmove website. In the Tribunal's judgment, when looking at the photograph of the six attenders, nothing about the claimant's appearance strikes the Tribunal as jarring in itself or in comparison with the others present.

119. In any case, the respondents' allegation against the claimant of unprofessionalism that day quickly unravelled when the Tribunal heard in evidence that all in the group (or at any rate certainly GH and Mr Chalkley) did not return to the office after the lunch but carried on drinking during the rest of the day. In contrast, the claimant returned to the office to work upon her forthcoming business trip to Barcelona. She carried GH's laptop back to the office with her. Mr Chalkley confessed that, *"in hindsight, it was not the wisest decision"* to carry on drinking into the afternoon.

120. On 22 September 2022, Mrs Betteridge and GH had an urgent meeting to discuss ways to lower overheads. Mrs Betteridge texted the claimant and asked her to join them. The text is at page 438. The claimant did not reply to the text. GH and Mrs Betteridge then shortly afterwards went to see the claimant and a meeting was held in the kitchen area. The claimant was clearly troubled by the meeting. She sent a WhatsApp message to Mrs Betteridge on 25 September 2022 saying that she *"thought I was going to have a panic attack on Thursday [22 September] and I haven't had one of those in a long time."*

121. In paragraph 35 of her witness statement the claimant says that GH produced a business plan that evening which he emailed out. It was this which prompted the claimant to then arrange a Teams meeting for the next day, 23 September. (The claimant was working from home that day as she had a vet appointment for her dog). Her account is that no one came on to the call. This is corroborated by the messages at page 440 from the claimant in which she said that she was *"just sitting here what's going on?"*

122. On 25 September 2023 (page 442) in addition to telling Mrs Betteridge that she thought she was going to have a panic attack, the claimant complained that GH "*gives me no time to think either. Just throws everything at me. I'm worried I'm going to burn out soon."* Mrs Betteridge sensibly advised the claimant to put her health first and suggested (later in the conversation at page 443) taking some time off once she returns from her business trip to Barcelona.

123. The Tribunal was not shown the business plan. That said, the Tribunal accepts that GH did prepare one and that he was genuinely concerned for the future of the business.

124. On the evening of 23 September 2022 there was a party to celebrate the second anniversary of the first respondent. This was attended by Mrs Dalloway. She had travelled up to Leeds from her home in Sussex the day before (22 September). She says that she was told by the claimant that there had been a meeting that day (22 September) at which GH and Mrs Betteridge had told her that the business wasn't doing well. This was a reference to the meeting in the office kitchen that day. Mrs Dalloway says that the claimant went into her home office to attend a Teams meeting with GH on the morning of 23 September. This is corroborative of the claimant's account of the events of 22 and 23 September.

125. Mrs Dalloway says that GH's demeanour towards her (Mrs Dalloway) at the party was quite different to that on previous occasions. Whereas before GH would chat to her, this time he simply said hello, *"fist bumped everyone"* and was off. She detected GH standing apart from the claimant and that GH's body language was different. She observed that GH appeared very despondent.

126. Under questioning from Mr Howarth, Mrs Dalloway said that the claimant had informed her of GH's advances. She said that these had been rejected but *"they'd left on good terms. She felt out on her own then."* Mrs Dalloway says that she was informed of this by the claimant upon her return from Barcelona. While corroborative of the claimant's account that an advance had been made upon her by GH, the Tribunal gives Mrs Dalloway's evidence about this aspect of matters little weight. It is surprising that this was not in either the claimant's or Mrs Dalloway's witness statements. It is certainly not as persuasive as the features highlighted earlier.

127. GH accepted in cross examination that he was not as friendly and chatty as he had been at the previous years' party. He attributed this to being under a lot more stress and that he *"didn't want to go round hugging people".* From this, we accept Mrs Dalloway's account that there was a difference in GH's demeanour than there had been at the previous years' event.

128. GH was coy when Mr Harris asked him the cost of the Kapia anniversary party. This may be contrasted with his criticism of the expenditure incurred by the claimant for her birthday meal. The claimant had in fact checked with Mrs Betteridge during the meal that the first respondent would pay some of the cost (page 492). GH was critical of the claimant for incurring a cost of £690 on this event.

129. In seeking to explore the urgency of matters in September 2022 necessitating the meeting of 16 September 2022 without the claimant, Mr Harris took GH to the revenue analysis at page 953. This does show significantly reduced revenue in September 2022 when compared with July and August of that year. However, the revenue received in September 2022 was nonetheless higher than achieved in March and April 2022 at which point no action had been taken against the claimant. In answer, GH directed the Tribunal to the management accounts at page 933 to 998 of the bundle. He drew attention to significantly increased office related costs in September 2022 when compared with March and April of that year and likewise significantly increased staff training costs in those months. Salary costs also showed a significant increase.

130. The Tribunal expressed reservations about analysing management accounts and financial trends. No forensic accountancy expert evidence was placed before the Tribunal by either party. That being said, GH was correct to show an increased overhead in September 2022 in comparison with March and April 2022. While receipts in September 2022 were higher than in March and April 2022, the overhead was likewise higher leading to GH's perception of a financial crisis. The Tribunal can accept that GH had well-founded concerns.

131. The difficulty with this, of course, from the respondents' perspective is that the decisions to increase overhead (by taking up a lease in more expensive premises and increasing headcount) was not a decision taken by the claimant alone. The decisions were taken jointly. There was therefore no basis for GH to blame the claimant for the predicament in which the first respondent found itself. This was a shared responsibility.

132. On 25 September 2022 the claimant attended a 'Feed Info' conference in Barcelona. She was accompanied by Will McCue.

133. The claimant sent a message to GH on 26 September from Barcelona. GH agreed to a catch-up meeting. The claimant apologised for having *"been stressed and I am sorry for being a burden business wise. I just get confused when you don't speak to me then when you do its panic stations and I have to make decisions quickly. I think all the stuff at home has finally hit me and then last Thursday as you were you it was overflow*." [This was a reference to the meeting in the kitchen on 23 September 2022]. The claimant went on to say, *"It's meant to be my wedding anniversary today so that hasn't helped. I'm trying to fix as much as possible a quickly as I can."* We refer to page 449.

134. GH did not reply to the messages in page 449. In evidence given under cross-examination, he said that "*The last thing I wanted was more emotional stuff."* The claimant also messaged Mrs Betteridge that day (page 448). She suggested that the claimant and GH talk through things "*as everyone is feeling pressure at the moment."* This is corroborative of Mrs Betteridge's position that she was becoming uncomfortable in having to mediate between GH and the claimant.

135. At 17.26 on 26 September 2022 GH emailed members of staff. This is at page 446. GH set out his expectations. A number of individuals were assigned the responsibility for generating sales. One of these was the claimant. This was accompanied by a blanket KPI structure to be monitored and managed by Mrs Betteridge. GH directed how to undertake the assigned tasks.

136. The same day, there were exchanges between the claimant and Mrs Betteridge about the prospect of reducing salary and dividends. The claimant was not unwilling to do this but had to consider her position as her wife was, it seems, not making any financial contribution. The claimant did agree to a reduction in salary from £80,000 to £50,000 per year (page 453).

137. The management role at this point to be carried out by Mrs Betteridge is one which the claimant had hitherto undertaken. The assignment of that responsibility to the claimant followed the division of labour agreed upon in July 2021 to which we referred earlier.

138. On 27 September 2022, an office administrator was dismissed. GH says that the claimant was consulted about this. The claimant contends that she was not. It is, frankly, surprising that the respondents could not produce so much as a short and straightforward email exchange between the claimant and GH agreeing to

the office administrator's dismissal. In the absence of such corroborative evidence, the Tribunal accepts the claimant's case that there was no consultation with her about this dismissal.

139. The claimant returned to work from the Barcelona business trip on 29 September 2022. That day, she had a meeting with Andrew Hawkins. Mr Hawkins suggested that it may be in the claimant's interest to take some time off. Mrs Betteridge then organised a meeting with GH to discuss this proposal. GH agreed to the claimant taking time off. The claimant said that in paragraph 45 of her witness statement that she found him to be *"less empathetic than usual".*

140. The claimant and Miss Pinks exchanged WhatsApp messages at around this time. Miss Pinks asked the claimant *"what happened with Goran"* the previous day (that being 29 September 2022). The claimant said, *"we just agreed that I needed some time off."* (We refer to the messages at pages 455 to 460).

141. The Tribunal accepts that GH was not as empathetic as before. This would be in keeping with his demeanour at the second anniversary party held earlier that month and his general attitude towards the claimant after 3 September 2022. Against that, to his credit GH did recognise that the claimant needed time off and heeded Mr Hawkins' advice.

142. On 30 September 2022, during her absence, Mr Sankey, GH and Mrs Betteridge held a budget meeting. Mr Sankey emailed GH and Mrs Betteridge the same day attaching a budget for the year ending 30 September 2023. The claimant was copied into the email.

The events of October 2022

143. On 1 October 2022, the claimant sent a message to Mrs Betteridge that she was not going to be able to attend a charity event *"on Friday".* (1 October 2022 was a Saturday so we infer from this that the charity event was going to take place on Friday 7 October). The claimant explained that "*it's just best to have as much time to myself ATM."* This proposal was met with no resistance from Mrs Betteridge who continued to be supportive of the claimant.

144. Against this background, it is difficult to understand the claimant's complaint about being excluded from the budget meeting of 30 September 2022. She had adopted Mr Hawkins' suggestion of taking time off in the interests of her mental health. She had announced that she was going to be off for a few weeks. She told Mrs Betteridge on 1 October 2022 that it was better for her to have time to herself. The business had, of course to run in her absence. Responsibility for that fell to GH. The claimant was not excluded altogether in any case. Mr Sankey had copied her into the budget proposal on the day of the budget meeting.

145. On 3 October 2022 Mrs Betteridge asked the claimant for a copy of the 'Sourcebreaker' contract. The claimant located it on her work laptop and sent it to her. Mrs Betteridge also requested some information about business expenses incurred during the Otley Run (page 471 and 474 to 476).

146. The claimant complains in paragraph 53 of her witness statement that she was being disturbed by these requests and the respondents were not affording her the time off which she needed. Again, this appears to undermine the merit of the claimant's complaint about being shut out of the budget meeting of 30 September 2022. It is understandable that subjectively the claimant was getting mixed messages. On the one hand, her absence was supported by Mr Hawkins, GH

and Mrs Betteridge. On the other, she was being asked for information from them. The Tribunal makes no criticism of the respondents about this aspect of matters. As we have said, the business needed to carry on in the claimant's absence. There was no medical advice given by the claimant to the respondents to the effect that contact was medically contra-indicated. In a small business, it is inevitable that requests for information of this kind will crop up.

147. The claimant nonetheless subjectively felt some pressure to contribute towards the business and on 6 October 2022 she attended two retainer pitches. Evidence of this is at paragraphs 477 and 478.

148. On 7 October 2022 Mrs Betteridge asked the claimant for a copy of the shareholders' agreement. The purported reason for this was to send it to a finance company.

149. The claimant suspected an ulterior motive on the part of GH following his requests for the Sourcebreaker agreement and the shareholders' agreement. The Tribunal accepts that GH had a benign explanation for asking for a copy of the Sourcebreaker agreement. He was wanting to see if the first respondent could escape the obligations under it. It is accepted by the claimant that the contract was not a success and that it was she who had sourced Sourcebreaker (albeit that she contends she did so with the knowledge and approval of GH). When taken to this issue in cross-examination GH said that the decision to go with Sourcebreaker was one taken by the claimant alone. GH said that he thought the services provided by Sourcebreaker were *"useless".* However, he made no complaint about this before the end of October 2022. Mr Harris suggested to him that this was a complaint made with the benefit of hindsight.

150. The Tribunal accepts GH's account that the decision to go with Sourcebreaker was one for the claimant alone. It fell squarely within the remit of operations assigned to her in July 2021. It was not denied by the claimant that Sourcebreaker had not been a great success. There is therefore merit in GH's complaint that it became a redundant cost.

151. It is, however, significant in our judgment that GH raised no concerns about this before September 2022 notwithstanding his protestation now that he thought the system to be useless all along. In our judgment, this is no coincidence of timing and prior to the beginning of September 2022 GH had been prepared simply to accept and absorb the Sourcebreaker costs as a price of doing business. As he candidly and fairly accepts in paragraph 25 of his witness statement, he too has made his *"fair share of mistakes which have had a negative impact on the respondent company".* In those circumstances, criticism of the claimant for the failed Sourcebreaker contract is unfair, unjustified, and is consistent with an attempt by GH to garner evidence after 3 September 2022 to try to justify the claimant's dismissal.

152. The Tribunal is rather more sanguine about the request for a copy of the shareholders' agreement. It may be a surprising request to have made of the claimant as presumably GH has in his possession one of the counterparts. However, it was not suggested to GH by Mr Harris that there was anything sinister in the request for a copy of the shareholder agreement.

153. On 16 October 2022, a dividend payment was made to GH in the sum of £5,000. The bank statement entry showing this is at page 962. This appears to have been the first of a series of dividend payments to GH during the last quarter of

2022. It is not necessary to detail them all. GH's account is that the dividend payments were by way of reimbursement of a director's loan. GH made a loan to the first respondent of £39,000 in September 2022.

154. Directors' loans and the repayment of them is a matter of company law. The Tribunal received no submissions from counsel as to the legality or otherwise of a director's loan being repaid through dividends. Whatever the rights and wrongs (and we express no opinion either way) the Tribunal accepts that the dividend payments were meant to be by way of reimbursement of GH's loan to the first respondent.

155. 23 October 2022 was the claimant's birthday. GH accepts that he did not send her a birthday message. It was suggested to him by Mr Harris that this was surprising given that just two months earlier the claimant and GH had been planning a birthday celebration in Florida. When it was suggested to him that he had not wished the claimant happy birthday he replied, "*absolutely not".* (in other words, he accepted that he had not passed on a birthday wish and was unrepentant about not doing so). His explanation for this was that by October 2022 only £16,000 remained in the first respondent's bank account.

156. At page 1061, we can see that $120,000 had been received from Somalogic Operating Co Inc, which was then moved, it seems, to the first respondent's sterling account. The receipt was on 17 October 2022. The Tribunal does have to be wary, as we have said, about interpreting bank statements and accounting information in the absence of expert evidence. The Tribunal is not qualified to conduct a forensic accounting exercise. There is some complexity with the first respondent's bank accounts which hold different currencies.

157. Nonetheless, it does appear as if a significant injection of cash was received from the company in the United States at around the time that GH was concerned about low reserves. The was from the account that GH was seeking to solicit in July 2021 (according to paragraph 23 of his witness statement). We also note that a payment of over $128,000 was received from Somalogic the next month.

158. Even if the first respondent was in penury, it was in our judgment somewhat heartless of GH not to take the simple step of sending the claimant a message of birthday good wishes. The contrast between him seeking to organise a trip to Florida for her birthday and him snubbing her in this way on her birthday on 23 October 2022 could not be greater.

159. The events from 17 October 2022 to the end of that month are compressed and overlapping. On 24 October 2022 the claimant sent a WhatsApp message to GH. She said, *"Did you want to speak at all. I haven't heard from you since I sent that email."* The email being referred to here is one from the claimant to GH at page 485 dated 19 October 2022. This was sent against a backdrop of the claimant's perception that following her return to work on 17 October 2022 after the leave of absence agreed on 29 September 2022, GH had been ignoring her. She says in paragraph 58 of her witness statement that he did not greet her on her arrival back and ignored her. She goes on to say that a meeting was held later the same day (17 October 2022) at which he had said that the claimant had left him in the lurch by taking a leave of absence and that he had been looking into her performance. The suggestion was made that the first respondent's perilous financial position was attributable to her performance.

160. The claimant said in the email of 19 October 2022 that she thanked GH *"for being there for me and stepping up when I wasn't fully there. I admit to the fact I haven't been mentally present and know full well how much you had stepped up in that absence. I am inordinately grateful for this as if you hadn't, I'm not sure where the business would be now."* She then accepted that things had got worse for her *"leading up to the party".* She felt that events were getting out of control and that her wife "*had become more hostile".* She acknowledged that work had become a respite and a place of safety for her *"and then suddenly it wasn't."* She then referred to the discussion of Thursday 22 September 2022. She acknowledged that working from home (the next day, 23 September) was inconvenient, but this was required as she was taking her dog to the vets. She recounted how she attempted to arrange a Teams meeting and had sat and waited for 40 minutes but no one joined. She acknowledged that she had to be selfish for her own mental well-being and take time out of the business. She then says that she *"cannot deal with the current situation we are in. I appreciate you may not want to be my friend right now but regarding business this situation is not working. The sheer lack of communication and cut off."* The claimant was asking for a conversation as to how move matters on.

161. The Tribunal notes the reference in the email of 19 October 2022 to *"the party".* There was no suggestion that this was anything other than the one at GH's house on 2 and 3 September 2022. Plainly, the claimant was attaching significance to what had happened that day and the change in GH as a consequence.

162. Returning to the WhatsApp message of 24 October 2022, the claimant had heard nothing from GH. He replied that he had *"been very busy."* She asked if they could sit down. He replied, *"I really don't have time for that."* He went on to say, *"I'm not ignoring you – I really don't have time for catch ups. I'm trying to bring in money and we're under target."* The claimant protested that she and GH were business partners and that he makes time for others. GH replied, *"yes to do with business – money and finance. I'm stressed and desperate to make sure we hit target – I have been actively recruiting to make sure the guys are aware I am with them."* Upon the basis of these messages, we accept the claimant's account in paragraph 159 that GH blanked the claimant on her return to work. A meeting did take place on 27 October 2022.

163. GH replied to the claimant's email of 19 October 2022 on 30 October 2022 (page 501). He apologised to the delay in replying. In the meantime, the meeting had taken place on 27 October. GH thanked the claimant in his email of 30 October 2022 for her honesty in the 27 October meeting and her acknowledgement that she had removed herself from the first respondent during the crisis that had arisen the previous month. GH said that it was *"an incredibly difficult time for me and the management team. However, we have pulled together to get things back on track."* He acknowledged that on 27 October 2022 the claimant had recognised that she had effectively been absent from the business and ineffective. He said that he wished for there to be no animosity and for matters to be as amicable as possible. GH, in his *'PS'* to the email, requested the claimant not to involve Mrs Betteridge or other employees of the first respondent in matters.

164. The claimant had in fact met with Mrs Betteridge on 24 October 2022. This was an impromptu meeting at which the claimant voiced her concerns about having had no communication from GH since returning to work on 17 October 2022. She complained that GH had not replied to the email of 19 October 2022 and that he was not finding time to meet with her. (He did not meet with her until 27 October).

The claimant complained that she was feeling excluded and not integrated and that if the impasse remained, she could not continue with the business partnership. Mrs Betteridge expressed awkwardness at being caught in the middle. She informed the claimant that she would log the meeting and place a record of the meeting notes on her employee file.

165. On 24 October 2022 GH sent a text message to Mr Rodwell. The subsequent exchanges are at pages 1 to 7 of the supplementary bundle. GH asked whether, Mr Rodwell was able to meet him *"confidentially."* The context of this is in paragraph 33 of GH's witness statement. (Chronologically, this part of his witness statement deals with the events at the end of October 2022). He says that *"By this point my stress was at its peak and I had reached breaking point by this point and could no longer carry the weight of the business as well as the ongoing issues with the claimant. My responsibility was to the business and its core workers. I decided we needed to agree a shareholder removal of [the claimant] as a director [for] the survival of the business. My decision was a difficult one and I was unsure what to do. I knew that I could no longer work with her, but I also knew that I could not leave the business in her care for all of the reasons I have mentioned. I decided I needed to have an honest discussion and called a meeting on 28 October 2022".*

166. From the text messages between Mr Rodwell and GH, it does appear that the suggestion of moving matters on by having a *"frank chat"* with the claimant emerged from Mr Rodwell. Mr Harris put it to GH that in October 2022 he had decided that he wanted the claimant out of the business. GH very fairly and candidly answered in the affirmative.

167. GH duly arranged another meeting with the claimant for 28 October 2022. Perhaps surprisingly given the importance of the meeting, there are no minutes of it. However, there is contemporaneous evidence of what was discussed as the claimant emailed Mrs Betteridge and GH on 28 October 2022 (page 500). She records that GH *"expressed his opinion that he feels he can no longer continue the working relationship."* She also recorded that GH had suggested that the claimant resign as a director. She acknowledged that she had become visibly upset given that there was *"no indication that I had reason to be concerned about my position within the business."* GH then told her that absent her resignation a vote amongst the shareholders will be taken *"against my directorship."*

168. GH replied around a quarter of an hour later (page 499). He asked the claimant to refrain from involving Mrs Betteridge "*as this is a legal matter not HR."* He said, *"just to be clear, in no way was your leave orchestrated and the evidence against your obligations and duties as a director and shareholder over the last eight months is proof enough of an unsatisfactory performance."* The claimant replied to this later the same day (also at page 499). She said that she would continue to involve Mrs Betteridge in the emails as the first respondent's most senior HR professional. She protested (with justification) the allegation of sub-standard performance that, *"At no point during this eight months have you raised a single issue regarding my performance nor has any other employee to me directly. On that basis please can you provide any evidence against my obligations and duties as a director and shareholder so that I can refer to this when I seek legal advice."*

169. On 31 October 2022, GH emailed the claimant (pages 504 to 506). This appears to have been prompted by a receipt from him of an invoice for sponsorship of the Wetherby Ladies Rugby Union Football Club for whom the claimant plays. The first respondent had agreed to sponsor the club's shirts. The invoice is at page 507 and is in the sum of £600. GH raised several other issues:

    169.1. Spending £690 for the claimant's birthday meal.

    169.2. Concerns around the Sourcebreaker contract.

    169.3. Issues around the corporation tax bill. GH said that a conversation took place between him, the claimant and Mrs Betteridge about this on 31 May 2022. (This is a different date than that given by GH in evidence in these proceedings of a meeting taking place on 4 July 2022. This further undermines the credibility of GH's account that a performance meeting took place that day).

    169.4. Disregarding an instruction from GH to ask Mr Chalkley and Adam Bakali to split the payment of their management bonus.

    169.5. Frolicking at the Kapia second anniversary party.

    169.6. Taking two weeks' leave of absence in the early part of October 2022 which, said GH, was "*not medically signed off might I add".*

    169.7. Attending a 'business' trip (*sic*) to Barcelona with Mr McHugh at a cost of £10,000 which produced no leads. (There is a curiosity here as Mrs Hawkins drew GH's attention to the rugby club invoice at 08.45 on 31 October 2022. Thirteen minutes later GH emailed the claimant about this, expanding matters to encompass the above issues. It is difficult to see how such a lengthy and detailed email could have been prepared in just 13 minutes. The probability is, we find, that this was prepared in advance, in response to the claimant's invitation in hers of 28 October 2022 to detail areas of poor performance. This leads us to accept the claimant's evidence in paragraph 159 that GH had investigated the claimant's performance during her leave of absence and was seeking to lay fault with her for the position in which the parties found themselves).

170. It is, we think, right to observe that the list of performance concerns in the email of 31 October 2022 differs from that set out in paragraph 24 of GH's witness statement. Omitted from the email of 31 October 2022 were issues around the claimant's temper, occupying time by bringing personal issues into the office, instigating arguments and being antagonistic within the office, the issues around the lease of the new premises, lack of support for staff, improper delegation of some of her duties to Mrs Betteridge, not conducting proper monthly reviews with members of staff, and bringing her dog into the office (prior to the move to the new premises where animals are banned). We agree with the claimant's suggestion (through Mr Harris) that this was GH attempting to shore up in his witness statement weak grounds of complaint against the claimant raised contemporaneously.

The events of November 2022

171. On 1 November 2022, the claimant messaged GH. She protested that she could not understand why they could not work matters out. GH was unresponsive. The claimant continued to work from home at this point.

172. Mrs Betteridge got married on 5 November 2022. The claimant says that she attended the wedding but was ignored by GH. Mrs Betteridge had seated GH and the claimant at the same table but on opposite sides to be away from one another. Unsurprisingly, the claimant felt uncomfortable and left straight after the wedding breakfast. GH makes no mention of Mrs Betteridge's wedding in his witness statement. We have no record of him being cross-examined about this by Mr Harris. That said, it is entirely credible that GH and the claimant would have felt uncomfortable at the wedding given that their relationship had now gone past breaking point.

173. On 6 November 2022 GH emailed the claimant requesting a meeting at 8am on 7 November. (6 November was Sunday, Mrs Betteridge's wedding having taken place on the Saturday). The claimant says that she had felt ambushed on 28 October 2022 and therefore requested GH to provide her with an agenda. The relevant correspondence is at page 518.

174. On 7 November 2022 at 7.45am, GH emailed the claimant (at pages 519 and 520) to express concern that he had been informed *"by several members of staff that you have continued to bring your personal issues into work."* He mentioned the claimant having been overheard on 21 October 2022 discussing matters loudly with her wife's solicitor. He then said, *"On multiple occasions you have dragged myself and Lis out of the office for not just a few minutes but for closer to two hours at a time to discuss personal problems. Both myself and Lis asked you kindly five months ago to keep these problems away from the workplace."* There is no evidence that the claimant was asked to desist availing herself of the support of GH and Mrs Betteridge until after 3 September 2022.

175. On 9 November 2022 GH emailed the claimant requesting a general meeting of shareholders to approve a resolution removing her as a director. This notice was placed in an envelope left upon the claimant's desk. GH accepted that this was in full view of all. However, the Tribunal is not satisfied that this was done with malicious intent. After all, the envelope was sealed. There is no evidence that others had any inkling as to the contents of the envelope.

176. Twenty-eight days' notice of the resolution for the removal of the claimant as a director of the first respondent needed to be given. On 8 November 2022 GH sent a text to Mr Rodwell. He said he had spoken to *"Richard"* (that is, Mr Newstead) and that he (Mr Newstead) had prepared the necessary documentation which would be sent to him and Mr Chippendale by Mrs Betteridge. GH was requesting their signature and, as he put it, *"it's 28 days from there."* Plainly, GH had got Mr Rodwell and Mr Chippendale on-side. The vulnerability apprehended by the claimant in paragraph 17 of her witness statement and recorded in paragraph above 55 was about to come to pass.

177. The claimant's evidence (in paragraph 79 of her witness statement) is that on 14 November 2022 she approached GH and asked him "*Why are you doing this."* The claimant's account is that GH replied, *"you are the victim and you always play the victim."* In cross-examination, GH accepted that he had said this to her. Her account on this issue is thus accepted.

178. There was then recruitment of another employee that day without the claimant's input. The claimant sent a WhatsApp message to GH and others on 14 November 2022 enquiring as to whether a pipeline meeting was to be held. We can see from page 532 that the claimant's message was ignored.

179. Mr Chalkley in fact organised the pipeline meeting. On 1 December 2022, Mr Chalkley circulated the team asking for information from them. This is at page 558. This is something within the claimant's domain following the division of responsibility in July 2021. Mr Chalkley denied, in cross-examination, that the claimant was being excluded. He said, *"We were a small company, she was out of her depth, someone had to take ownership, exclusion is a strong word."* Mr Chalkley accepted that the claimant's request for pipeline information made of him on 17 November 2022 was a reasonable request. This is at pages 539 and 540. Even then, it appears that, after she was compelled to chase him, he did not provide full information. We can see this by contrasting pages 539 and 540 with page 1156. Mr Chalkley confessed that, *"I should take better notes."*

180. Mr Chalkley fairly accepted that the Sourcebreaker system looked good on the demonstration. This corroborates the Tribunal's finding that the criticism by GH of the claimant around Sourcebreaker was made with hindsight and is unwarranted.

181. In our judgment, the reality is that by the end of October and early November 2022, the die was cast. GH had effectively delegated away the claimant's role to Mrs Betteridge and Mr Chalkley. Despite her efforts to involve herself in mid-November 2022 around the pipeline, by then she was effectively out of the business to all intents and purposes barring the formality of termination as illustrated by the grudging way in which the pipeline information was given to her.

182. On 15 November 2022, the claimant submitted a formal grievance. The covering email is at page 573. The grievance itself is at pages 761 to 772.

183. The claimant referred to the incident arising out of GH's homophobic comment in 2021. This is on the fourth paragraph at page 761. (It is upon this basis that the respondent's concede the claimant's grievance to be a protected act. This was a concession properly made as on any view the claimant was raising a complaint against GH of harassment related to sexual orientation).

184. In her grievance, the claimant attributes GH's change towards her *"as a result of being aware in more detail of the respondent's financial situation in September and taking advantage of my absence in the office."* The Tribunal notes that the claimant does not attribute the change in approach to what happened on 3 September 2022. This is consistent with the claimant's case that after discussing the matter with Miss Pinks, a decision was taken by her not to pursue matters. (Of course, she did raise the issue in the letter of 9 December 2022 to which we will come. We agree with Mr Clement there is something of a tension in the claimant's approach to this issue, in not raising in November but doing so in December).

185. The claimant then lists the 13 allegations in GH's email of 31 October 2022. In our judgment, the claimant raises meritorious defences in answer to each. We should observe that it is perhaps unfortunate that her attachments by way of supporting evidence are not with the grievance itself but are dispersed though the bundle. This has not made the Tribunal's task any easier. Dealing with each issue in turn as set out in her grievance:

    185.1. Upon the basis of the evidence as seen by the Tribunal and which is the basis of the claimant's rebuttal in her grievance, we agree that the contention that the claimant neglected to deal with the corporation tax issue is unmeritorious.

185.2. The claimant was able to work out that the cost of the trip to Barcelona was not £10,000 as alleged by GH but was in fact £7,606. The claimant compared the cost of this trip with those undertaken by GH. The breakdown is in the email at pages 523 and 524 corroborating the claimant's account. The claimant suggested that *"£5,224 of this [spend on Barcelona] was met from a sponsorship."* It is not clear to the Tribunal the source of that information or what if any return was generated by the Barcelona trip. Nonetheless, the Tribunal considers that the claimant has made a valid point about the business returns from her trips which compare favourably with those of GH.

185.3. The third allegation was about the rugby club sponsorship. No issue was raised about this until after 3 September 2022. The claimant also compares this with GH's decision to sponsor a ski and snow university team.

185.4. The fourth issue was the allegation that the claimant had involved the first respondent's HR in the issues between them. The claimant replied that she has such a right. There is merit in the claimant's case. Mrs Betteridge, the HR function within the first respondent, should be available for all to utilise.

185.5. The next issue is Sourcebreaker. The claimant defended her decision to buy in this package. She noted that GH had not been present for much of the training in the Sourcebreaker software.

185.6. The claimant drew support of her position upon the issue of Mr Chalkley and Mr Bakali's bonus by reference to an email of 23 September 2022 containing GH's instruction (page 439). She pointed out that this was sent two-and-a-half hours before a large event and was sent to both her and Mrs Betteridge. There was therefore no clear basis upon which to say that this was the responsibility of the claimant, much less that she had disregarded GH's instruction. There is merit in the claimant's position. Indeed, the email says that *"someone needs to have a conversation with Adam [Bakali] and Oliver [Chalkley] about this month's bonus as well prior to payday"*- [emphasis added].

185.7. The claimant rebutted the allegation that she had been frolicking at the Kapia second anniversary party. She in fact noted that the cost of the party was £2,554 which was more than three times the amount spent on her birthday party. She says that she was not drinking as she was driving her and her mother home. This is in fact corroborated by Mrs Dalloway.

185.8. The next allegation is that the claimant took two weeks' leave of absence unsupported by medical need. The claimant said, with justification, that it had been agreed by all that she would benefit from some time out of the business at the suggestion of Mr Hawkins.

185.9. The ninth issue concerns the claimant's birthday. The claimant said that there was nothing out of the ordinary in spending £46 per head on such an event. She said that GH had not alerted her to the fact that the booking should not go ahead.

185.10. The next issue concerns not attempting to convert leads from the Feed Info event. The claimant defended her position upon the basis that she has made four pitches, all for businesses which came from that event.

Two of those in fact took place during the claimant's leave of absence in early October 2022. The claimant added that she was not consulted about the dismissal of Mr McHugh, who had accompanied her to Barcelona.

185.11. Next is an allegation that she was underperforming in role. She said that never before had GH or she reported into one another or agreed set KPIs. However, GH did just that on 1 November 2022 (page 513). He said*, "As we now have KPI's set in place to monitor palpable recruitment activities myself and the management team have seen that there has been no activity recorded in your LinkedIn Recruiter, Vincere, whiteboard or 3CX. As we're repairing the quality of work and steering the company away from 'lazy' culture we're being proactive on all accounts. Do you have detail of the work you've done over the last two weeks?"* The claimant said that this coincided with GH seeking to oust her from the business. There is, we think, much merit in the claimant's point. She returned to work on 17 October 2022. GH's request of 1 November 2022 therefore covered the two weeks following her return from absence. There was no evidence that the claimant was accountable to him in this way, certainly not before the email of 26 September 2022 at page 446. Even then, no like request had been made of the claimant after the latter date. This may be regarded as an oppressive request.

185.12. The next allegation is that the claimant continued to discuss personal issues in work with him and Mrs Betteridge after being requested not to do so. The claimant pointed out that she had in fact acknowledged the impact of discussing issues within the office in a WhatsApp exchange between her and GH on 11 August 2022. This is at page 344. She observed that there was no complaint from Mrs Betteridge that she was occupying disproportionate amounts of her time. She also drew attention to the fact that GH had in fact been openly encouraging her to open up and talk.

185.13. The final issue concerns the allegation that GH spoke to the claimant about her performance on 31 May 2022. There is again merit in the claimant's point that she has no record of any such meeting having taken place.

186. In conclusion, therefore, the Tribunal is satisfied that the claimant had a defensible position in relation to each of the thirteen allegations raised against her by GH in his email of 31 October 2022. There were deficiencies in the claimant's performance. She has never shied away from that and has always acknowledged it. The claimant plainly felt deeply enough about the business to have taken a considerable amount of time and care in putting forward her grievance. Respectfully, it is very well written and supported by corroborative evidence.

187. The claimant may have subjectively considered the position to be remedial at this stage. As we have seen, she did make overtures to GH in the WhatsApp message of 1 November 2022 to see if things could be worked out. Objectively, in the Tribunal's judgment, the situation by this stage was hopeless. GH had clearly determined in October 2022 that he wanted the claimant removed from the business and had obtained the support of Mr Rodwell and Mr Chippendale in this direction.

188. On 16 November 2022, Mrs Betteridge emailed the claimant (page 571) to say that the grievance would not be dealt with as an employee grievance. She informed the claimant that "*as you are a director shareholder in the business the forum to discuss these points is direct with the other shareholders."*

189. Mrs Betteridge said when giving evidence that this email had been sent on the advice of Mr Newstead. The Tribunal warned Mrs Betteridge that she need not give evidence about the advice given as such was protected by legal advice privilege. Mrs Betteridge was released from her oath by the Tribunal to enable her to discuss the issue with Mr Clement and the respondent's solicitor Miss Roberts who was in attendance. On the resumption, Mr Clement informed the Tribunal that he had instructions to waive legal advice privilege.

190. The Tribunal was then presented with a timesheet recording that the meeting between the respondents and their solicitor had been held on 16 November 2022 and had lasted an hour-and -a-half. The Tribunal was told that there was no note of the meeting. This was somewhat surprising. Miss Roberts was not called to give evidence about the meeting at which she was present.

191. On 30 November 2022, the claimant was paid her wages. She noted that these had been described as dividend payments as opposed to wages. The claimant raised this issue as a concern with Mrs Betteridge on 30 November 2022 (page 552).

192. In evidence, Mrs Betteridge explained that when processing banking transactions, the system will automatically pick up the last entry in favour of the payee. We can see that a dividend payment of £3,430 was made to the claimant and GH on 30 November 2022. Subsequent entries (of the same day) in favour of the claimant and GH refer to dividends in the sum of £736.67. This is of course the amount payable by way of wages. The claimant righty pointed out that the payments made to others on the same date correctly describe their remittances as wages.

193. The Tribunal is satisfied with Mrs Betteridge's explanation. This was simply an error attributable to the banking App being operated by her when she processed the wages.

The events in December 2022 and the termination of the claimant's directorship

194. On 6 December 2022 the claimant received an email about the shareholders' meeting to be held on 22 December for a resolution to be passed for her removal as a director of the first respondent. The resolution may be found from pages 1168 of the bundle. These were signed on 5 December 2022 by Mr Chippendale and Mr Rodwell approving the resolution for the removal of the claimant as a director of the first respondent with immediate effect.

195. Notwithstanding the difficult position she was in, the claimant took part in the managers' reviews undertaken on 6 December 2022. She explains in paragraph 95 of her witness statement that she felt it *"imperative I was in attendance for those to establish from the managers directly if there were any concerns over both myself and Goran's management. There were none."* She says that during these meetings GH ignored her. Towards the end of the working day, GH suggested that the claimant work from home (page 565). Accordingly, her evidence of being ignored is credible given the circumstances. Her account is accepted.GH had for some time made his intentions clear that he wished the claimant out of the business.

196. Having taken the defensive step of attending management reviews on 6 December 2022, the claimant then took a period of self-certified sick leave from 7 December 2022. She replied to GH's email of 6 December 2022 (at page 565 about the shareholders' meeting scheduled for 22 December 2022) by way of detailed written representations sent on 9 December 2022. Mrs Betteridge told her on 18 December 2022 that *"As a director shareholder in the business it is not necessary to provide a sick note"* (page 570).

197. The representations were effectively a second grievance raised by the claimant. These was sent under cover of the claimant's email of 9 December 2022 (pages 562 to 564). The claimant said (in her email at page 563) that she did not wish to leave the first respondent *"in the slightest, yet you seem determined to oust me from my own company."* She observed that *"I am a director and majority shareholder and am entitled to work from home whenever I please."* She went on to say that *"If removed as a director or employee I will continue to be a majority shareholder."*

198. GH replied on 12 December 2022 (page 561). He rebutted any suggestion from the claimant that they were employees. He referred to the shareholders' unfettered right to remove a director by ordinary resolution and the ability of shareholders to call a general meeting with 28 days' notice. (In fact, the claimant had been given notice of the general meeting on 9 November 2022 and therefore had had more than 28 days' notice of the meeting which was held on 22 December 2022).

199. The second grievance is at pages 778 to 794. Pages 778 to 790 is in fact simply a duplicate of the first grievance. The claimant then explains the impact of GH's actions upon her. She then says this at pages 792 and 793:

> "*The only explanation I can provide for the extreme change in Goran's behaviour towards me relates to the events of a work night out on 2 September 2022. Prior to this date I was feeling vulnerable, going through a divorce and Goran was emotionally supporting me. We had discussed our relationship prior to this point and decided that being business partners and friends was the way to keep things. I had been invited and agreed to stay at Goran's house as it was easier to stay there as the social was in Leeds. We went out and nearly all employees were invited back to Goran's house to have food and drinks afterwards. At this event drugs (cocaine) was being taken (not by myself) and Goran continued to stay up with … two current employees of Kapia Partners. I went to bed at around 1.30am. Goran came upstairs at around 5.30am and tried to hug me from behind, I shrugged him off as he was intoxicated and seemed also to be exhibiting behaviours of someone on drugs. He continued to try and hug me and touch my boobs. He asked what was wrong and I said I was "too hot and didn't want him on me" to which he was visibly frustrated about. I then went to sleep. The next morning he expressed that he liked me. I told him it was not a good idea to continue like this but primarily the drugs and alcohol was my biggest concern. Goran continued over the coming few weeks to communicate with me regarding business and personal matters about [my wife] but this dwindled until the point whereby I had to take time off. I believe my rejection of him was the catalyst to his behaviour towards me and that if I had accepted his advances, I would not be in the same circumstances that I find myself in today."*

200. The claimant then referred to the relevant provisions of the Equality Act 2010. She referred to harassment related to a protected characteristic, sexual harassment, and less favourable treatment because of the rejection of conduct of a sexual nature.

201. The minutes of the general meeting of the first respondent held on 22 December 2022 are at pages 795 and 796. Neither Mr Rodwell nor Mr Chippendale were present. They each gave GH their proxy. There is reference to GH reading the statement received from the claimant in relation to the resolution to remove her from her office. He also noted that claimant's written statement in pages 778 to 794 had been sent to Mr Rodwell and Mr Chippendale, but it is recorded that neither of them had any comments or points to make. The resolution was therefore passed.

202. On 30 December 2022 the claimant was paid her final salary. She has received no dividend payments since. The Tribunal accepts that no dividends have been declared by the first respondent after that date in any case. There was no evidence that GH has received any dividends after 1 January 2023 from the first respondent. At any rate, the Tribunal was not taken to any such record.

203. On 5 January 2023, Mrs Betteridge asked the claimant to make arrangements for the return of the first respondent's property (page 579). The claimant then received the letter from the first respondent's solicitor of 9 January 2023 regarding her post-termination obligations to which reference has already been made. This letter is at pages 798 to 800 of the bundle.

204. This concludes are findings of fact.

The issues in the case

205. The issues to be decided are set out in the annex to the Order of Employment Judge Cox dated 19 September 2023. This is at pages 134 to 136 of the bundle. For convenience, it is now set out as it appears in her Order:

ANNEX: LIST OF ISSUES

<u>Unfair and wrongful dismissal</u>

Was the Claimant an employee of R1 [the first respondent] within the definition in Section 230(1) of the Employment Rights Act 1996?

If the Claimant was an employee, the First Respondent concedes that it unfairly and wrongfully dismissed her on 22 December 2022. The agreed length of her notice period was two years.

<u>Preliminary issue in relation to claims under the Equality Act 2010</u>

Is the Claimant entitled to bring a claim under the Equality Act 2010 (EqA) by virtue of being:

(1) *in employment with R1 within the definition in Section 83(2) of the Equality Act 2010 (EqA)? and/or*

(2) *a personal office holder within the definition in Section 49(2) EqA?*

Harassment

1. *Did any or all of the conduct set out below under "Alleged unlawful conduct" occur?*
2. *If so, did the conduct relate to the Claimant's sex or her sexuality or was it because of her rejection of the sexual conduct described in paragraph 13-18 of her Grounds of Complaint (GoC)?*
3. *If so, was the conduct unwanted?*
4. *If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?*

Direct discrimination

In the alternative, if any or all of the conduct set out below under "Alleged unlawful conduct" occurred, did it amount to treating the Claimant less favourably than the Respondents would have treated a man or a person not of the Claimant's sexual orientation, because of her sex or sexual orientation?

Victimisation

The Claimant did two protected acts:

1. *On 15 November 2022 she submitted a grievance letter to Ms Betteridge*
2. *On 9 December 2022 she submitted written representations by email to the Second Respondent.*

If any or all of the conduct set out in paragraphs 12 to 19 under "Alleged unlawful conduct" occurred, was it because of either or both of these protected acts?

Alleged unlawful conduct

1. *On 2 September 2022, the Second Respondent's conducted himself as in paragraphs 14 to 18 GoC.*

2. *The Second Respondent failed to communicate with the Claimant after that incident (paragraphs 18 and 27 GoC).*

3. *The Second Respondent failed to involve the Claimant in the budget meeting on 30 September 2022 (paragraph 24 GoC).*

4. *The Second Respondent ignored the Claimant on her return from leave on 17 October 2022 (paragraph 27 GoC).*

5. *At a meeting on 17 October 2022 the Second Respondent complained that the Claimant had left him to run the business, that her performance had been poor, and told her he did not want her to be involved in operations (paragraphs 28 to 30 GoC).*

6. *On 24 October 2022 the Second Respondent failed to attend a meeting with the Claimant.*

7. *From October 2022, the Second Respondent excluded the Claimant from managerial decisions (paragraph 32 GoC).*

8. *On 28 October 2022, the Second Respondent told the Claimant he no longer wanted to work with her (paragraph 33 GoC).*

9. *The Second Respondent transferred parts of the Claimant's role to other employees (paragraph 35 and 48 GoC).*

10. *On 1 November 2022, the Second Respondent asked for details of the Claimant's work activity over the previous two weeks (paragraph 37 GoC).*

11. *On 28 October 2022, the Second Respondent made unfounded performance allegations against the Claimant (paragraph 38 GoC).*

12. *The Respondents failed to respond to the Claimant's grievance of 15 November 2022 (paragraph 42 to 44 GoC).*

13. *The Respondents failed to pay the Claimant's salary (paragraph 47 GoC).*

14. *The Respondents failed to pay the Claimant a dividend of £13,500 that was paid to the Second Respondent (paragraph 47 GoC).*

15. *On 2 and 5 December 2022 the Second Respondent told the Claimant that he would remove her as a director (paragraphs 49 and 50 GoC).*

16. *On 6 December 2022 the Second Respondent failed to speak to the Claimant during a meeting and during the day (paragraph 51 GoC).*

17. *On 6 December 2022 the Second Respondent asked the Claimant to work from home (paragraph 51 GoC).*

18. *On 22 December 2022 the Respondents terminated the Claimant's employment and directorship.*

19. *With effect from the payment due on 30 December 2022, the Respondents stopped paying the Claimant dividends.*

The relevant law

206. The Tribunal now turns to a consideration of the relevant law. We shall start with the complaint of unfair dismissal.

207. By section 94 of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by their employer. Where the employee establishes that they have been dismissed (within the requirements in section 95 of the 1996 Act) then by section 98, it is for the employer to show a permitted reason for the

dismissal. Then, it is for the Tribunal to decide whether the employer acted reasonably or unreasonably in treating the permitted reason as a sufficient reason for the dismissal of the employee, taking into account the size and administrative resources of the employer's undertaking and the equity and substantial merits of the case. There is no burden of proof upon the question of reasonableness.

208. The right not to be unfairly dismissed is usually subject to a period of qualifying service of two years. If the claimant is found to be an employee for the purposes of the 1996 Act from no later than 23 December 2020 then she has the necessary qualifying service.

209. For the purposes of the 1996 Act, by section 230(1) of the 1996 Act, an employee means "*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".* By section 230(2), *"'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

210. The determination of the claimant's complaint of unfair dismissal brought pursuant to the 1996 Act turns entirely upon the question of employee status. This requires that she bring herself within the definitions in section 230(1) and (2). This is because the first respondent conceded, at the hearing before Employment Judge Cox, that if the Tribunal decides that the claimant was an employee of the first respondent then the dismissal of her was unfair. Respectfully, this is a concession which was properly made by the first respondent. Subject to employee status, the claimant plainly was dismissed on 22 December 2022. She was dismissed without being informed of the reason for the dismissal and without the first respondent following any kind of procedure.

211. The claimant was a director of the first respondent. It is now well established that directors can simultaneously be employees, even if they hold a controlling shareholding in the company. In this case, the claimant (on 22 December 2022) did not hold a controlling shareholding in the first respondent. Thus, she was vulnerable to being removed from her office of director by a majority of votes cast at a general meeting of the company. Indeed, this is what came to pass on 22 December 2022. However, she was a controlling shareholder until 16 March 2021, within two years of the date of her dismissal as director. The case law on the employment status of controlling shareholders is therefore relevant.

212. To be an employee, the office holder (the claimant in this case) must have entered a contract with the first respondent company and the contract must be one of service. It is right to observe that the question of employment status of directors is one of several categories of work which have given rise to challenges when it comes to employee status.

213. The fact that an individual is a controlling shareholder is relevant but does not by itself mean that the individual cannot also be an employee (**Secretary of State for Trading and Industry v Bottrill [1999] ICR 592, CA**). A similar approach was taken in **Nesbitt and another v Secretary of State for Trade and Industry [2007] IRLR 487, EAT**. (Each of these cases was referred to in **Clark v Clark Construction Initiatives Ltd and another [2008] IRLR 365** a copy which authority was handed to the Tribunal by Mr Harris).

214. In **Nesbitt**, it was held that where a claimant is a majority shareholder and a director of the company that should not lead a Tribunal to conclude that the

claimant is not an employee unless the Tribunal finds that the company was a *"mere simulacrum"* and that, as a result, any contract between the company and the putative employee was a sham. (A *"simulacrum"* is something having merely the form of a certain thing, but without possessing its substance or proper qualities- see **Clark** at [88]). A simulacrum in this context is where there is no intention to vest the business in the company or in any way to observe the distinction between the roles of director and employee such that there is no real independent company at all, and the company is simply the *alter ego* of the individual and merely a façade concealing the true facts.

215. In **Nesbitt,** the fact that the two claimants between them owned every share but one in a company was insufficient to deprive them of employee status because they otherwise satisfied all the criteria for employment. They had contracts of employment, they received all their remuneration by way of salary, they behaved like employees and there were no other factors pointing away from employee status.

216. In **Bottrill** it was suggested that in analysing whether the relationship was one of employee/employer, the degree of control is always important, as is whether the parties conducted themselves in accordance with a contract of employment. A Tribunal should consider where the real control lies. **Bottrill** (when before the Employment Appeal Tribunal (EAT) - **[1998] IRLR 120, EAT**) - signalled a retreat from the stance earlier taken by a different division of the EAT in **Buchan and Ivey v Secretary of State for Employment** [1997] IRLR 80 that it was contrary to common sense and the reality of the situation to treat a controlling shareholder as somebody also capable of being an employee. The EAT's judgment in **Bottrill** was upheld by the Court of Appeal - the citation is in paragraph 213 above. The Court of Appeal unanimously rejected the approach in **Buchan and Ivey**. That an individual is a controlling shareholder is likely to be a significant factor but is just one factor to be considered alongside others.

217. In **Nesbitt**, concern was expressed that the *"real control"* test in **Bottrill** imported uncertainty into the already difficult issue of deciding upon employee status. The view was expressed in **Nesbitt** that the fact that individuals with a majority shareholding are the "*prime movers"* of the business or *"their own boss"* does not prevent them from being employees if they otherwise satisfy the criteria for employment status. Even in a "*one man company"* the majority shareholder does not have absolute control of their destiny as they could be dismissed by the liquidator in the event of the company's insolvency or in the event of a share sale.

218. In **Clark,** an Employment Tribunal's finding was that the complainant in that case, who had been a controlling shareholder of the respondent company, was not also an employee of the company when he held the controlling shareholding. Key considerations in the employment tribunal's findings were that Mr Clark drew a very small salary before being subject to *"any serious tax band."* Living expenses were met by drawing loans from the company by using company credit cards as a matter of course to pay them. It was his intention to repay the loans from dividends declared in his favour should the company become profitable. The ability to service the loans depended on the success of the company which involved him in a substantial risk. He sold his shares to two of his friends who were also business associates. He became managing director with a salary reflective of his status. The appointment as managing director was within twelve months of his dismissal by his associates after their relationship broke down. Mr Clark was dismissed for redundancy. The issue was whether he had twelve

months of service (which was the qualifying period for unfair dismissal rights at the time). This depended on him being able to bring into account his pre-managing director service.

219. That he was receiving only a minimal salary and was relying on loans from the company to cover his living expenses coupled with the fact that an employment contract was never drawn up, pointed strongly against the existence of an employment relationship in the judgment of the EAT.

220. The EAT in **Clark** gave some guidance to employment tribunals as to the factors to be considered in determining whether effect should be given to a contract of employment between a controlling shareholder and their company. The following factors are of significance to our case:

220.1. Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee and thus, on the face of it, has earned the right to take advantage of the benefits that employees may derive from such payments.

220.2. The mere fact of a controlling shareholding does not of itself prevent a contract of employment arising, nor does the fact that in practice the controlling shareholder is able to exercise real or sole control over what the company does.

220.3. That the shareholder will profit from the success of the company will not militate against a finding of employee status.

220.4. If the conduct of the parties is in accordance with the contract, that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays. Conversely, if the conduct of a parties is either inconsistent with the contract or in certain key areas where one might expect that to be governed by the contact and is not so governed, that would be a potentially very important factor militating against a finding that the controlling shareholder is an employee.

220.5. If contractual terms have not been identified or reduced into writing, that will be powerful evidence that the contract was not really intended to regulate the relationship in any way.

220.6. That the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship but in most cases is unlikely to carry any weight. In many small companies, such practices are necessary.

221. The EAT upheld the employment tribunal's ruling in **Clark**. The EAT said that there are three circumstances where it may be legitimate not to give effect to a binding contract of employment between a controlling shareholding employee and the company. The first is where the company is a sham. The second circumstance (as had been observed by the Court of Appeal in **Bottrill**) is where the contract is a sham and entered for some ulterior purpose such as to secure some statutory payment from the Secretary of State. The Court of Appeal held that were the contract not a sham, then the question arises as to whether there is a contract of service and whether the Articles of Association of the company

vest the controlling shareholder with power to prevent his own dismissal. The third circumstance is where the parties do not in fact conduct their relationship in accordance with the contract (either from the outset or subsequently where the relationship ceases to reflect the contractual terms). The first respondent's Articles of Association are at pages 715-735. We can see nothing within them empowering a controlling shareholder from preventing their own dismissal as employee. At any rate, our attention was not drawn to any such provision.

222. As we saw (in paragraph 220.6) the EAT held (in **Clark**) that financial risk taken by a controlling shareholder did not preclude a finding of employment status. Often, working capital will not be forthcoming from a lender without a personal guarantee. However, in Mr Clark's case the loans operated independently of the contract of employment which barely impinged on the relationship, and which would have existed absent that contract.

223. The **Clark** guidelines were considered by the Court of Appeal in **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Another [2009] ICR 1183, CA** and were modified in certain respects. Where a contract is in existence, the court or tribunal must be satisfied that any relevant document is a true reflection of the claimed employment relationship, and for this purpose it will be relevant to know what the parties have done under it. Where there is no written contract of employment, the tribunal should not seize too readily on the absence of a written agreement to justify rejecting the claim. The EAT in **Clark** had overstated the potential negative effect of the contractual terms not being in writing.

224. The Court of Appeal also said that exercise of control of a company as a shareholder does not prevent the control test for an employment contract being met. As demonstrated in **Lee v Lee's Air Farming Limited [1961] AC 12, PC**, that the company is a separate legal entity provides the necessary element of control. The company had the right to decide into what contracts to enter. The director was agent/director of the company. The profit generated belonged to the company and not the agent. It was observed by the Judicial Committee of the Privy Council in **Lee's Air Farming** that, *"There appears to be no greater difficulty in holding that a man acting in one capacity can give orders to himself in another capacity than there is in holding that a man acting in one capacity can make a contract with himself in another capacity.* Further, *"There might have come a time when the director would remain bound contractually to serve the company (as chief pilot) though he had retired from the office of sole governing director*." As was said in **Bottrill**, the practical control over an individual's destiny as an employee (by being a shareholder) does not prevent that individual being an employee.

225. It was also observed by the Court of Appeal in **Neufeld**, that the fact that a controlling shareholder or director does not draw his salary could point against the existence of a contract of employment if the remuneration was irregular. However, if there was a contractual entitlement to a salary, the fact that the employee does not actually take it could not retrospectively diminish employment status. It can be a difficult question as to whether the correct inference is that a shareholder and director was truly an employee. It will be necessary to consider how the parties have conducted themselves, what they have done, and how they have been paid. A lack of a written employment contract or other record of such is likely to be an important consideration.

226. More generally, moving away from the special case of company directors and controlling shareholders, over the years, the courts have developed several tests of employment status. No single test is conclusive and what the tribunal or court must do is weigh up all the relevant factors and decide whether on balance, the relationship between the parties is governed by a contract of employment.

227. It is now clear that five essential elements must be fulfilled for a contract of employment to exist. This proposition follows the tests formulated in **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497, QBD**; **Carmichael and another v National Power Plc [1999] ICR 1226, HL**; **Express and Echo Publications Limited v Tanton [1999] ICR 693, CA**; **Hewlett Packard Limited v O'Murphy [2002] IRLR 4, EAT**, and **HMRC v Professional Game Match Officials Ltd** [**2024] UKSC 29**. The five elements are:

- That there must be a contract in existence between the worker and the putative employer.
- There must be an obligation on the worker to provide work personally.
- There must be mutuality of obligation.
- There must be an element of control over the work by the employer.
- The other terms of the contract and all the circumstances of the relationship between the parties when viewed in the round are consistent with a contract of service.

228. As to the first of these, a contract of employment need not be in writing. That said, for an individual to have employee status there must be a contract in existence between the putative employer and a putative employee. The contract may be an entirely oral agreement. (There is a statutory obligation upon employers to provide a written statement of employment particulars. At the time of the events with which we are concerned, this obligation had become a '*Day 1'* right by virtue of amendments made to section 1 of the 1996 Act (by the Employment Rights (Miscellaneous Amendments) Regulations 2019 with effect from 6 April 2020. The statutory statement is not a contract of employment but can be used as evidence of contractual terms. There is no factual dispute that such a document was not served by the first respondent upon the claimant).

229. Where there is a written agreement, then under ordinary contractual principles, the ability of courts to look behind the written terms is limited to situations where there is a mistake that requires rectification or where the parties have a common intention to mislead as to the true nature of their rights and obligations under the contract (that is to say, where the contract is a sham). In **Autoclenz Limited v Belcher and others [2011] ICR 1157, SC**, the Supreme Court held that employment contracts are an exception to ordinary contractual principles in this regard. The Supreme Court was persuaded that the relative bargaining power of the parties must be considered in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.

230. In **Autoclenz,** car valeters had entered a contract which specified that they were self-employed subcontractors. A clause allowed them as subcontractors to supply a substitute. The Tribunal found that the clauses did not reflect the reality

of the claimants' working situation. There was never any intention realistically that the valeters would refuse work or exercise a right to send a substitute. They were expected to turn up and do the work provided. It was held that they were fully integrated into **Autoclenz** Limited's business and were subjected to a considerable degree of control.

231. The Supreme Court held that the Tribunal had been entitled to find that the reality of the situation was that the valeters were employees despite the terms of the written agreement. Lord Clarke (who gave the sole judgment of the Supreme Court) considered that the question in every case is "*what was the true agreement between the parties?"*

232. At [35] Lord Clarke commented that, "*The relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

233. In **Uber BV and others v Aslam and others [2021] ICR 657 SC**, the Supreme Court held that a written agreement is not decisive of the parties' relationship and is not even a starting point for determining employment status. The correct approach is to consider the purpose of employment protection legislation which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work.

234. For a contract to exist at all, the parties must be under some obligation towards each other. This is known as "*mutuality of obligation".* In the context of employment, this is often expressed as the wage/work bargain – an obligation on the employer to provide work to the employee and/or pay a wage or salary and a corresponding obligation on the employee to accept and personally perform the work offered. Mutuality of obligation may be implied from the parties' course of conduct.

235. One of the requirements of a test for a contract of service laid down by MacKenna J in **Ready Mixed Concrete** is that the employee must have agreed to provide their work and skill in exchange for a wage or remuneration. Freedom to choose whether to do it "*by one's own hands"* or to send a substitute is inconsistent with a contract of service although a limited or occasional power of delegation may not be. The **Tanton** case to which we referred earlier in paragraph 227 concerned a substitution clause within the contract. On the facts, this was found not to be a sham and that the newspaper delivery driver in the case was entitled to choose whether to perform the contract or pay someone else to do it for him and therefore was an independent contractor.

236. For the contract to be one of service, there must also be control of the employee by the employer. The question of control is an essential part of the multiple test approach advocated in **Ready Mixed Concrete**. Control can take many forms. This may be practical and legal, direct, and indirect. It is not necessary for the work to be carried out under the employer's actual supervision or control. Indeed, many employees apply a skill or expertise which is not susceptible to direction by anyone within the employer. Control therefore focuses upon what an employer can direct the employee to do as opposed to how the employee is required to undertake the work. Thus, in **Cassidy v Ministry of Health [1951] 2 KB 343**, it

was held that a resident surgeon was an employee as part of the organisation run by the hospital authority. Plainly, the hospital authorities could not instruct the surgeon how to perform the operations but nonetheless he was part of the organisation and in that respect was subject to their control. As is said in **Harvey on Industrial Relations and Employment Law** (at Division A1 [11)] a power of dismissal *"smacks of employment."*

237. The Supreme Court reviewed the authorities on the issue of employment status in **HMRC v Professional Game Match Officials Ltd** [**2024] UKSC 29.** This judgment was handed down on 16 September 2024, after the conclusion of the parties' cases and the tribunal's deliberations in chambers on 22 August 2024 but before promulgation of the tribunal's reserved judgment. Given the significance of **PGMOL**, the tribunal invited further submissions prior to promulgation. The Tribunal is obliged to Mr Harris and Mr Clement for their helpful further submissions (received on 4 and 3 October 2024 respectively).

238. The Supreme Court in **PGMOL** said that the starting point in deciding whether there is a contract of employment has often been taken to be the judgment of MacKenna J in **Ready Mixed Concrete**. Albeit perhaps somewhat dated now in some of the language used, the test was endorsed by the Supreme Court in **PGMOL**. Plainly, this is the approach which courts and tribunals should now take to this question. MacKenna J in **Ready Mixed Concrete** posed the test for deciding upon employment status in these terms:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

239. The Supreme Court was critical of a tendency to focus unduly on the first two of the three tests in **Ready Mixed Concrete** - the issues of mutuality of obligation and control summarised in paragraphs 234-236 above- and to treat all other terms of the contract and the surrounding circumstances of the parties' relationship as of less significance, or even as being relevant only if they negative the existence of an employment relationship.

240. MacKenna J himself in **Ready Mixed Concrete** made clear that mutuality of obligation and control were necessary, but not necessarily sufficient, conditions of a contract of employment. It is not the case that once the pre-conditions of mutuality of obligation and control are satisfied, they drop out of the picture as relevant factors in the overall assessment of whether a contract of employment exists. He emphasised the need to address the cumulative effect of the totality of the provisions of the contract and to view in the round the relationship between the parties in the setting of the surrounding circumstances.

241. In **PGMOL**, the Supreme Court said that as a pre-condition to a finding of employment there must be a sufficient degree of control by the putative employer

over the putative employee. The extent of that control in any particular case remains a relevant factor in the overall determination of whether there exists an employment relationship. They gave guidance on the issue of control now summarised in paragraphs 242 to 247.

242. Flexibility in approach to deciding whether a sufficient level of control exists is critically important, given the ways in which employment practices have evolved and continue to evolve. The days when the vast majority of the workforce attended at a particular factory, shop or office between set hours to work in highly prescriptive roles have long gone, all the more so following the Covid pandemic. The need for this flexibility was recognised in **Ready Mixed Concrete**. While MacKenna J went on to stipulate matters that must be *considered* in this context (to use his words*, "the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done*") in the modern world there can still be sufficient control absent these elements.

243. However, the right of control must exist *"in a sufficient degree"* to create the relationship of employer and employee. MacKenna J quoted with approval the High Court of Australia in **Zuijs v Wirth Brothers Pty Ltd** (1955) 93 CLR 561 (*Zuijs*) at p 571: *"What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."*

244. There can be no doubt that a sufficient element of control by the employer over the employee is essential to the existence of a contract of employment, but it is a test that can prove difficult to apply in the minority of cases where the nature of the services provided by the putative employee leaves little room for intervention by the putative employer. This was recognised by MacKenna J in **Ready Mixed Concrete.** He expressed the requirement of control in these terms: *"[The employee] agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other [the employer]*."

245. This test allows for a wide range of circumstances and leaves the question of control to be answered by an assessment of the facts of each case. In **Montgomery v Johnson Underwood Ltd [2001] EWCA Civ 318, [2001] ICR 819** at para 19, Buckley J spoke of "*some sufficient framework"* of control. He said: *" Society has provided many examples, from masters of vessels and surgeons to research scientists and technology experts, where such direct control is absent. In many cases the employer or controlling management may have no more than a very general idea of how the work is done and no inclination directly to interfere with it. However, some sufficient framework of control must surely exist. A contractual relationship concerning work to be carried out in which the one party has no control over the other could not sensibly be called a contract of employment."*

246. Therefore, there are many occupations in which the employer would not have the practical ability, nor probably the legal right, to intervene during the performance of at least some duties to direct the manner in which they were performed. It is hard to see that hospital managers would be entitled to intervene in the

performance of an operation which was being carried out in a competent manner or that the managers of an opera house could intervene in the conductor's performance to direct him or her to increase or reduce the tempo. Indeed, in **PGMOL** there was no scope to step in while the employees were performing their roles as football referees during a game. That is not to say that there would not be circumstances in which intervention would be both permissible and practical, such as where the duties were being performed in a way which was by relevant standards unacceptable. In summary, the requirement for control extends only so far as there is scope for it and, on the other hand, that there must be some control, if only in incidental or collateral matters.

247. There needs to be a sufficient framework of control as regards each contract. A sufficient framework of control consistent with an employment relationship may take many forms and is not confined to the right to give direct instructions to the individuals concerned. In **Uber BV** the framework of control took the form of monitoring trips, and a warning and rating system. Control thus can take many forms short of direct instruction. This will include a power of dismissal.

248. Other factors (being the fifth criterion cited above in paragraph 227 and the third limb of the Ready Mixed Concrete test cited in paragraph 238) may be relevant to the question of employee status. One such issue is financial considerations. A person in business on their own account will carry the financial risk of that business. Another relevant financial indicator of employment is the incidence of income tax and national insurance. Deductions at source point to employment and gross payments suggest self-employment. This factor is not generally regarded as strong evidence. Payment of tax and national insurance on a self-employed basis is not conclusive proof of a contract for service as opposed to a contract of service (**Enfield Technical Services Limited v Payne; BF Components Limited v Grace [2008] ICR 1423, CA**). Being part of a PAYE scheme and paying employees' national insurance contributions is not conclusive evidence that a worker works under a contract of service (**O'Kelly and others v Trusthouse Forte Plc [1983] ICR 728, CA**).

249. The degree to which an individual is integrated into the employer organisation remains a material factor under the multiple test in **Ready Mixed Concrete**. Relevant considerations might include (amongst other things) whether the individual is subject to the employer's disciplinary and grievance procedures.

250. The parties' stated intentions as to the status of their working relationship may be a relevant factor. However, courts and tribunals should look at the substance of the matter to determine the reality of the position. That said, a contractual description of the relationship may carry considerable weight and will continue to be important in cases where all the other factors are evenly balanced. In **Massey v Crown Life Insurance Co [1978] ICR 590 CA**, Lord Denning MR said that *"when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be."*

251. The claimant also pursues a complaint of wrongful dismissal. In the Employment Tribunal, there is jurisdiction to consider such a claim pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. As we said in paragraph 7, this confers jurisdiction upon the Tribunal to hear a contractual claim brought by an employee which arises or is outstanding on termination of

the employee's employment. Should the claimant establish that she is an employee, then plainly wrongful dismissal is a claim which arises upon termination of her employment.

252. In contrast to the situation under the 1996 Act, there is no definition within the 1999 Order of the term "employee". However, there is no dispute that in this context the expression "employee" is that of an employee at common law in accordance with the tests which we have just looked at for a traditional contract of employment. There is no suggestion that the term "employee" in the context of the 1994 Order embraces the wider definition to be found in section 83(2) of the Equality Act 2010.

253. As with the unfair dismissal complaint, the wrongful dismissal claim turns entirely upon the Tribunal's finding about employee status. This is in light of the concession recorded by Employment Judge Cox. Again, respectfully, this is a concession which was correctly made on the part of the first respondent. The claimant's engagement was summarily ended on 22 December 2022. There is no suggestion that she was liable to have her engagement summarily terminated (without notice) by reason of any repudiatory conduct on her part. It follows therefore that, subject to employee status, the wrongful dismissal claim is bound to succeed.

254. We now turn to a consideration of the claimant's claims brought under the 2010 Act. A question also arises under these complaints about the claimant's status. It is not conceded by the respondents that the claimant has standing to pursue her complaints under the 2010 Act.

255. The claimant seeks to establish standing upon the basis that she was in employment (within the definition in section 83(2) of the 2010 Act) or alternatively has standing by virtue of being a personal office holder (for the purposes of section 49(2)).

256. By section 83(2) of the 2010 Act *"employment"* means "*employment under a contract of employment a contract of apprenticeship or a contract personally to do work."* The definition of employment under section 83(2) is substantially wider than the corresponding definition in section 230(1) of the 1996 Act. If the claimant establishes that she is an employee for the purposes of the 1996 Act, then it follows that she also is an employee for the purposes of the 2010 Act. It is however possible for her to be held to be an employee for the purposes of the 2010 Act but not for the purposes of the 1996 Act. There must be a contract of employment or a contract personally to do work – we need not be concerned for these purposes, with a contract of apprenticeship.

257. It has been held that there need not be mutuality of obligation between contracts or engagements – **Nursing and Midwifery Council v Sommerville [2022] ICR 755, CA** and **Sejpal v Rodericks Dental Limited [2022] IRL 752**. These cases were in fact concerned with the question of whether the complainants were worker within the definition in section 230(3) of the 1996 Act. The significance of these authorities to this case is that the statutory definition of "*worker"* and the extended definition of "*employee"* in section 83(2) of the 2010 Act are to be interpreted the same way following the Supreme Court's decision in **Bates van Winkelhof v Clyde & Co LLP and another (Public Concern at Work Intervening) [2014] ICR 730, SC**. Key considerations are the requirement to perform work personally, integration within and being an integral part of the

business, and that the services are not being provided to the business as a client of an undertaking carried out by the worker.

258. The concept of an obligation personally to do work (being one of the three limbs within the statutory definition of employment within section 83(2) of the 2010 Act) imports similar considerations to those which arise upon a consideration of whether there is a contract of services for the purposes of the 1996 Act. The obligation personally to do work may be an implied one. The focus should be upon the practical reality of the working arrangements. Following **Uber BV**, tribunals should have regard to the purpose of employment protection legislation for vulnerable individuals in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. The tribunal should be alive to sham substitution clauses such as those which operated in **Autoclenz.**

259. Section 49(1) provides that the protections within section 49(3) to (9) apply to personal offices. Section 49(2) provides that a personal office is an office or post to which a person is appointed to discharge a function personally under the direction of another person and in respect of which an appointed person is entitled to remuneration.

260. Section 49(3) to (9) then provides for the statutory protection of personal office holders or applicants for such a post against a discrimination, harassment, and victimisation.

261. There is little authority on what is meant by the expression in section 49(2) of being *"under the direction of another person".* This wording suggests a practice of giving instruction to an office holder as to how to undertake the work. This would be consistent with the distinction in the case law cited in paragraphs 236 and 246 between control (what the employee is to do) and direction (how the employee is to do it).

262. Mr Clement helpfully drew the Tribunal to excerpts from Part L of **Harvey on Industrial Relations and Employment Law.** At Part L [734] attention is drawn to provisions in schedule 6 paragraph 1 of the 2010 Act. This provides that individuals may only avail themselves of the protections in section 49 where they are not covered by the prohibition against discrimination, victimisation, or harassment as employees by employers. It follows therefore that this aspect of the claimant's complaint is brought in the alternative.

263. By section 109(1) of the 2010 Act, anything done by a person in the course of their employment must be treated as also done by the employer. Upon this basis, the claimant seeks to establish that GH was an employee of the first respondent. If she is right in this, then no issue has been taken by the respondents that GH's actions (including those at the party on 2 and 3 September 2022) were not in the course of employment. The respondents are right not to take issue upon this point. The Equality and Human Rights Commissions Statutory Code of Practice on Employment [2011] says that the phrase *"in the course of employment*" in section 109(1) has a wide meaning. It includes acts in the workplace but they also extend to circumstances outside the workplace such as work-related social functions. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party. The Tribunal refers to paragraph 10.46 of the EHRC Code.

264. By section 109(2), anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. It is not an issue that directors are agents of the company: see **Halsbury's Laws of England** vol 19 [45]. Thus, If GH is not an employee of the first respondent, then the first respondent has a liability for any of his acts found to be tortious as the principal of GH as their agent.

265. By section 110 of the 2010 Act:

(1) A person (A) contravenes this section if —

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

266. Section 110 therefore makes it explicit that an employee or agent who commits an act of discrimination, harassment, or victimisation is personally liable.

267. Where more than one respondent is found liable for the same act or unlawful discrimination, harassment or victimisation the Tribunal is entitled to make an award for compensation on a joint and several basis. Indeed, in **London Borough of Hackney and Sivanandan and others [2011] ICR 1374, EAT** Underhill P held that joint and several liability should be the norm when a claimant has suffered discrimination, harassment or victimisation from multiple respondents and the damage caused is indivisible because the joint respondents are responsible for the same act. Thus, where the employer and employee are jointly liable, there is no basis for apportionment between them.

268. The conduct of which the claimant complains against the respondents under the 2010 Act is of direct discrimination, harassment, and victimisation. These are complaints brought pursuant to sections 13, 26 and 27 of the 2010 Act respectively.

269. If the claimant establishes employee status, then such conduct is made unlawful in the workplace pursuant to provisions to be found in Part 5 of the 2010 Act. By section 39(2) of the 2010 Act, an employer must not discriminate against an employee by (amongst other things) dismissing the employee or subjecting them to any detriment. By section 39(4) an employer must not victimise an employee (by amongst other things) dismissing them or subjecting them to any other detriment. By section 40(1)(a) an employer must not in relation to employment harass somebody who is an employee of theirs. Harassment includes dismissal: **Driscoll v V & P Global Ltd and another** [UKEAT/0009/21.

270. The complaint of direct discrimination is that the claimant was discriminated against (in respect of the unlawful conduct in the annex to the list of issues) by being less favourably treated because of her sex.

271. By section 13(1) of the 2010 Act, a person discriminates against another if, because of a protected characteristic, they treat the other less favourably than they treat or would treat others.

272. Direct discrimination is based on the concept of less favourable treatment and therefore envisages a comparative exercise and consideration of appropriate comparators. By section 23(1), on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case - that is, the complainant's situation and that of the comparator.

273. The critical question in this case is whether there was less favourable treatment of the claimant and if so whether the reason for the less favourable treatment is sex.

274. No comparator is required where the treatment is inherently discriminatory. In **Amnesty International v Ahmed [2009] ICR 1450 at [33]** (a copy of which authority was handed to the Tribunal by Mr Harris) Underhill P said that there are cases where the treatment itself is inherently discriminatory, so that an examination of the alleged discriminator's reasoning becomes irrelevant, and a comparator may be dispensed with. Examples might include exclusion from a shop displaying a sign excluding a particular racial group, specifying different ages for women and men being allowed free admission to a swimming pool, or inherently discriminatory comments.

275. In other cases, the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation - that is, a mental process (conscious or unconscious) which led the discriminator to do the act. Tribunals may draw an inference from the surrounding circumstances with the assistance where necessary of the burden of proof provisions (to which we shall come).

276. Comparators can take two forms: actual, real-life ones and the hypothetical comparator. If an actual comparator is used but they are not a statutory comparator as they are in a materially different circumstance for some reason, then that comparator may still have an evidential role. As was said in **Shamoon v Chief Constable of the RUC [2003] ICR 337**, (which is cited in **Ahmed**) the treatment of the evidential comparator may assist in the construction of a hypothesis as to how a hypothetical comparator may have been treated in comparison with the claimant.

277. By section 26 of the 2010 Act:

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(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.

(5) The relevant protected characteristics are —

…

sex.

Thus, there are three essential elements of a harassment claim under section 26(1) of the 2010 Act. The first is that there must be unwanted conduct. The second element is that the unwanted conduct must have the proscribed purpose or effect. The third element is that the unwanted conduct must relate to a relevant protected characteristic.

278. The EHRC's Code notes that unwanted conduct can include *"a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour"* – paragraph 7.7.

279. The EHRC Code provides (in paragraph 7.8) that the word "*unwanted"* is essentially the same as *"unwelcome"* or *"uninvited".* In **Thomas Sanderson Blinds Limited v English (EAT 0316/10**) it was held that *"unwanted conduct"* means conduct that is unwanted by the employee. This therefore should largely be assessed subjectively from the employee's point of view.

280. The second limb of the definition requires the unwanted conduct in question to have the purpose or effect of violating the claimant's dignity or creating an intimidating etc environment for the complainant. Conduct intended to have that effect will be unlawful even if it does not have that effect. Conduct that does in fact have that effect will be unlawful even if that was not the intention. The creation of an intimidating etc environment may be created by a one-off incident but to do so, the effects of a one-off incident must be of longer duration to come within section 26(1)(b)(ii) and create an intimidating etc environment. The adverse purpose or effect can be brought about by a single act or by a combination of events.

281. Where a case of harassment is brought upon the basis of the effect of the conduct, there are subjective and objective elements within the statutory definition. The subjective part involves the Tribunal looking at the effect that the conduct has upon the complainant. The objective part is for the Tribunal to ask whether it was reasonable for that conduct to have that effect given all the circumstances of the case. By paragraph 7.18 of the EHRC's Code, the circumstances may include such factors as the complainant's mental health, mental capacity, cultural norms, previous experience of harassment, and the environment in which the conduct took place. The objective element within the statutory definition is primarily intended to exclude liability where the complainant is hypersensitive and unreasonably takes offence.

282. To constitute unlawful harassment under section 26(1) of the 2010 Act, the unwanted and offensive conduct must be related to a relevant protected characteristic. The question of whether conduct is related to a protected characteristic is a matter for the appreciation of the Tribunal, making findings of fact and drawing on all the evidence before it. In paragraph 7.10 of the EHRC Code, an example is given of conduct which would be regarded as harassment related to sex. The example given is of a female worker who has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

283. Section 26(2) deals with sexual harassment by way of conduct of a sexual nature. Paragraph 7.13 of the EHRC Employment Code gives examples of such conduct. This includes unwelcome sexual advances, touching, sexual assault, sexual jokes, displaying pornographic photographs or drawings, or sending emails containing material of a sexual nature. Again, the conduct of a sexual nature must be unwanted and have the prohibited purpose or effect.

284. In cases of physical contact, factors to consider will include the nature of the physical contact and the part of the anatomy that is touched, the circumstances or the context in which the contact took place, the relationship between the two individuals, whether the conduct is unwanted and whether the recipient has made it clear that it is unwanted conduct, the intentions of the person making the contact, the perception of the recipient of the context and how a reasonable person would view or perceive the conduct.

285. Section 26(3) also provides protection for individuals who are treated less favourably because they reject or submit to sexual harassment. (For the sake of completeness, section 26(3) also provides like protection if the harassment is related to gender reassignment). EHRC again provides a helpful example in paragraph 7.14. The example given is of a shopkeeper propositioning one of his shop assistants. She rejects his advances and is then turned down for a promotion that she believes she would have got had she accepted the advances. She could then bring a complaint of harassment under section 26(3). To bring a claim under section 26(3) all the elements in section 26(1) or (2) must be made out. In addition, less favourable treatment must be shown and a causal link must established between the sexual harassment on the one hand and the less favourable treatment on the other. Unlike a complaint under section 13 however, less favourable treatment is established not by reference to another person as

comparator (or a hypothetical comparator) but rather by reference to the way in which the complainant would have been treated had they not rejected or submitted to the harassment.

286. We now turn to the victimisation complaint. By section 27 of the 2010 Act:

(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 —

…

(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.

287. The respondents do not dispute that the claimant's grievances of 15 November 2022 and 9 December 2022 are protected acts for the purposes of section 27(2).

288. The 2010 Act does not contain a definition of the word *"detriment".* As has been seen, an employee is protected against being subjected to detriment by (amongst other things) being subjected to direct discrimination or victimisation. Paragraphs 9.8 and 9.9 of the EHRC Code provide that, "*Generally, a detriment is anything which the individual concerned might reasonably consider change their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance related awards … A detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment."*

289. This passage within the EHRC Code summarises the relevant case law upon this issue. In **Shamoon**, the House of Lords held that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to their disadvantage. The House of Lords also said that an unjustified sense of grievance could not amount to a detriment. It is sufficient that a reasonable worker might take the view that the conduct in question was detrimental. Therefore, the situation must be looked at from the complainant's point of view, but the perception of detriment must be reasonable in the circumstances.

290. It was also held by the **House of Lords** in **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL** (cited in **Ahmed**) that an omission to act, such as a refusal to provide a reference, may constitute detrimental treatment. However, the detriment must be because of the protected act or because the employer believes the complainant to have done or that they might do a protected act. In **Khan**, the Chief Constable refused to provide a reference for Mr Khan as

it might compromise his handling of proceedings brought against him by Mr Khan. The refusal to provide the reference was not because he had done a protected act. It is right to say that but for having brought the proceedings, he would have been provided with a reference. However, that was not the reason for the refusal to supply it. A "*but for"* test is therefore inapt, and the focus must be upon the real reason or motive on the part of the respondent for doing the act in question. The real reason for not providing a reference was because of tactical considerations in the litigation.

291. In **Nagarajan v London Regional Transport [1999] ICR 877, HL** (cited in **Ahmed**) it was held to be sufficient if the protected acts had a significant influence on the employer's decision making. In **Igen Limited (formerly Leeds Careers Guidance) and others v Wong and others [2005] ICR 931** (a copy of which authority was handed to the tribunal) it was clarified that for an influence to be *"significant"* it must be more than trivial.

292. Given that discrimination, harassment, and victimisation is difficult to prove, the 2010 Act has specific provisions about the burden of proof. By section 136:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

293. By section 136(6)(a) a reference to a court includes an employment tribunal. The application of section 136 has given rise to significant case law.

294. In **Hewage v Grampian Health Board [2012] ICR 1054** at [32], Lord Hope suggested that it is appropriate to go straight to the reason why an alleged discriminator or harasser acted as they did unless there is room for doubt. He said *"… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."*

295. In **Shamoon**, Lord Nicholls said (at [8]), "*No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the prescribed ground, receive less favourable treatment than others? But especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."* He went on to say in [12] that, *"There will be cases where it is convenient to decide the less favourable treatment first … when formulating their decisions employment tribunals might find it helpful to consider whether they should postpone determining the less favourable issue until after they have decided why the treatment was afforded to the claimant."*

296. Where the reason for the treatment cannot be clearly determined on the evidence, the initial burden is on the claimant to prove, on a balance of

probabilities, a *prima facie* case of discrimination, harassment, or victimisation. The burden does not shift to the employer to explain the reasons for the treatment unless the claimant is able to prove, on the balance of probabilities, those matters which they wish the Tribunal to find as facts from which an unlawful act of discrimination, harassment or victimisation can be inferred. In **Madarassy v Nomura International Plc [2007] EWCA Civ 33**, Mummery LJ said at [56] that, *"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 has committed an unlawful act of discrimination."*

297. The *"something more"* than a difference in status and a difference in treatment may be found from indirect evidence and inference. This can include matters such as a lack of transparency, inconsistent explanations, and unreasonable behaviour.

298. Section 136 of the 2010 Act is reflective of the case law prior to its coming into force. In **Igen Limited** the Court of Appeal held that the amendments to the statutory provisions then in force required the tribunal to go through a two-stage process. The first stage requires the complainant to prove facts from which the tribunal could, apart from the sections, conclude in the absence of an adequate explanation that the respondent has committed or is to be treated as having committed the unlawful acts of discrimination, harassment, or victimisation. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that they did not commit or are not to be treated as having committed the unlawful act if the complaint is not to be upheld. If the second stage is reached and the respondent's explanation is inadequate it would not be merely legitimate but also necessary for the tribunal to conclude that the complaint should be upheld.

299. The Court of Appeal in **Igen Limited** gave guidance as to the approach to be taken in such cases. We shall not set this out in full. The guidance includes a reminder that it is unusual to find direct evidence of discrimination. Few employers are prepared to admit such discrimination, even to themselves. Further, it may be appropriate to draw inferences from the primary findings of fact. To discharge the burden of proof (if such should pass) the respondent to the complaint has a burden of showing that in no sense whatsoever was the treatment on the proscribed ground.

300. We now turn to look at the issue of time limits. The relevant time limit for bringing proceedings before the Employment Tribunal is in section 123 of the 2010 Act. This provides:

"

(1) Subject to section 140B [providing for an extension of time for early conciliation], proceedings on a complaint within section 120 [employment tribunal proceedings] may not be brought after the end of –

(a) the period of three months starting with date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

(2) …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the 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 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."

301. The particular act complained of must therefore be identified. For example, where the alleged discriminatory act is dismissal then the relevant date is when the notice expires.

302. In **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal said 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 continuing state of affairs in which the claimant was treated less favourably.

303. Time may be extended if in all the circumstances the Tribunal considers it just and equitable to do so. The Tribunal has a wide discretion.

304. It is for the claimant to show that it would be just and equitable to extend time.

305. In **Robertson v Bexley Community Centre trading as Leisure Link [2003] IRLR 434, CA** it was held that there is no presumption that Tribunals should extend time. Quite the reverse, a Tribunal cannot hear a complaint unless the complainant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. This does not mean however that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

306. In **Jones v The Secretary of State for Health and Social Care [2004] EAT 2,** HHJ Tayler observed that the *dicta* in **Bexley Community Centre** must be seen in the context of the rest of the judgment in that case which made it clear that Tribunals have a wide ambit when deciding whether to exercise their discretion in respect of time limits. He opined that Tribunals should focus less on **Bexley Community Centre** and rather more on Court of Appeal authorities such as **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** in which it was pointed out that, on a proper construction of section 123 of the 2010 Act, *"Parliament has chosen to give the Employment Tribunal the widest possible discretion."*

307. In **Abertawe** it was held by Leggatt LJ at [19] that the factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) The length of, and reasons for the delay and

(b) Whether the delay has prejudiced the respondent (for example by preventing or inhibiting them from investigating the claim while matters were fresh).

308. The balance of prejudice places a burden on the claimant to show that their prejudice would outweigh that of the respondent. **Abertawe** also held that there is no justification for reading into the statutory language any requirement that the

Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal ought to have regard. However, there is no requirement for a Tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time.

309. We also need to comment briefly upon the issue of waiver of legal professional privilege. In **Brennan and others v Sunderland City Council [2009] ICR 479** it was held that it would be unfair to allow a party making a disclosure of privileged material not to reveal the whole of the relevant information. Such would risk the court and the other party only having a partial and potentially misleading understanding of the material. There may not be a selective and partial waiver of privilege.

310. In assessing the credibility of the parties' respective accounts, the Tribunal bears in mind the guidance given by Leggatt J (as he then was) in **Gestmin SGPS (SA) v Credit Suisse (UK) Limited and Another [2013] EWHC 3560 (Comm)**. He commented upon the effect of litigation upon the reliability of oral evidence and the general tendency to believe one's memory to be more faithful than it is, particularly where an experience is strongly, vividly, and confidently recollected. Human memory is fluid and constantly re-written whenever retrieved and subject to influence by external information, such as the process of civil litigation where a witness will often have a stake in a particular version of event. Leggatt J suggested that inferences drawn from contemporaneous documents and known or probable facts will be more reliable than oral evidence which is more useful as an opportunity to apply critical scrutiny to the personality, motivations and working practices of a witness. Above all, it is important to avoid the fallacy of supposing that because a witness has confidence in their recollection and is honest, evidence based on their recollection provides any reliable guidance to the truth. This helpful guidance has assisted the Tribunal in our assessment of the accounts of the witnesses in their evidence when set against the contemporaneous material.

Discussion and conclusions

311. We now turn to a discussion of the issues in the case and to our conclusions. Although we have set out a lengthy exposition of the law, it will be necessary to refer to some additional case law from time-to-time.

312. The first issue which we shall consider is that of the claimant's employee status to bring the unfair dismissal and wrongful dismissal claims. It is uncontroversial to say that company directors are office holders but may simultaneously be employees, even if they hold a controlling interest in the company. The claimant held a controlling interest in the first respondent until 16 March 2021. Thereafter, she did not have a controlling shareholding interest. As we said in paragraph 35, from that date she held 335 shares out of an issued share capital of 1000. The facts of this case therefore chime with those in **Clark** where continuity of service must be made up with a period in there was a controlling shareholding. (**Clark** can be distinguished in that there was no dispute around his employee status after he became managing director whereas no concession is made in our case about employee status at all).

313. The first question that arises therefore is whether the claimant entered a contract at any point with the first respondent. The contract may be express or may be implied. Whatever discussions there may have been between the claimant, GH, Mr Rodwell and Mr Chippendale prior to the incorporation of the first respondent, it is necessary for the claimant to establish that a contract was entered into between her and the first respondent. If so, then the next question is whether that contract was one of employment.

314. A company director is an agent of the company and owes fiduciary duties to the company of which they are director. They are obliged to perform their duties personally. The claimant did so from the date of incorporation of the first respondent. As we said in paragraph 33, she received remuneration through the PAYE system. The first payment made to her of wages in this way was on 1 November 2020. She was given an employee PAYE reference number, and her wage slips contain an employee ID number. She also received monthly dividend payments. Regular wages and monthly dividend payment pertained both before and after 16 March 2001 (which is the date when the issue share capital was increased and allocated between the claimant, GH, Mr Rodwell and Mr Chippendale).

315. It was in return for this remuneration that the claimant performed her work personally. As we said in paragraph 42, GH was complimentary about the work that the claimant undertook in the early months in setting up the first respondent's business.

316. In closing submissions, Mr Clement accepted that there was mutuality of obligation between the first respondent and the claimant. This was in the form of payments made to her by the first respondent in return for her work. He also accepted that the claimant performed her work personally. The Tribunal notes that there was no suggestion made to the claimant in cross-examination that she was able to send a substitute in her place to undertake the work. Mutuality of obligation and personal performance plainly are hallmarks of an employment contract. However, they are also hallmarks of a director's service agreement and of contracts to provide a personal service. That both of those features exist are not sufficient, in themselves, to validate the claimant's claim of employee status per **Ready Mixed Concrete**.

317. The essence of the dispute about employment status centres upon the question of control. As we saw in paragraph 243, there must be some semblance of control. When the Tribunal put this to Mr Clement, he did not demur.

318. There are some pointers within the contemporaneous material upon this issue. While she was sole director and shareholder, she did not issue in one capacity (of director and shareholder) a written contract of employment (to herself in another capacity) or a statement of terms and conditions (under section 1 of 1996 Act). The latter is not a contract of employment but serves an evidential basis as to whether one exists or not. What may safely be said, therefore, is that at least until 16 May 2022, there was no express contract in existence – (that date, is, of course, the date of the shareholders' agreement).

319. The claimant sought to rely upon the control exerted by the first respondent of her taking annual leave. This was by reference to the Timetastic holiday booking scheme (in paragraph 750 to 758 of the bundle). The Tribunal was not satisfied, however, that this was anything more than simply the claimant notifying the dates upon which she was going to take leaves of absence on the system. This was

not the same as the first respondent (or any of their employees or officers) being able to countermand the claimant's wish to take leave. However, that she had to notify her leave on Timetastic is indicative of accountability. She could not simply take off without informing anyone.

320. There are other pointers within the contemporaneous material in favour of employment status. The parties proceeded upon the basis that GH was liable to disciplinary action arising out of the unfortunate remark which he made on 13 November 2021. The factual findings are in paragraphs 48 - 51. As the claimant had, at that point, an equal shareholding with GH, the probability is that she too would have been liable to such action had anything untoward had occurred. Subjecting an individual to a disciplinary process is consistent with control and with an employment contract. It is one of the factors highlighted in **Ready Mixed Concrete** (see paragraph 249 above). When the claimant met with Mrs Betteridge on 24 October 2022, Mrs Betteridge told her that a log of the meeting would be placed upon her employee file (paragraph 164). Further, the claimant was issued with regular payslips and, as we have said, was given an employee reference number.

321. On the authority of **Buchan**, the claimant would not, at least until 16 March 2021, have been regarded as an employee. She was the sole shareholder and director. Plainly, it was within her power to block any dismissal. However, the case law moved on when **Bottrill** came before the Court of Appeal. A controlling shareholding now is a significant factor and may in some cases be decisive. Lord Woolf MR in that case was however influenced by the fact that a beneficial controlling shareholding did not necessarily imply day-to-day control of the company and that control of the company can change over time and it would be extraordinary if that could change the employment status of an individual during the life of the contract.

322. On the facts we find them, day-to-day control of the company until 16 March 2021 was vested in the claimant. However, as she discovered to her cost, control of a company may change over time. That is indeed what has happened in her case as observed in paragraphs 55 and 176 of our factual findings. Aspects of the claimant's role were divested to others. GH imposed KPIs on her and asked her to account for her performance. Ultimately, she was dismissed by GH who had got Mr Rodwell and Mr Chippendale's support for such a move. Control was with them and not with the claimant.

323. In **Nesbitt**, it was held that even in a *"one man company"* the majority shareholder did not have absolute control of their destiny as they could be dismissed by the liquidator in the event of the company's insolvency, or in the event of a share sale. In this case, there was a share sale (or at any rate a share issue and disposition) with control of the first respondent divested from the claimant in return for a significant financial investment by Mr Rodwell and Mr Chippendale.

324. The payment to the claimant by the first respondent of a regular monthly dividend was by reference to her performance in role. She was not paid a director's fee. She was being paid by reference to work done. She was not taking out money credited to a director's loan account. It is also significant, in our judgment, that the payment to her of her monthly wage through the PAYE system and monthly dividend stopped after 22 December 2022. That is consistent with her being paid in return for services. (Tax treatment is not decisive but when taken alongside the other features that present in this case, is on these facts a factor weighing in

the claimant's favour). The profits went not to the claimant but to the first respondent. They belonged to the first respondent which, per **Lee's Air Farming** was a separate legal entity. That the profits were vested in the first respondent demonstrates it not to be a mere simulacrum.

325. In these circumstances, we hold that the claimant has established the existence of a contract between her and the first respondent. Until 16 May 2022 there was no written contract. One may however be implied by reason of the existence of mutuality of obligation, an obligation of personal performance, and that the claimant was under the control of the first respondent. Until 16 March 2021, per **Nesbitt**, the framework of control arose through the possibility of dismissal by the liquidator in the event of the first respondent's insolvency. Per **Harvey** (cited in paragraph 236) a power of dismissal smacks of control. Per **Lee's Air Farming**, the right to control existed in the company, a separate legal entity from the claimant. From 16 March 2021 to this feature was added that the claimant had ceased to be a majority shareholder and was therefore vulnerable to dismissal at the behest of the other shareholders (which in fact came to pass). Per **Ready Mixed Concrete** (cited in paragraph 243) there was in the circumstances control if only collateral and incidental and per Montgomery (paragraph 245) there was a framework of control.

326. A contract between the first respondent and the claimant may be implied as on any view by their conduct, the parties were in a contractual relationship. This came about as (whichever way around it was) an offer for the claimant to work for the first respondent was made and accepted. True it is that no there was no express offer and acceptance, but such may be readily implied - how otherwise could it come about that the claimant worked for the first respondent? There is nothing improper in the claimant making an offer to herself on one capacity and accepting it in another per **Lee's Farming**. She was working regular hours for the first respondent in their premises. Consideration moved from the claimant in the form of her work and from the first respondent in the form of regular remuneration. This was made up of wages and a regular dividend payment to arrange for payment of remuneration in the most tax efficient way. The payment of wages ceased after 31 December 2022, consistent with that being referable to her work for the first respondent. There was certainty as the expectation was upon the claimant to devote her time and attention in normal working hours to the affairs of the first respondent. There was an intention to create legal relations. She was declared to HMRC by each party as an employee of the first respondent. Some of these features were redolent of the facts in **Folami v Nigerline (UK) Ltd** [1977] ICR 277 relied upon by Mr Harris. That there was no resolution passed entitling the employee in **Folami** to remuneration and that there was no written contract did not preclude a finding that he was an employee where, as in our case, the employee was performing his duties which entailed the effective management of the company's business, and he was being paid a regular salary. At p280 (D) it was observed that *"…it now seems established that a director appointed a managing director, with duties of this kind, even though he has no separate contract is in a contractual relationship with the company and is, for some purposes at least, to be considered an employee of the company."* Mr Folami was held entitled to pursue a claim of unfair dismissal.

327. The claimant was effectively fronting the first respondent's operation with GH working *"unofficially"* behind the scenes due to his post-employment covenants

with GSH Talent. She was accountable to him and to the investors in the business.

328. A further factor is that the claimant adopted no financial risk. The investment in the first respondent came from Mr Rodwell and Mr Chippendale. While the claimant was intended to benefit from the success of the first respondent (and indeed did so) that is not the same as her holding a financial risk. The Tribunal's attention was not drawn to any form of bank guarantee from her for the first respondent's bank account or anything of that kind. The claimant was of course vulnerable to financial disadvantage should the first respondent fail but that is the same for any employee where their employer fails. Further, she was clearly expected to (and did) devote all her time and attention to the first respondent's business. There was no question of her working for another during her working hours (or being free to do so). She complied with the implied duty of fidelity.

329. Standing back and looking at matters in the round (applying the third limb of the **Ready Mixed Concrete** test), the way the parties conducted themselves was redolent of an employment relationship. There was mutuality of obligation (on the part of the claimant to work and on the part of the first respondent to pay her), there was control of her, and the conduct was consistent with a contract of service. All three limbs of the **Ready Mixed Concrete** test are satisfied.

330. An express contract was then entered into between the three parties in the case together with Mr Rodwell and Mr Chippendale. This is the shareholders' agreement dated 16 May 2022 (at pages 173). This is not, of course, a contract of employment.

331. On any view, clause 5.6.5 of the shareholders' agreement (recited in paragraph 54 above) recognises GH and the claimant to be employees as well as directors of the first respondent. It is declaratory of the position. If it were not the case that they were already employees, then the clause may have been expected to say so and read along the lines that in the event they become employees then the operative provisions shall apply. It is, we think, significant that there was no declaration to the effect that none of the shareholders (particular the claimant and GH) were not employees in circumstances where there is an express declaration that the shareholders are not in partnership with each other.

332. The shareholders' agreement was entered into in May 2022. This is more than 18 months after the claimant had begun to work for the first respondent (as we find, pursuant to a contract of service) and over a year after GH had done so. The shareholders' agreement was professionally drafted by a solicitor. The Tribunal is entitled to presume that the drafting was upon the instructions of the four individual parties to the agreement and the directors of the first respondent.

333. As we have said, where factors relevant to employee status are finally balanced then, as was said by Lord Denning MR in **Massey**, it is open to the parties by agreement to stipulate what the legal situation between them shall be. This is what was done here.

334. The respondents now seek to disavow the express terms within the shareholders agreement and argue that in reality the claimant was not an employee of the first respondent. This is in fact the converse of the case in **Autoclenz** (and in the Tribunal's experience the general run of cases) where it is the employees who seeks to argue that terms and conditions (often in a standard form) imposed upon

them by an employer is not reflective of the true position. In contrast to **Autoclenz**, the claimant and the second respondent were of equal bargaining power. They were equal shareholders from 16 March 2021. There was no suggestion other than that the instructed solicitor acted in accordance with instructions from each of them (both in the individual capacities and in their capacities as directors of the first respondent). By way of reminder, GH was appointed to the office of director of the first respondent on 15 February 2021. He held that office until 27 March 2023. He was therefore in office when the shareholders' agreement was executed (as was the claimant).

335. Given the equal bargaining power of the parties, the Tribunal is not persuaded that **Uber BV** is of any greater assistance in this case. Neither the claimant nor GH had any vulnerability in the circumstances (in contrast to the car valeters in **Autoclenz** and the taxi drivers in **Uber BV**).

336. For these reasons, we hold that the claimant was an employee of the first respondent. Reduced into writing in the form of a shareholders' agreement to which the claimant and the first respondent were parties, a declaration to this effect is in our judgment decisive upon the authority of **Massey**. That, coupled with features pointing in the direction of an employment relationship (there being mutuality of obligation, an obligation of personal performance and control and other features consistent with a contract of service such as regularity of service and payment, the claimant's time-accountability, her accountability to GH, Mr Rodwell, and Mr Chippendale, that the profit and assets belonged to the first respondent per the filings with Companies House, and the dilution of her controlling shareholding interest) persuades us that this is in reality a contract of service.

337. There was no suggestion that the claimant would work other than by her own hands. There was no suggestion that she could send along someone to work in her stead as a substitute. There was an expectation of personal service. GH exerted increased line management authority over the claimant particularly from 26 September 2022 (paragraph 135). There was always room for control of her with these arrangements and a clear framework of control. The claimant's vulnerability to dismissal was exposed on 22 December 2022.

338. It follows, therefore, in light of the first respondent's concessions, that the complaints of unfair dismissal and wrongful dismissal succeed. Remedy will be determined at a subsequent hearing.

339. In the alternative, even if we are wrong to hold that the claimant was an employee working under a contract of service from the outset in September 2021, we are satisfied that she had become an employee by the time of the dismissal on 22 December 2022. From 26 September 2022, GH treated her as an employee given the features highlighted below in paragraph 350 by seeking to exert control over her. Such actions plainly fall within the scope of what MacKenna J had in mind when he spoke in **Ready Mixed Concrete** of "*the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done*." Matters had evolved by the autumn of 2022 such that the claimant had become an employee. The dismissal of her was wrongful and succeeds, the claimant not requiring any qualifying service to bring such claim. The length of the claimant's notice period (which, given her seniority may exceed the statutory minimum) will be one of the issues to be decided at the remedy hearing.

340. We now turn to the complaints brought by the claimant under the 2010 Act. The first issue which arises is that of the claimant's status to bring her complaints. As she has established that she is an employee, it follows that she was within the first respondent's employment within the first limb of the definition in section 83(2) of the 2010 Act. If the Tribunal is wrong to have concluded that the claimant is an employee for the purposes of the unfair dismissal and wrongful dismissal complaints, then we hold that the claimant was an employee within the wider definition in section 83(2) of the 2010 Act in any event.

341. The key considerations in that analysis are whether there was in existence a contract personally to do work. For the reasons already given, we hold there to have been a contract between the claimant and the first respondent at all times. There was no express written contract of employment at any stage. We have held there to be an implied contract of employment from the date of the first respondent's incorporation. If wrong in that, we are satisfied that there was a contract (by virtue of the claimant's status as a director) between the first respondent and the claimant which came with an obligation for her to provide personal service. She did provide personal service on behalf of the first respondent between September 2000 and 22 December 2022. She received regular remuneration from the first respondent by way of the payment of a monthly wage and monthly dividends. This was clearly by reference to the work that she was doing for the first respondent. The payments ceased after the end of December 2022. She was fully integrated within the first respondent. She played an integral role in it. There was no suggestion (nor realistically could there have been) that the claimant was providing services for the first respondent as a client or customer of hers. The position was recognised in the shareholders' agreement of 16 May 2022 when an express contract was entered into (albeit not one of employment) between the first respondent, the claimant and the three others.

342. Our findings upon employment status render otiose the question of whether the claimant can pursue a complaint against the respondents under the 2010 Act in her capacity as a personal office holder. For the sake of completeness, we will make our findings in the further alternative about this.

343. The claimant was a personal office holder. An example of such an office, given in paragraph 733 of Division L of **Harvey** is of a director of a company who is not in employment by the company.

344. To qualify as a personal office holder having the protections in section 49 of the 2010 Act, the personal office holder must be appointed to discharge a function personally under the direction of another and be entitled to remuneration.

345. The claimant was entitled to remuneration. We have seen that she was paid a regular week/monthly wage and a regular monthly dividend. As we have said before, this was by reference to the work undertaken by her for the first respondent.

346. We also find that she was appointed to discharge her functions personally. This inevitably follows from holding the post of director. In any case, no question arose of the claimant being able to substitute her service by engaging another to perform her duties. Further, we find that she was discharging her function personally under the express direction of GH from 26 September 2022 but not before.

347. Between September 2000 and 16 March 2001 the claimant was the sole director and shareholder. As we said in paragraph 34, GH was working for the first respondent *"unofficially".* It follows therefore that on the respondents' case, GH had no official involvement in the first respondent. However, the Tribunal takes a real-world view of matters and recognises that in reality GH had an influence. He had procured the investment into the first respondent by Mr Rodwell and Mr Chippendale. It is unrealistic therefore to suppose that he had no influence in the running of the first respondent. That said, as we observed in paragraph 39, we do not accept the claimant's evidence that she was subordinate to GH at this time (that is to say in the early months of the existence of the first respondent between September 2000 and March 2021). As we said in paragraph 32, it was clearly GH's intention for him and the claimant to have an equal interest in the first respondent.

348. The claimant's controlling interest in the first respondent was of course diluted following the share issue of 16 March 2001. Even then however the claimant and GH had an equal interest in the first respondent. There was no suggestion that the division of labour implemented in July 2021 (mentioned in paragraph 23 of GH's witness statement) was anything other than consensual. (None of this detracts from our findings upon employment status which does not require features of direction to be present to constitute control per **Ready Mixed Concrete** cited in paragraph 242 above) and per our observations in paragraph 261.

349. The Tribunal notes Parliament's use of the word *"direction"* (as opposed to *"control*") in section 49(2) of the 2010 Act. *"Control"* is a different concept to *"direction"* as we highlighted in paragraphs 236, 246, and 261.

350. The Tribunal is not satisfied that GH sought to direct how the claimant undertook her role until September 2022. As we said in paragraph 135, GH took control of matters that day assigning specific duties to the claimant and directing that be subjected to a blanket KPI structure to be managed by Mrs Betteridge. He also directed how the roles should be done. Part of the claimant's duties were assigned away from her by this move. GH also held the claimant accountable on 1 November 2022 in respect of her work activity over the previous two weeks. We refer to paragraph 185.11. This was a direction from GH as how the claimant was to do her job by recording her activities on the systems there referred to. Further, other duties hitherto held by the claimant were delegated to Mr Chalkley (paragraphs 179 and 181). (GH's conduct after 26 September 2022

351. In the circumstances, the Tribunal is satisfied that the claimant was a personal office holder under the direction of GH from the end of September 2022. That being said, the claimant is not covered by the protections in section 49 of the 2010 Act anyway by virtue of paragraph 1 of Schedule 6 to the 2010 Act which serves to exclude that protection where the complainant is brought within the scope of the 2010 Act by other provisions (in this case those arising from employee status under section 83(2)).

352. For the avoidance of doubt, the findings upon personal office holder status is only engaged in the further alternative should the Tribunal's conclusions be wrong that the claimant was engaged by the first respondent under a contract of employment or alternatively under a contract personally to do work. (The further alternative of personal office holder status, should that be engaged, would result in the dismissal of the first alleged act of unlawful conduct which arose on 2 September

2022 prior, on our findings, to the claimant as office holder coming under the direction of GH).

353. The Tribunal shall now analyse the 19 alleged acts of unlawful conduct in Employment Judge Cox's list of issues. We shall do this firstly by reference to the harassment complaints. (The allegations in the list of issues in in italics).

354. The first act of alleged unlawful conduct is that *on 2 September 2022, the second respondent conducted himself as pleaded by the claimant in paragraphs 14 to 18 of her grounds of claim.* This is a reference to the events of the night of 2 and 3 September 2022. Our factual findings about this are at paragraphs 81 to 107.

355. The Tribunal finds that the claimant has succeeded in her claim that the second respondent so conducted himself. For the reasons in paragraph 106 we do not find that GH's actions in getting into bed with her was unwanted conduct. For the reasons in paragraph 107, we find that the subsequent conduct after GH got into bed with the claimant was unwanted in the sense of being unwelcome or uninvited. GH made two advances or passes at the claimant. They were both unwanted. Alternatively, the second pass was unwanted.

356. We do not find that GH's actions after he had got into bed with the claimant was with the purpose of violating her dignity or creating an intimidating etc environment for her. As we said in paragraph 107, GH may have been encouraged by the mutual flirtatious messaging between him and the claimant the week before. The claimant told him that she is bisexual, and the claimant was a willing participant in the flirtatious messaging that passed between them. Subjectively, the Tribunal considers that GH may have understood the claimant to be signalling that she was not homosexual in circumstances where GH had attended her wedding to another woman and that he could have understood her to be signally her sexuality to him.

357. In our judgment, however, GH's conduct in making two passes at the claimant after he got into bed with her reasonably had the effect of violating her dignity and then of creating an intimidating etc environment for her. The violation of her dignity took place that night. As we conclude, this led to the creation of an intimidating etc environment for her within the first respondent's workplace thereafter.

358. The claimant did perceive her dignity to have been violated that night. She was sufficiently concerned about it to discuss the matter with Miss Pinks the next morning. The claimant plainly perceived an adverse environment to have been created given the events which we have recounted occurring after 3 September 2022. In our judgment, plainly it was reasonable for the claimant to perceive GH's actions in the early hours of 3 September 2022 to have the effect of violating her dignity and creating an intimidating etc environment for her thereafter.

359. Even if we are wrong, as we said in paragraph 107, to accept that the first pass at the claimant was unwanted conduct (by virtue of the flirtatious messaging the week before and what GH may reasonably have considered to be invited conduct on his part) he continued to make a pass at her after the first rejection.

360. Unwelcome sexual advances and touching are cited as examples of conduct of a sexual nature by the EHRC in the Code in paragraph 7.13. That being the case, the Tribunal has little hesitation in finding that GH's conduct towards the claimant was of a sexual nature.

361. We also find that it related to sex. We refer to the EHRC Code (in paragraph 7.10 cited earlier) where in the fictional example the manager's conduct was not because of the sex of the female worker but because of the suspected affair, which is related to her sex. In this case, GH's conduct towards the claimant related to her sex. Harassment is not of course a comparator exercise. There is no suggestion that GH is not heterosexual. He had not and would not act as he did towards a male employee. He wanted a relationship with the claimant as he was attracted to her as she is female. Thus, the conduct relates to the claimant's sex.

362. The second allegation is that *the second respondent failed to communicate with the claimant after 3 September 2022*. This is, respectfully, rather a sweeping allegation. There were instances of GH not communicating with the claimant (for example around 24 October 2022 to which we shall come). However, it is clear from the chronology of events from paragraph 108 onwards that there was communication on occasions from GH to the claimant. This may not have been the communication which she welcomed. However, it is not right to say that he failed to communicate with her altogether after 3 September 2022. It follows therefore that the second allegation fails on the facts. No explanation is called for from the respondents under s 136 of the 2010 Act upon the harassment allegation.

363. The third allegation is that *the second respondent failed to involve the claimant in the budget meeting held on 30 September 2022.* The findings of fact are at pages 142 to 144. The third allegation also fails on the facts. The claimant had, on the advice of Mr Sankey, decided to take two weeks leave of absence on 30 September 2022. She was copied into the budget in any case and was not excluded altogether. Given that she had taken a voluntary leave of absence (for good reason) this allegation is difficult to understand and fails. Again, no explanation is called for from the respondents under s 136 of the 2010 Act upon the harassment allegation.

364. The remaining allegations numbered 4 to 19 inclusive all relate to the period after the claimant's return to work on 17 October 2022 following her two weeks leave of absence commencing on 30 September 2022. It is convenient, we think, to take these slightly out of order. This is because we can deal with the remaining complaints which we find to have failed as allegations of harassment relatively quickly.

365. Allegation 13 is that *the respondents failed to pay the claimant her salary 30 November 2022.* Our findings of fact upon this issue are at paragraphs 192 and 193. We are satisfied that this was a banking error. It was nothing to do with the claimant's sex or her rejection of GH's conduct of a sexual nature on 3 September 2022.

366. The fourteenth allegation is that *the respondents failed to pay to the claimant a dividend of £13,500 that was paid to GH.* Our findings upon this issue are in paragraphs 153 and 154. Again, the reason for this conduct was GH's wish to be repaid loans which he had made to the first respondent. We find that to be the reason why the dividend payments were declared in his favour which were nothing to do with the claimant's sex or her rejection of GH's conduct of a sexual nature.

367. The nineteenth allegation is that *the respondent stopped paying the claimant dividends on 30 December 2022.* Our finding upon this issue is in paragraph

202. The first respondent has declared no dividends after 30 December 2022. That is the reason why no dividends had been paid to the claimant. Again, we find this is nothing to do with her sex or her rejection of a sexual nature. Upon allegations 13, 14, and 19 no explanation is called for from the respondents upon the harassment allegations.

368. We now turn to allegations 4 to 12 and 15 to 18. In summary, the allegations numbered 4 to 12 and 15 to 18 inclusive of the list of alleged unlawful conduct fail under section 26(1) of the 2010 Act but succeed pursuant to section 26(3) of the 2010 Act. We are satisfied that in each instance of unlawful conduct this was unwanted and was done with the purpose of violating the claimant's dignity or creating an intimidating etc environment for her. Alternatively, the conduct reasonably had that effect.

369. We do not find the conduct to be related to the claimant's sex. We find the reason why GH subjected the claimant to unlawful harassment was because of her rejection of the conduct of a sexual nature on 3 September 2022. True it is but for the fact that the claimant is female, the incident of 3 September 2022 would not have occurred. It had its origins in the claimant's attractiveness as a woman to GH. We find however that the reason why GH treated the claimant as he did was because he felt he could no longer work with her following her rejection of his sexual conduct. That was the reason why GH acted as he did towards her. Plainly, she was female before and after 3 September. The thing that changed was the rejection of the sexual conduct.

370. As we said when we analysed the conduct of a sexual nature in paragraphs 81 to 107, GH was very supportive of the claimant up to 3 September 2022. His whole deportment and manner towards her then changed. He could hardly have been more supportive of her before that date but became increasingly hostile towards her after it. There can be no other rational explanation for his change in demeanour than the claimant's rejection of his sexual conduct. As a general proposition, the claimant has on these allegations made out a *prima facie* case of harassment on the facts. There plainly was less favourable treatment of her by reason of that rejection and which would not have occurred had she submitted to it. There is no satisfactory non-discriminatory explanation from the respondents for the conduct. The tribunal can be satisfied that the rejection of the sexual conduct is the reason why. We now look at the individual allegations through the prism of section 26(3) of the 2010 Act.

371. The fourth allegation is that *GH ignored the claimant on her return to work from leave on 17 October 2022.* The factual findings are at paragraphs 159 to 164. We have found as a fact that GH did ignore the claimant. He did not greet her upon her return. However, he did agree to see her later the same day at which he informed her that he had been looking into her performance and attributed the first respondent's perilous financial position to her.

372. As we said in paragraph 169.7, the probability is that GH drew up the list of concerns emailed to the claimant on 31 October 2022 during her leave of absence or at any rate investigated them. We have also found as a fact that the claimant put up a robust defence against the thirteen allegations levelled against her. Many of the allegations are unmeritorious and certainly would not warrant moving to the dismissal of the claimant as an employee (as we have found her to be) on performance grounds.

373. This neatly segues into the fifth allegation which is *at the meeting held on 17 October 2022, GH complained that the claimant had left him to run the business and that her performance had been poor, informing her that he did not wish her to be involved in operations.* For the reasons given in paragraphs 159 to 164 and paragraph 169.7 the factual findings behind this allegation are upheld.

374. On any view, GH's conduct on 17 October 2022 was unwanted conduct. It is hard to see how the Tribunal could conclude otherwise in circumstances where the claimant was met with a cold reception from GH and then largely unmeritorious allegations levelled against her later the same day. We find that this was done with the purpose of violating the claimant's dignity and creating an intimidating etc environment for her. GH made no secret before the Tribunal of his wish no longer to work for the claimant. He had decided to snub her birthday. As we said in paragraph 166, he fairly and candidly accepted that he simply wanted the claimant out of the business. He was doing what he could to achieve that aim including meeting with Mr Rodwell to formulate a plan of action for the claimant's departure. (We should say that the claimant was unaware of the latter development which cannot accordingly constitute harassment of her. However, it does corroborate the claimant's conclusion that GH's hostility towards the claimant from 17 October 2022 was directed at exiting her from the business and therefore the acts of harassment were with that purpose).

375. As we have said, we find this conduct to be related to her rejection of GH's sexual conduct and not because she is female. By section 11 of the 2010 Act, in relation to the protected characteristic of sex, a reference to a person who has a particular protected characteristic is a reference to a man or to a woman. It may be an obvious observation, but before and after 3 September 2022 the claimant plainly had the same protected characteristic of sex. There is no reason to suppose that had the events of 3 September not taken place GH would not have continued to provide the large measure of support as he had before that date. The only difference in circumstance was the claimant's rejection of his sexual conduct. We find that to be the reason for the harassment of her from 17 October 2022 onwards.

376. The sixth allegation is that *on 24 October 2022 GH failed to attend a meeting with the claimant.* Our findings of fact are in paragraph 162. It is convenient to take this in conjunction with the seventh allegation which is that *from October 2022, GH excluded the claimant from managerial decisions.* Our findings of fact upon this issue may be found in particular at paragraphs 144, 146, 162, 171, 178, and 179.

377. For similar reasons as with the fourth and fifth allegations, we find that the claimant has made out her case that GH subjected her to harassment within the meaning of section 26(3) of the 2010 Act. The conduct was plainly unwanted. The claimant was being ostracised and excluded. GH was acting in this way with the purpose of ensuring her exit from the business. The reason why was the claimant's rejection of the sexual conduct. (For the avoidance of doubt, this finding does not include the budget meeting of 30 September 2022, as to which see our findings on allegation three).

378. The eighth allegation is that *on 28 October 2022 GH told the claimant that he no longer wanted to work with her.* Our findings of fact are at paragraphs167 and 169.7. This has, in effect, already been dealt with in connection with the fifth allegation. This element of the claim succeeds.

379. The ninth allegation is that GH *transferred parts of the claimant's role to other employees.* Our factual findings are at paragraphs 135, 137 and 179-181. We have made factual findings in the claimant's favour upon this issue. We find that the complaint of harassment under section 26(3) succeeds for similar reasons as with the fifth to eighth allegations. Again, this is part of a pattern. Plainly, there was unwanted conduct in that elements of the claimant's role were being given away to others. This was with a view to denuding the claimant's role and emptying it of all content as GH no longer wished her to be in the business. GH's conduct was therefore done with the purpose of violating her dignity and of creating an intimidating etc environment in mind. Again, this originates in the claimant's rejection of GH's conduct of a sexual nature on 3 September 2022.

380. It is convenient, we think, to skip now to the eleventh allegation which is *that on 28 October 2022, GH made unfounded performance allegations against the claimant*. The findings of fact are at paragraphs 167 to 169.7 and paragraph 185. For the reasons given upon the fifth allegation, this complaint succeeds. Making largely unmeritorious allegations against an employee is plainly unwanted conduct. GH did this with the purpose of ensuring the claimant's exit from the business. Again, the reason why was the claimant's rejection of the sexual conduct on the morning of 3 September 2022. This was done with the purpose of violating the claimant's dignity and of creating an intimidating etc environment for her to procure her exit.

381. We now turn to the tenth allegation. (We skipped over this as it was out of chronological order in the list of alleged unlawful conduct). This is that *GH asked for details of the claimant's work activity over the previous two weeks.* The factual findings upon this issue are in paragraph 185.11. Again, the claimant has succeeded in establishing as a fact that this conduct took place. This was unwanted conduct as it was an oppressive request out of line with the course of conduct prior to that date. True it is that GH had sought to direct the claimant's activities after 26 September 2022. However, he had never sought to elicit from her a detailed breakdown of her work activity over the previous two weeks. The height of the direction was that given on 26 September 2022 of the claimant's activity being measured KPI's by Mrs Betteridge. In our judgment, this conduct was unwanted and was being done with the purpose of ensuring the claimant's exit from the business. It was a continuation of the increasingly hostile and oppressive attitude adopted by GH towards the claimant particularly from 17 October 2022. Again, we find this to be unrelated to the claimant's sex but related to her rejection of the sexual conduct on the morning of 3 September 2022.

382. We now turn to the twelfth allegation which is that *the respondents failed to respond to the claimant's grievance of 15 November 2022.* The factual findings are in paragraphs 182 and 188 to 190.

383. Plainly, from the claimant's perspective, the refusal to deal with her grievance of 15 November 2022 was unwanted conduct. Any employee would want their grievance to be dealt with conscientiously and within a reasonable time.

384. The Tribunal is not satisfied that the respondents have disclosed to the Tribunal all the advice given and documentation generated by the particular transaction in question (that is to say, the advice given by the respondents' solicitor about the claimant's grievance of 15 November 2022). As we said in paragraph 190, it is with some surprise that the Tribunal was informed that there was no note of the meeting. Further, Miss Roberts (the respondent's solicitor's representative who

attended throughout the hearing) was present at the meeting. The respondents took the decision not to call her to give evidence. This is contrary to their obligations, having elected to waive privilege, pursuant to **Brennan.**

385. In these circumstances it is legitimate to draw an adverse inference against the respondents as to the advice given to them by their solicitor about how to deal with the claimant's grievance. Further, and in any case, no effort was made by the other directors and shareholders of the first respondent to engage with the claimant's grievance.

386. The Tribunal is entirely satisfied that by this stage the die was cast. GH set in train the process to achieve a resolution for the claimant's dismissal as director from the first respondent. The claimant was aware of this. We conclude therefore that this conduct was a continuation of GH's purpose in violating the claimant's dignity and creating an intimidating etc environment for her to procure her removal from the first respondent consequent upon her rejection of the conduct of a sexual nature which had occurred on 3 September 2022.

387. We can now move on to the fifteenth allegation. This is that *on 2 and 5 December 2022 GH told the claimant that he would remove her as a director.* There was no evidence of a meeting held on 2 December 2022. That allegation must therefore fail on the facts. However, there was a meeting held on 6 (not 5) December 2022. The factual findings are in paragraphs 194 and 195. Again, the claimant's factual contention is upheld. Again, this was unwanted conduct. This conclusion very much chimes with those upon the eighth allegation which is very similar in terms to the fifteenth allegation.

388. The sixteenth allegation is that *on 6 December 2022 GH failed to speak to the claimant during a meeting and during the day.* The factual findings are in paragraph 195. It is convenient to deal with the seventeenth allegation at the same time which is that *on the same day GH asked the claimant to work from home.* The factual findings are in paragraph 195. Again, the same conclusions are reached that this was unwanted conduct done by GH with the purpose of violating the claimant's dignity and creating an intimidating etc environment for her and that the reason why was her rejection of the sexual conduct of 3 September 2022.

389. The eighteenth and final allegation is that *on 22 December 2022 the respondents terminated the claimant's employment and directorship.* The factual finding is at paragraph 201. There can be no serious dispute that this is what actually occurred that day. Plainly, this was unwanted conduct. The claimant did not wish to leave the first respondent's employment. The summary dismissal of her was a violation of her dignity. It was not to create an intimidating etc environment for her because of course by then she was out of the business and out of that environment. The termination of her employment and directorship ensured that she would not return. Again, the reason why was GH's wish to end his working relationship with her following her rejection of his conduct of a sexual nature perpetrated on 3 September 2022.

390. Upon allegations 4 to 12 and 15 to 18, we find in the alternative that the conduct reasonably had the proscribed effect of violating the claimant's dignity and (save in respect of the eighteenth allegation) creating an intimidating etc environment for her. We have little doubt upon our findings that this is how the claimant perceived matters. We consider that in all the circumstances it was reasonable for the respondents' conduct toward the claimant from 17 October 2022 to have

that proscribed effect. Accordingly, even if we are wrong in holding that the impugned conduct in allegations 4 to 12 and 15 to 18 was done with the purpose of violating the claimant's dignity and creating an intimidating etc environment for her, it reasonably had that effect and was because of the claimant's rejection of GH's conduct on 3 September 2022. The claimant's complaints of harassment therefore succeed upon that alternative basis.

391. The success of the complaints of harassment in allegations one, 4 to 12, and 15 to 18 obviate the need for the Tribunal to consider these also as allegations of direct discrimination related to sex. This is because by virtue of section 212(1) a detriment does not include conduct which amounts to harassment. As we said in paragraph 11, harassment and direct discrimination claims are mutually exclusive. The allegations in paragraphs 2 and 3 have failed on the facts. These need not therefore be considered through the prism of a complaint of direct discrimination. This just leaves us to consider allegations 13, 14, and 19 as complaints of direct discrimination related to sex.

392. The thirteenth allegation is that *the respondents failed to pay the claimant's salary in November 2022.* By way of reminder, the factual findings are in paragraphs 192 and 193. There can be no question that non-payment of salary is something that a reasonable employee would consider to be to their disadvantage. We consider this to be the case even though, as we have found, the claimant received the correct amount of money which was mislabelled as a dividend rather than as payment of her wage. We do not consider such to be an unjustified sense of grievance.

393. In principle, therefore, we accept that the respondent's conduct by showing the payment of the sum in question as a dividend rather than a wage is a detriment for the purposes of section 39(2)(c)(d) of the 2010 Act. The real issue in this case is the reason why.

394. The Tribunal is satisfied that the burden of proof provisions in section 136 of the act are not engaged upon this issue. The Tribunal may go straight to the reason why as we are in a position to make positive findings on the evidence. This is that the wrong labelling of the payment made to the claimant on 30 November 2022 was by reason of the operation of the banking app being used by Mrs Betteridge.

395. Even if we are wrong to go straight to the reason why, the Tribunal is satisfied that the claimant has not discharged a burden upon her in section 136 of the 2010 Act to show a *prima facie* case of less favourable treatment related to sex. It is difficult to see how she could achieve this in circumstances where GH had his wages also labelled as dividends on the very same day. We refer to pages 968 and 969 of the bundle. There is therefore evidence before the Tribunal of a male comparator in the same circumstances as the claimant (being, at that stage, a fellow director and equal shareholder) who was treated in the same way.

396. The fourteenth allegation is that *the respondents failed to pay the claimant a dividend of £13,500 that was paid to GH.* The factual findings are at pages 153 and 154. We can accept that non-payment of a dividend may reasonably be considered to be to an employee/shareholder's disadvantage. Of course, such may reasonably be considered the case.

397. Again, however, the Tribunal considers that it may bypass the burden of proof provisions in section 136(1) of the 2010 Act because the reason why is plain.

Dividends were paid to GH in this way by way of repayment to him of loans made to the first respondent.

398. Again, if we are wrong to go straight to the reason why, then the Tribunal is satisfied that the claimant has not discharged a burden upon her to show a *prima facie* case of direct discrimination in the circumstances. There was no evidence placed before the Tribunal that a woman who had made a loan to the first respondent as had GH would be treated less favourably. There was no suggestion that the claimant had provided any loans to the first respondent. Indeed, it is upon this basis (in part) that we found her to be an employee because of the absence of any financial risk to her.

399. The nineteenth allegation is that *with effect from the payment due on 30 December 2022, the respondent stopped paying the claimant dividends.* The factual findings are in paragraph 202. After that date, the claimant ceased to be an employee. That does not in itself preclude a complaint of direct discrimination in any case upon the grounds of her employment status because of the operation of section 108(1) of the 2010 Act which prohibits discrimination in relationships that have ended.

400. We conclude that the non-payment of a dividend may reasonably be considered to be to the claimant's disadvantage. The difficulty for her is that there is evidence before the Tribunal that no dividend had been paid to anybody (including GH) after 30 December 2022. The claimant has therefore been treated the same as a male comparator in the same circumstances. The reason why the claimant has not received any dividends is because none have been declared. This is nothing to do with her sex and, in any case, she has been treated the same as GH.

401. We now turn to the victimisation complaints. It is accepted by the respondents that the grievances of 15 November 2022 and 9 December 2022 are protected acts. The question which arises therefore is whether the claimant was subjected to detriment by the respondents because she did the protected acts.

402. We should say that the respondents have not raised any issue that the acts have lost their protection because the allegations within them about a breach of the 2010 Act are false or were made in bad faith. The respondents were right not to raise such an issue. On any view, the allegations raised about breaches of the 2010 Act within the two protected acts were soundly based. GH accepted that he had made the homophobic remark on 13 November 2021 which was the subject of the first protected act. The second protected act raised the allegation of conduct of a sexual nature against GH. The Tribunal has found this to be soundly based. There was no bad faith on the part of the claimant as she raised both protected acts with a view to vindicating her position. She had good cause to write as she did to rebut allegations of poor performance (in November 2022) and to seek to prevail upon the shareholders not to expel her as director in December 2022.

403. The alleged detriment because of the first protected act can only relate to those matters occurring after 15 November 2022: allegations 12 to 19 inclusive.

404. We deal with each in turn starting with the twelfth allegation which is that *the respondents failed to respond to the claimant's grievance of 15 November 2022.* This has succeeded as an act of harassment under section 26(3) in any case and therefore cannot also succeed as an allegation of detriment by way of victimisation under section 27 because of section 212(1).

405. If wrong upon this, then we are satisfied that the claimant has discharged the burden of proof upon her to show a *prima facie* act of victimisation. The grievance was not responded to. An adverse inference may be drawn, as has been said, against the respondents for failure to disclose the totality of the transaction with their solicitor on 16 November 2022 the subject of legal advice privilege (which has been waived). That said, we are satisfied that the reason why the respondents refused to reply to the grievance was because of the legal advice given to them that the claimant was not an employee. The respondents were acting pursuant to that advice. As was the case in **Khan v Chief Constable of West Yorkshire Police**, the respondents were seeking to protect their position acting upon legal advice.

406. We can quickly dispose of the thirteenth, fourteenth and eighteenth allegations as complaints of victimisation. We are satisfied that in each case the relevant action on the part of the respondents was unconnected with the protected act of 15 November 2022. The failure to pay the salary in November 2022 was simply because of the application of the banking app operated by Mrs Betteridge. The dividend payments vested in GH were by way of repayment to him of loans to the first respondent. No dividends were paid to anybody after 30 December 2022.

407. It is also convenient we think to take the fifteenth, sixteenth and seventeenth allegations together. Broadly, this encompasses GH's conduct in telling the claimant that he would remove her as director, failing to speak to her on 5 December and then suggesting that she work from home.

408. The Tribunal can see no causal connection between these acts on the one hand and the protected act of 15 November 2022 on the other. It was plain from October 2022 that GH was determined upon the claimant's ouster from the first respondent. The protected act therefore had no causal impact.

409. In any case, the fifteenth, sixteenth and seventeenth allegations have succeeded as complaints of harassment under section 26(3) and therefore cannot also be brought as acts of detriment under section 27(1) by virtue of section 212(1) of the 2010 Act. That said, GH's reasoning for acting as he did on 5 and 6 December 2022 was, we find, uninfluenced by the grievance of 15 November 2022.

410. The claimant has done sufficient to shift the burden of proof under section 136 by reason of the somewhat peremptory response of Mrs Betteridge on 16 November 2022 and the unwillingness or refusal of the officers and shareholders of the first respondent to even engage with the grievance. Such unreasonable conduct is sufficient to shift the burden to the respondents. We are satisfied however that the respondents have satisfied the burden upon them by section 136(2) that in no sense whatsoever was the grievance of 15 November 2022 a material consideration in their treatment of the claimant. GH had determined upon the course of action to oust her from the business from October 2022. Notice of general meeting of 22 December 2022 was served on 9 November 2022 prior to the protected act of 15 November.

411. The protected act of 9 December 2022 could only impact the respondent's actions on 22 December and 30 December 2022. For the reasons already given, we need not dwell upon the nineteenth allegation in connection with the second protected act. This had no material influence on the non-payment of dividends.

412. We are satisfied that the protected acts of 15 November and 9 December 2022 had no bearing whatsoever upon the respondents' decision to terminate the

claimant's employment and directorship on 22 December 2022. As has been said, notice of the general meeting of the latter date had been served in November 2022. The resolution in favour of the claimant's removal had been signed by Mr Chippendale and Mr Rodwell on 5 December 2022, before the second protected act.

413. Again, this complaint in any case runs aground by reason of section 212(1). In the alternative, the claimant has in our judgment done sufficient to shift the burden of proof to the respondents upon the basis that the second protected act was read by GH and communicated to Mr Rodwell and Mr Chippendale but was ignored by them. There is simply no evidence that either of them sought to engage with what the claimant had said. The Tribunal heard evidence from neither of them in which case an adverse inference may be drawn. That said, the Tribunal is satisfied that the respondents have established that in no sense whatsoever was the decision to end her employment and her directorship on 22 December 2022 in anyway influenced by either of the protected acts. This is because the dismissal of her was the culmination of a longstanding desire on the part of GH (endorsed by Mr Chippendale and Mr Rodwell) to oust the claimant from the first respondent's business.

414. In conclusion, therefore, the first complaint of alleged unlawful conduct succeeds upon the basis of harassment related to sex and harassment by way of unwanted conduct of a sexual nature. The second and third allegations fail on the facts. The fourth to twelfth and fifteenth to eighteenth allegations succeed pursuant to section 26(3) of the 2010 Act upon the basis of less favourable treatment for the rejection of the conduct of a sexual nature the subject of the first allegation. The thirteenth, fourteenth, and nineteenth allegations fail as allegations of harassment and as allegations of direct discrimination and victimisation. Allegations numbered 1, 4 to 12 and 15 to 18 inclusive stand dismissed as allegations of direct discrimination related to sex and (in relation to allegations 12 and 15 to 19 inclusive) as acts of victimisation.

415. Those matters in allegations 4 to 12 and 15 to 18 date from 17 October 2022. The claimant contact ACAS as required by the Employment Tribunals Act 1996 on 9 January 2022. ACAS issued the early conciliation certificate at page one of the bundle on 16 January 2023. The claim form was presented on 22 February 2023.

416. The Tribunal has little hesitation in finding that the acts on and after 22 October 2022 were part of a continuing course of conduct. GH was very much at the centre of matters. The course of conduct ended on 30 December 2022. These claims have been brought within the limitation period in section 123 of the 2010 Act. Even if the Tribunal is wrong on this and all of the contentions stand-alone then the complaints have been brought in time in any case as the earliest in time took place on 17 October 2022. That was within three months of the commencement of early conciliation on 9 January 2023.

417. This gives rise to the Tribunal's jurisdiction to consider the first allegation which took place on 3 September 2022. On the authority of **South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, EAT** where a complainant wishes to show that there has been conduct extending over a period they will usually allege a series of acts, each of which is connected with the other. However, if any of those acts are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

418. On the face of it, there is a gap of around six weeks between 2 September 2022 and 17 October 2022. The question which arises therefore is whether GH's actions on 2 and 3 September 2022 had created a state of affairs continuing until the claimant's dismissal or whether it was merely a one-off act with continuing consequences.

419. The Tribunal is satisfied that GH's conduct on the night of 3 September 2022 started the state of affairs that ultimately led to the claimant's dismissal on 22 December 2022. As we have said several times, from that point he resolved to ensure the claimant's exit from the business. He had created a state of affairs that would continue until her dismissal on 22 December 2022.

420. Even if the Tribunal is wrong on that, and the incident of 3 September 2022 is a one off and isolated act it is in our judgment just and equitable to extend time to vest the Tribunal with jurisdiction to consider it. The claimant should, if treated as an isolated act, have initiated the early conciliation process by 2 December 2022. She did not do so for a period of five weeks until 9 January 2023. This is a relatively short delay.

421. No argument was advanced before the Tribunal that the respondents suffered any forensic prejudice by reason of the five weeks' delay. There was no evidence that any witnesses were no longer available or that any key documentation had been lost.

422. It is the case that the claimant has advanced no explanation for the delay. As was said in **Morgan**, however, this is but one factor to be taken into account.

423. In the Tribunal's judgment, the balance of prejudice favours the claimant. If the claim were to be held time barred, she would lose a complaint which the Tribunal has found to be meritorious. This would vest the respondents with an unjustified windfall. The claimant also attempted to deal with matters internally (albeit that she did not raise the issue of conduct of a sexual nature until 9 December 2022 by which time she was already seven days out of time if that incident is viewed as a specific and isolated act).

424. There is a clear link between the impugned conduct of a sexual nature which took place on 3 September 2022 on the one hand and GH's acts on and after 17 October 2022 on the other. GH had resolved to see the back of the claimant in October 2022. All the impugned acts of harassment which we have upheld can be traced back to the incident of 3 September 2022. We find therefore that there was from 3 September 2022 an ongoing situation which culminated in the claimant's dismissal such that the events of that night can be linked with those from 17 October 2022 onwards. Alternatively, as we say, it is plainly just and equitable to extend time to vest the Tribunal with jurisdiction to consider the first allegation in the list of alleged unlawful conduct.

425. The Tribunal has not needed to decide whether GH was himself an employee of the first respondent. We take the view that the probability is that he was, given that the arrangements for his remuneration and the expectations upon him were the same as for the claimant. He was also liable for disciplinary action (see paragraphs 48 and 49 above). We need not be overly concerned with the issue of employment status because, as Mr Clement rightly accepted, GH would in any event be acting as agent for the first respondent in his capacity as director. He therefore has a personal liability pursuant to section 110(1) when read in

conjunction with section 109(2) of the 2010 Act. His acts are treated as having been done by the first respondent.

426. The first respondent therefore has vicarious liability for GH's acts and GH has a personal liability for his acts. It follows therefore that GH has a personal liability in respect of the first and then the fourth to twelfth and fifteenth to seventeenth issues in the list of alleged unlawful conduct. The first respondent has a vicarious liability in respect of those acts. GH and the first respondent each incur a liability in respect of the eighteenth act of terminating the claimant's employment and directorship. Liability between the respondents is joint and several.

427. The Tribunal will now hold a case management hearing to be conducted by the Employment Judge to give case management directions for the convening of a remedy hearing. The parties shall, within 14 days of the date upon which this Judgment is sent, notify the Tribunal of dates to avoid over the next three calendar months.

Employment Judge Brain

Date 7 October 2024