EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms Sanja Veselinovic		(1) Curtin Communications Limited (2) Ms Catherine Mary Senda (3) Mr Stephen John Carey (4) Mr Nicholas Paul Stanton (5) Mr Paul Duncan Harvey

Heard at: London Central

On: 2- 5 and 8-10 March 2021 and 11 and 15 March 2021 in Chambers

Before: Employment Judge Stout
Tribunal Member Frederick Benson
Tribunal Member Georgina Carpenter

Representations
For the Claimant: Carolyn D'Souza (counsel)
For the respondent: Claire McCann (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) The Claimant's claims of unfair dismissal and automatic dismissal for having made protected disclosures and/or exercised her right to maternity leave are not well-founded under Part X of the Employment Rights Act 1996 (ERA 1996), and are dismissed.

(2) The Respondents did contravene s 18(4) and s 39(2)(d) of the Equality Act 2010 (EA 2010) by discriminating against the Claimant because she had exercised her right to maternity leave in relation to the detriments identified in the judgment as detriments (a), (e) and (f).

(3) The Respondents did not contravene s 13 and s 39(2)(c)/(d) of the EA 2010 by discriminating against the Claimant because of her sex. Those claims are dismissed.

(4) The Respondents did not contravene s 27 and s 39(2)(d) of the EA 2010 by victimising the Claimant. Those claims are dismissed.

(5) The Claimant's claims that she was subjected to detriments for having made protected disclosures are:

a. well-founded as against the First Respondent under s 47B(1) of the ERA 1996 in respect of the detriments identified in the judgment as detriments (a), (b), (d), (e), (f) and (h)(iv);
b. well-founded as against the Second Respondent under s 47B(1A) of the ERA 1996 in respect of the detriments identified in the judgment as detriments (a), (b), (d), (e), (f), (g) and (h)(iv), and the First Respondent is vicariously liable for those detriments under s 47B(1B);
c. not well-founded and therefore dismissed as against the other Respondents and in respect of the other detriments against all Respondents.

(6) The Claimant's claims that she was subjected to detriments for having exercised her right to maternity leave under s 47C ERA 1996 are out of time and are dismissed.

(7) Any compensation to be awarded against the First and/or Second Respondent in respect of any loss flowing from dismissal is to be calculated on the basis of a reduced salary and subject to a 90% deduction to reflect the chance that the Claimant would have been lawfully dismissed for redundancy in any event.

(8) The ACAS Code of Practice on Disciplinary and Grievance Procedures did not apply in this case and therefore there is no adjustment to be made to any award under s 207B of the TULR(C)A 1992.

REASONS

1. Ms Sanya Veselinovic (the Claimant) was formerly a statutory director, shareholder and the Finance Director of the First Respondent, Curtin & Co Limited (the Company). While she was absent on maternity leave, there was a management buy out (MBO) of the Company by the individual respondents (Ms Senda, Mr Stanton, Mr Carey and Dr Harvey) and a Mr Michael Cox, as part of which the Claimant relinquished her shareholding and directorship, but remained an employee. On her return from maternity leave in May 2019 she was placed 'at risk' of redundancy and her employment was subsequently terminated by the Company by reason (the Respondents say) of redundancy. The termination was on notice with effect from 10 December 2019. In these proceedings, the Claimant brings claims for unfair dismissal, including automatic unfair dismissal for whistle-blowing/exercising her statutory right to maternity leave. She also brings claims of sex and maternity discrimination, subjection to detriments for whistle-blowing and victimisation.

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was V: fully video. A face to face hearing was not held because of the pandemic.

3. The public was invited to observe via a notice on Courtserve.net. Some members of the public joined. There were some connectivity issues but only briefly and each occasion was dealt with by the parties and Tribunal agreeing what was said during any period that counsel, Judge or Tribunal Member had suffered the connection problem. The order of witnesses also had to be changed when Mr Curtin was unable to connect at the time originally arranged for his evidence.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

5. At the start of the hearing it was agreed that the list of issues to be determined was as follows:

    1. <u>Time limits / jurisdiction</u>

    1.1. Were all of the Claimant's complaints presented within the time limits set out in s.48(3) & (4) of the Employment Rights Act 1996 (ERA 1996) / s.123(1)(a) & (b) of the Equality Act 2010 (EA 2010)? Given the date when the ET1 was presented and the dates of early

conciliation, any complaint about something which happened before 10 June 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

2. Protected disclosures (ss.43B & 43C ERA)

2.1. Did the Claimant make any of the following alleged disclosures of information?

(a) On around 20 September 2012 to Tom Curtin (former Managing Director) verbally that R2 had that day underpaid a cash float repayment into the R1 's bank account (§40 GoC) – the Respondent accepted this at the Preliminary Hearing in this matter.

(b) On around 20 September 2012 to R2 verbally, by informing her that the repayment to R1 's bank account was short, and asking to see a receipt for the transaction (§44 GoC) - this is not admitted.

(c) on 5th October 2012 to R2 in writing, by informing her that Muhammed was going through the bank statements, that a withdrawal of £200 as petty cash had been highlighted and asking what the money had been used for (§44 GoC) – this was accepted.

(d) On around 26 October 2012 to Tom Curtin verbally that R2 had fabricated an expenses receipt for a meal at a hotel in Amsterdam on 24 August 2012 and other expenses receipts such as the taxi boat receipts from Venice (§41, 44 GoC) - this was accepted.

2.2. Did any such disclosure tend to show, in the Claimant's reasonable belief, that R2:-

(a) committed a criminal offence (s.43B(1)(a) ERA), namely:
  (i) theft, under s.1 Theft Act 1968;
  (ii) obtaining property by deception, under s.15 Theft Act 1968; and/or
  (iii) fraud, under s.2 Fraud Act 2006

(b) was failing to comply with the duty of good faith owed to R1 in her capacity as company director, in breach of s.172 of the Companies Act 2006 (s.43B(1)(b) ERA);

(c) was failing to comply with the implied legal obligation of trust and confidence which R2 owed to R1 as her employer (s.43B(1)(b) ERA 1996).

2.3. It is agreed that there was no requirement for good faith at the time that the Claimant made the alleged protected disclosures.

2.4. It is agreed that these disclosures were made to the Claimant's employer, in accordance with s.43C(1) ERA 1996.

3. Detriment - Protected disclosures (s. 47B ERA 1996)

3.1. Was the Claimant subjected to the following detriments on the ground of any protected disclosure which she may prove, contrary to s.47B ERA 1996?

(a) By R1-R5 inducing the Claimant into relinquishing her shareholding in R1, by a false representation made on 10 January 2019 that her salary and title would be preserved (§10 GoC). (Detriment a.)
(b) By notifying the Claimant on 8 May 2019 that her role was at risk of redundancy (§11 GoC). (Detriment b.)
~~(c) By R5 informing the Claimant in a call on 8 May 2019 that it would be in her interest not to return to work (§12 GoC).~~[1]
(d) By R2 on 21 May 2019 denying the Claimant access to the email account of the Claimant's maternity cover (Raj Parmar) (§13 GoC). (Detriment d.)
(e) By denying the Claimant access to relevant HR files in 2019 (§13 GoC). (Detriment e.)
(f) Requiring the Claimant to sit at a different desk upon her return to work in May 2019 (§13 GoC). (Detriment f.)
(g) By R2, R3 or R5's participation in the decision to make the Claimant's role redundant and / or dismiss her (in the case of R2-R5 only). (Detriment g.)
(h) By R2 - R5 between January - May 2019 creating a false or exaggerated case in order to conceal the real reason for the Claimant's selection for redundancy (namely, discrimination or protected disclosure victimisation) (§21-28 GoC), (Detriment h.) in particular by–
i. Exaggerating the financial difficulties of R1 (§21, 22 GoC)
ii. Not terminating the fixed term contract of C's maternity cover, Raj Parmar (§23 GoC);
iii. Telling staff at a meeting on 1st May 2019 that R1 was doing really well and making profits (§24 GoC);
iv. By the decision that C's duties could allegedly be dispersed to other colleagues (§27 GoC);
(i) Failure to treat the Claimant's grievance as a grievance, instead treating it as an appeal against dismissal (with the consequence of there being no right of appeal) (Detriment i.)
(j) by R1 conducting an unfair appeal process by (Detriment j.):-
i. withholding material documents from the appeal officer;
ii. its solicitors editing and/or revising the appeal report, thereby compromising independence of the appeal officer?
iii. by R2 lying to and/or withholding material information from the appeal officer.

4. <u>Detriment - Leave for family reasons (s.47C ERA 1996)</u>

4.1. Was the Claimant subjected to any of the detriments identified above i.e. §1.3 for the reason that she had taken maternity leave, contrary to s.47C(2)(b) ERA 1996?

5. <u>Automatic Unfair Dismissal (s.103A ERA 1996)</u>

[1] Allegation withdrawn at the start of the hearing.

5.1. Was the reason or principal reason for the Claimant's dismissal that she had made a protected disclosure, contrary to s.103A ERA 1996?

6. Automatic unfair dismissal (s.99 ERA 1996 / regulation 20 of the Maternity and Parental Leave Regulations 1999 ("MPLR 1999")

6.1. Alternatively, was the reason or principal reason for the Claimant's dismissal that she had taken ordinary maternity leave, contrary to s.99(3)(b) ERA 1996/ regulation 20(3)(d) MPLR?

7. Ordinary Unfair Dismissal (s.98 ERA 1996)

7.1. Was the reason or principal reason for the Claimant's dismissal redundancy?

7.2. Did R1 act unfairly in treating that reason as a sufficient reason for dismissal, contrary to s.98(4) ERA, more particularly:

(a) Was there a fair selection process?

(b) Did R1 unreasonably fail to engage with the Claimant in discussions on reducing her salary?

(c) Did R1 fail to make reasonable efforts to find suitable alternative employment, specifically:

(i) Did R1 fail to consider and / or offer the Claimant any alternative positions if such were available with an associated employer of R1, Harwood Communications Ltd?

(ii) Did R1 unreasonably make an offer of unsuitable alternative employment as Credit Controller at a FTE equivalent salary of £35,000 (but pro rata of £14,000)?

(d) Did R1 conduct an unfair appeal process by withholding material documents from the appeal officer and/or by the appeal officer not being independent?

7.3. If the Claimant was unfairly dismissed, to what extent, if any would a fair procedure have made a difference to the timing or outcome of her dismissal? Consideration of this issue should take in to account both the respondent's conduct of the process, and the Claimant's refusal to engage with the independent Appeal Officer.

7.4. Should any award for unfair dismissal be increased or reduced for either party's failure to fully follow the ACAS Code under s.207A of the Trade Union & Labour Relations (Consolidation) Act 1992? The Claimant complains that the respondent failed to treat the Claimant's grievance as a grievance, instead treating it as an appeal against dismissal.

8. Direct maternity discrimination (ss. 18 & 39 EA 2010)

8.1. Did the Respondents treat the Claimant unfavourably during her protected period (the protected period for the purposes of s.18 EA 2010 ending on 13 May 2019) because she had taken maternity leave, by subjecting her to any of the detriments identified above i.e. §1.3.1 (a) - (c)? The Claimant also claims that her dismissal was an act of direct maternity discrimination, relying upon s.18(5) EA 2010.

9. Direct Sex Discrimination (ss.13 & 39 EA 2010)

9.1. Did the Respondents treat the Claimant less favourably than it would have treated a male employee after her return to work on 13 May 2019, by subjecting her to any of the detriments identified above i.e. §1.3.1 (d) - (i) and/or her dismissal??

10. Victimisation (ss.27 & 39 EA 2010)

10.1. It is accepted that the Claimant's complaints of discrimination in her grievance / appeal letter dated 17 June 2019 amounted to a protected act?

10.2. Did R1's failure to progress the Claimant's grievance other than as an appeal amount to a detriment because of the Claimant's protected act?

11. Liability (ss.109, 110 & 111 EA 2010)

11.1. R1 accepts that is shall be vicariously liable for any act of discrimination carried out by R2-R5, in accordance with s.109 EA 2010?

11.2. Has individual liability for any act of discrimination carried out by R2-5, been established in accordance with s.110 EA 2010?

11.3. Did R2 instruct, cause or induce (or attempt to instruct, cause or induce) R3 and/ or R4 and/ or R5 to directly discriminate against the Claimant on grounds of her maternity and / or sex, contrary to s.111 EA 2010? (§33, 34 GoC)

Amendment applications / resiling from the List of Issues

12. In Closing Submissions, the Claimant (and, to a lesser extent, the Respondents) sought to change their positions and/or to amend their cases as follows:-

13. The Claimant identified potential errors in her pleading and sought leave to amend: (i) to plead detriment (a) as a false assurance inducing her to relinquish her directorship of the Company rather than her shareholding; (ii) to bring the claims identified under Issue 8 above as claims of discrimination for exercising the rights to maternity leave under s 18(4) EA 2010; and (iii) to bring the claims identified under Issue 9 above as claims of direct sex discrimination instead of as claims for maternity leave discrimination under s18(4) EA 2010. The Respondents resisted those applications.

14. The Respondents on the other hand sought to resile from the List of Issues in which they had identified the only positive reason advanced for the Claimant's dismissal as being 'redundancy' and re-introduce reliance on 'some other substantial reason', which had been pleaded in the Grounds of Resistance, but which was (the Respondents now submit) wrongly withdrawn by then counsel for the Respondents at the Preliminary Hearing.

15. We heard submissions on these questions at the hearing, but it was left to us to decide as part of our final deliberations whether we should permit the Claimant to amend her claim and/or the Respondents to resile from the List

of Issues. Given that we had heard evidence and closing submissions, we decided to approach this by first reaching our determinations on the facts, including the facts as they would be relevant to the parties proposed amended cases and then considering in the light of our conclusions whether and if so to what extent we should permit the parties to change their cases.

16. In the light of our conclusions on the substance of the complaints set out below, the only questions we have to decide in relation to amendment are whether we should permit detriment (a) to be amended to accord with the facts as we have found them to be, and whether we should permit the Claimant to amend her claims in relation to detriments (e) and (f) so as to bring them as claims of direct maternity discrimination under s 18(4) EA 2010, in addition to the already pleaded claims of detriments for having taken maternity leave under s 47C ERA 1996.

17. Our discretion in this respect under Rule 29 must be exercised in accordance with the principles in *Selkent* [1996] ICR 836, and the over-riding objective. We must take into account all the circumstances, including the nature of the amendment, any applicable time limits, the implications of the amendment in terms of impact on the trial timetable or costs and balance the injustice/hardship of allowing the amendment against the injustice/hardship of refusing it.

18. Regarding detriment (a), we consider that this amendment should be permitted. It is a minor factual amendment that in our judgment changes nothing of substance about the claim. Although this ought to have been pleaded as an inducement to relinquish the directorship in the first place given the sequence of events as is apparent from the emails, and although the failure to plead it in that way meant that slightly different lines of cross-examination were pursued than would otherwise have been the case, we do not consider that this amendment makes any substantive difference to the case against the Respondent because the material part of detriment (a) is the false assurance and there is no need to amend that part of the pleaded detriment. Whether it is the Claimant's shareholding or her directorship that she was induced to relinquish on the basis of a false assurance, that constitutes a detriment. It is immaterial whether she suffered any financial loss or whether there were any other realistic options open to her; the threshold for a detriment is a low one and it is the sense of having been misled that creates that detriment here in our judgment. It is in the interests of justice to permit this minor amendment to align the Claimant's pleaded case with the facts as we have found them to be.

19. As to the relabelling of some of maternity detriments claims as maternity discrimination claims, we have no hesitation in deciding that we should permit this amendment. It is in truth a minor relabelling of issues at the end of a trial which has had no impact on the trial at all. The prejudice to the Claimant of not allowing these amendments is that these claims would simply fail as we have found that the s 47C detriments claims were out of time, but claims under s 18(4) would be in time as it would be just and equitable to extend. Although there may be some fault here in the way the Claimant's case was pleaded, it

is not right to visit the consequences of that on the Claimant at this late stage. There is some prejudice to the Respondents who otherwise escape liability for meritorious claims, but the prejudice to the Claimant of denying her meritorious claims would be much greater. We consider that the interests of justice and balance of hardship here fall firmly in favour of granting the amendment.

The Evidence and Hearing

20. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle in the course of the hearing.

21. We explained our reasons for various case management decisions carefully as we went along. In particular, that included our reasons for refusing to admit some further disclosure produced by the Respondents on the morning of 8 March 2021 relating to computer searches that it had made for documents relevant to the case.

22. We heard oral evidence for the Claimant from the Claimant herself and Mr Thomas Curtin, the former owner of the Company.

23. For the Respondent we heard oral evidence from the following witnesses:

    23.1. Mr Michael Cox (Director of Harwood);
    23.2. Mr Nicholas Stanton (Fourth Respondent, Joint Managing Director of the Company);
    23.3. Ms Catherine Senda (Second Respondent, Joint Managing Director of the Company);
    23.4. Mr Stephen Carey (Third Respondent, Account Manager for the Company);
    23.5. Mr Paul Harvey (Fifth Respondent, Consultant to the Company);
    23.6. Mr Andrew Hodge (Independent HR Consultant).

The facts

24. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities and after considering all of the evidence 'in the round'.

25. We note here that both parties in the course of the hearing had cause to complain about the disclosure provided by the other side. The Claimant also sought to make issues regarding disclosure relevant to the liability issues, but

we have in the end not found these points to be of any assistance and we were able to make our findings of fact without reference to these issues.

26. We also note here that in the findings of fact that follow we in places (in particular when dealing with the reasons for the various detriments about which the Claimant complains) set out what the Respondents' evidence was as to their reason(s) for acting on a particular issue, but not our conclusions as to what the real reasons were. That is because our conclusions in relation to those issues are to be found in the Conclusions section of our judgment where we set out our reasons for deciding whether or not we accept the Respondents explanations and whether or not the Respondents reasons for acting were unlawful.

27. Page references, where they appear in the judgment below are to the PDF page in the electronic bundle, not the printed page numbers on the documents.

The Company's business

28. The Company undertakes community consultation and political engagement in relation to planning applications. Its clients include property developers and commercial companies. It works with clients on putting a planning application together, and engaging with stakeholders and the local authority. Since January 2019, the Company has been owned by Harwood Communications Ltd (Harwood), which is a company in which the Second to Fourth Respondents and Mr Michael Cox are shareholders. The current joint Managing Directors of the Company are Mr Stanton and Ms Senda. The individual respondents are all directors of the Company and of Harwood.

29. The business was originally set up by Thomas Curtin. The Company was incorporated by Mr Curtin in March 2009 following a year of sole trading by him. He was its only shareholder at that time. Mr Curtin is an expert in property development crisis and reputation management, and a visiting lecturer at a major European business school based in Lausanne. Mr Curtin had run a similar successful business previously, called Green Issues Communications Limited (GIC). After he sold the Company to Harwood in January 2019 the Company ceased to offer the crisis management services, and focused solely on the planning application side of the Company's business.

30. In February 2009 Mr Curtin hired Catherine Senda (then Worboys) as an assistant and as someone who he could mentor to potentially take over from him if the business grew successfully like his previous business. At around the same time he also offered a freelance contract to Paul Harvey on a part-time basis. He had worked for him previously at GIC.

31. Ms Senda had control of all finances for the Company in these early years, but in 2011 Mr Curtin decided that a dedicated finance function was required and so what became the Claimant's position was advertised. Ms Senda and Mr Curtin interviewed the Claimant for the role and recruited her.

The Claimant's employment with the Company

32. The Claimant commenced employment with the Company as Office Manager on 18 April 2011 on a salary of £28,000. She had a Business Studies degree, but no financial qualifications. Her previous experience was as general administrator and marketing assistant for a design company. Mr Curtin was very impressed by the Claimant from the outset and confirmed her in post before the end of her probationary period. By September 2012 she was promoted to Administration and Finance Director. Ms Senda was reluctant to relinquish financial control to the Claimant and also resented the attendance at Board meetings of Ian Nunn, the accountant, and so in January 2012 Mr Curtin asked him to step down in order to 'keep the peace'.

33. The Claimant's responsibilities when she commenced employment involved general office management, setting up processes for administration, accounts payable and credit control and helping with Mr Curtin's business diary and travel arrangements when required. She was from the outset responsible for the finance function of the Company. A job description from 2012 indicates that the role had expanded to include personnel issues including issuing contracts, holidays, sickness management, recruitment, personal data collection, personnel files and induction of new starters (p 325). The role also included events, marketing and advertising and facilities and business management, and IT as well as finance. Much of the finance role was, however, outsourced with a company called Occulus providing the payroll and Ian Nunn doing the book-keeping.

34. At the time that the Claimant joined the Company Mr Carey was not an employee of the Company but was working 4 days per week as a contractor. Mr Stanton started working for the Company at the same time as the Claimant as an Account Manager, subsequently being promoted to Team Leader in 2013 and becoming a statutory director and 5% shareholder in 2015.

35. Relations between the Claimant and all the Respondents were good at the start, and (so far as the Claimant is concerned) remained good with everyone apart from Ms Senda until her dismissal on return from maternity leave in 2019.

Claimant's change of employment status and changes for the individual Respondents

36. Mr Curtin regarded the Claimant as an excellent employee who knew exactly what was required of a Finance Director role, despite not having finance qualifications. He rewarded her with promotion, pay rises, shares and a statutory directorship. From 22 August 2013 the Claimant became a statutory director of the Company. She signed a new employment contract on 1 November 2014 pursuant to which her salary increased to £55,000 and she became entitled to receive a bonus (p 147). The Claimant became a shareholder in the Company in early 2015 with a 5% shareholding. Mr Stanton was also issued with a 5% shareholding at that time and Ms Senda's

shareholding was increased to 7.5%. The Claimant's role continued to grow so that she was responsible for all aspects of the Company's finances, monitoring and reporting. From 2015 the Claimant ceased undertaking personal administration and assistance tasks for Tom Curtin as these were now done by Emma Davis (Office and Events Manager) and Charlotte Watt (Junior Office Manager), albeit generally under the Claimant's supervision. In 2015 the Claimant's salary was increased by Mr Curtin from £60,000 to £90,000. Ms Senda's was also increased to the same level. In the latter part of 2015 Mr Curtin had health issues and was away from work for three months. He contemplated moving away from the business at this point, but that was resisted by Ms Senda.

Issues raised and inquiry in respect of expenses claims made by Catherine Senda (the alleged protected disclosures)

37. The Claimant says that her relationship with Ms Senda was strained from 2012 onwards as a result of issues that she raised regarding Ms Senda's expenses. At this time Ms Senda held the title of Managing Director in the Company and was in fact a statutory director of the Company, but the Claimant when she appealed against her dismissal (p 723) referred to Ms Senda as being a 'Consultant' at this time and Ms Senda also described herself as such when interviewed in the course of the appeal and that was also the title used in the Respondent's Grounds of Resistance which she approved. Given that it was the Claimant who first got Ms Senda's title wrong, we do not consider that this particular error is a significant part of what we have ultimately found to be mendacious downplaying of this expenses issue by Ms Senda both at the appeal stage and in these proceedings. In relation to this expenses issue, we have in general accepted the Claimant's account. Although her recollection was faulty on two more recent issues (whether the Respondent had sent her direct a draft director's resignation letter also proposing resignation of employment, and what precisely Dr Harvey said to her in the telephone call on 9 May – as to both of which see further below), we have in general found the Claimant to be a truthful witness and her recollection of this expenses issue is supported by the documents and Mr Curtin and in our judgment more reliable than Ms Senda's who, for the reasons we set out below, acted dishonestly at the time in relation to some aspects of her expenses and has not been wholly truthful since.

38. The Claimant was alerted to potential irregularities in relation to cash transactions by Ms Senda when some cash left over from a Company trip to Venice was apparently not all paid into the bank by Ms Senda but was short by about £100 by the Claimant's calculation. The Claimant asked Ms Senda about this on 20 September 2012. She described this alleged protected disclosure in her witness statement in the following terms: *"I informed her that the amount deposited in the account appeared to be short, and I asked her to provide me with the cash deposit receipt. She said she did not have one and this surprised and concerned me, as I would expect her to have kept that. Catherine then asked why I needed it. I said it was to confirm the exchange rate as the amount paid in looks to be less than the current exchange rate.*

Catherine then told me that she had paid the Euros directly into Curtin&Co's bank account and that she could not see a problem with that. At this point I was very concerned that a director of the company, as well as an employee, was acting inappropriately and unlawfully. I related it to one of the cases I studied for my exam in Business Law. … I was certain that it was illegal for a company director to use company funds for his or her own benefit." The Claimant was challenged on this in cross-examination and confirmed that all she said to Ms Senda was what she had written in this paragraph. She did not at any time tell Ms Senda that she thought she had acted illegally or unlawfully.

39. The Claimant decided to investigate this transaction. She went to Barclays and they confirmed that the exchange rate on that day 1.3589 Euros to the pound so that based on the Euros left over £1,033.92 should have been credited to the account instead of £940. The Bank confirmed that the £940 had been paid in in pounds and that there were no foreign transactions showing on the account whatsoever. We accept the Claimant's evidence on this point because she made a contemporaneous note of this conversation on a reconciliation sheet she was working on and which we have in the bundle (p 252). The next day (i.e. on 21 September 2012, adopting the date in the Claimant's and Mr Curtin's witness statements) the Claimant reported her concerns to Mr Curtin. In this alleged protected disclosure, the Claimant told Mr Curtin what she had discovered, that there had been a shortfall in the money paid into the account by Ms Senda and it appeared Ms Senda had kept some money back. She also told Mr Curtin that there had been other suspicious cash withdrawals from the Company's debit card. Mr Curtin was shocked and instructed the Claimant to commence an audit of the Company's cash transactions. We accept the Claimant's evidence as to this conversation, which is in all material respects consistent with Mr Curtin's recollection.

40. With regard to the missing Euros, Ms Senda, for her part, says that she does not recall this particular transaction being raised with her. She says that it would not have been unusual for her to take responsibility for paying money into the Company bank account and that if the money was short on this occasion (which she does not recall) it is possible that she retained the cash for some other use. We note that this explanation does not deal with the facts as they have been advanced by the Claimant in this case, and as we have accepted, specifically that on this occasion Ms Senda told the Claimant she had paid all the leftover Euros into the Bank, but in fact had not. On this occasion, therefore, Ms Senda had retained Company cash without explanation.

41. As a result of the further investigation, the Claimant identified what she considered to be many other irregularities, including in particular one in relation to a lunch at the Sheraton Hotel (Amsterdam Airport). It appeared to the Claimant that Ms Senda had retrospectively created a receipt because she had initially denied having a receipt, then produced a document that had no details of what items had been purchased and when the Claimant had contacted the Hotel they said they did not recognise the document that Ms Senda had provided. In her witness statement in these proceedings, Ms

Senda admits she created this 'receipt'. She had not admitted to it previously, and was unaware that the Claimant had contacted the Hotel and thus had evidence of her forgery until the Claimant made disclosure in these proceedings.

42. The Claimant was similarly concerned that Ms Senda had wrongly claimed expenses for water taxis in Venice as Ms Senda had claimed these as personal expenses when the Claimant believed they had been paid for on the client's account. When challenged by the Claimant at the time in 2012, Ms Senda had initially said she did not have receipts. There are emails in the bundle which show that Ms Senda sought to obtain copies of the receipts from the Hotel. There is no documentary evidence of a response from the Hotel, but receipts were subsequently produced by Ms Senda, which receipts the Claimant considered were obviously cut by hand to the size of the receipts rather than being originals. In cross-examination in these proceedings, Ms Senda maintained that these were genuine receipts which she had found after a further search of her belongings. We note that, contrary to the Claimant's submission, this is consistent with her witness statement at paragraph 2 which does not suggest that she obtained a copy of the receipts from the Hotel. However, this point notwithstanding, Ms Senda has never provided any explanation for why the receipts appeared to have been cut to size, and we therefore find that in the light of the Claimant's evidence and the fact that Ms Senda did forge another receipt, these water taxi receipts were also forged.

43. At the end of September or the beginning of October Mr Curtin discussed the company card expenses with Ms Senda in a meeting in the Board Room. Ms Senda's evidence about this meeting in her witness statement was *"He told me that a number of expenses had been incurred on the company credit card without receipts being provided. … I remember that one of the examples he gave me was the water taxi … claiming that although I claimed I had taken a private taxi, because there was no receipt to demonstrate this I could have gotten a public cheaper taxi and then claimed for the more expensive one and benefitted in terms of the difference in costs. This was categorically untrue as I quite simply had forgotten to get a receipt as I was in a rush trying to make a plane. The reason I remember this particular example is because it was completely blown out of proportion. It was a simple thing to forget a receipt but Tom had taken a real issue with it, along with other examples he presented. … "*. In oral evidence she said that she remembered it because she broke her finger that day while boarding the plane. Mr Curtin does not recall having had more than one meeting with Ms Senda, or discussing any of the details of the expenses with her, but it is apparent that she does and given that we consider it to be likely that he discussed at least some details with her, and that in her case this is an admission against her interest, we accept her evidence as to what Mr Curtin said to her in that meeting. We note that although what Mr Curtin said to her did not quite accord with the facts as they appeared to be to the Claimant (i.e. Mr Curtin suggested that she had claimed for a private taxi when she could have got a cheaper public one, whereas the Claimant believed that Ms Senda had claimed for a private taxi when in fact she had taken one on the client account), Mr Curtin did in this conversation accuse Ms Senda of misconduct.

44. The second alleged protected disclosure that the Claimant says she made to Ms Senda herself is an email from the Claimant of 5 October 2012 to both Mr Curtin and Ms Senda as follows:

> Hello Tom and Catherine,
>
> Hope the train journey has been ok this morning.
>
> Muhammad is going through the bank statements and we've got a withdrawal of £200 on Sept 21st as petty cash.
>
> Could you please let me know what the money's been used for so that he can update Sage?
>
> Many thanks,
>
> Sanja

45. Ms Senda subsequently left £200 in a drawer in the office, and there is a post-it note in the bundle in Ms Senda's handwriting which the Claimant believes relates to this and says (p 250): *"Can you tell him that the one on the 20th (?) Sept is now in his drawer waiting pls?"*. Ms Senda did not deny being the author of the post-it note. She could not recall leaving £200 in the drawer, but did not specifically deny doing so, saying she was very busy at the time. In cross-examination, she refused to answer whether it was a common occurrence for her to leave cash in drawers for the bookkeepers, saying that this was 'a leading question'. In the circumstances, Ms Senda has provided no explanation for the return of the £200 cash, and we again accept the Claimant's evidence on this for the reasons we have set out above. We accordingly find that Ms Senda did leave £200 in a drawer after it was pointed out to her by the Claimant in the email of 5 October 2019 that there was an unaccounted for cash withdrawal of £200 made on 21 September.

46. On 23 October 2012 Ms Senda emailed the Claimant saying *"I'm so sorry Sanja, I have sorted one more of the receipts .."*.

47. At some point during the investigation, Ms Senda became very upset and cried on the Claimant's shoulder as she feared for her job. We find this was on 25 October 2012 as the incident is reflected in the email of 26 October 2012 from Ms Senda to the Claimant which says, *"Thank you so much Sanja – I really appreciate everything you are doing and how kind you are. I'm really sorry about yesterday and very embarrassed. Everything is fine now and much better so hopefully I'll be back to contributing to the management team rather than getting in the way! x"*.

48. In her final alleged protected disclosure, which the Claimant dates as taking place on or around 26 October 2012, the Claimant reported all her findings to Mr Curtin, including her concerns about what she believed to be the forged Sheraton lunch 'receipt' and Venice water taxi receipts. Mr Curtin agreed with the Claimant that Ms Senda appeared to have been 'defrauding' the Company and Mr Curtin said he would have to deal with it. Although he felt he could

have dismissed Ms Senda for gross misconduct Mr Curtin was reluctant to do so because he had invested time in developing Ms Senda as his successor and he did not wish to 'start from scratch at 62 years of age'. Mr Curtin was under the impression that at this time Ms Senda had money 'difficulties', in the sense that she had expensive tastes, and decided to treat it as a stupid mistake by Ms Senda, and not dismiss her or call the police, provided she reimbursed the money. Mr Curtin then spoke to Ms Senda on the telephone on 29 October 2012. In this telephone call Mr Curtin made clear that he was aware of substantial discrepancies in her expenses and that these needed to be sorted out. He did not discuss any details with her at this point or say that it was the Claimant who had reported the matter to him, but Ms Senda was (we find) aware that it was the Claimant who had brought the issues to his attention because as is apparent from the foregoing, it was the Claimant who had been asking her questions and working with her on providing explanations for the various transactions. Mr Curtin told Ms Senda to find the missing receipts and work with the Claimant on it and repay any monies for which she did not have receipts.

49. Following this meeting, the Claimant was asked by Mr Curtin to sit down with Ms Senda and go through all her expenses, and accept without question any receipts that Ms Senda provided. This the Claimant did and a list was drawn up of all the expenses for which Ms Senda could not provide receipts. Despite the Claimant's concerns about the receipt for the water taxis and the Sheraton Hotel lunch, as Ms Senda had in fact provided what purported to be receipts for those expenses, these expenses did not appear on that final list. Ms Senda was required to repay all they monies that she could not account for. She wrote a cheque for £929.30 to the Company on 29 October 2012 which she gave to the Claimant. The Claimant emailed Mr Curtin to inform him that the cheque had been written, but Mr Curtin decided that it should not be cashed.

50. Mr Curtin took Ms Senda out for lunch some time later with the purpose of indicating that he was prepared to put the matter behind him. Ms Senda was not so sure he had and wondered whether he would take the money out of her next bonus, but he did not and after a time she concluded that the matter had been put to rest.

51. Ms Senda's evidence in these proceedings was that she knew that Mr Curtin was very concerned about her various expenses claims, but she regarded the matter as 'blown out of proportion', and maintains that in all cases the expenses were properly claimed but she had not always kept the receipts. She was unaware that there was any evidence that she had forged the Sheraton Hotel receipt until disclosure in these proceedings. Prior to witness statements in these proceedings, Ms Senda had denied that she had any interaction with the Claimant in relation to the expenses. This was how it was put in the Grounds of Resistance and how it was put to Mr Hodge at the appeal stage (although she accepted to him that she was aware that the Claimant must have been involved). It was not until witness statements in these proceedings that she specifically accepted the Claimant was involved. She could not credibly have done otherwise given the documents disclosed by both sides.

52. None of the other individual Respondents knew anything about the issue with Ms Senda's expenses until the Claimant raised it in her appeal/grievance after she had been dismissed.

53. Mr Curtin (not the Claimant) retained the dossier of evidence in relation to Ms Senda's expenses issues which has been provided to the Tribunal in these proceedings.

Ongoing issues between the Claimant and Ms Senda

54. For a year or so after the expenses issue the Claimant says that her relationship with Ms Senda was amicable, but the Claimant attributes this to Ms Senda being fearful for her job. Once Ms Senda had re-established her security and position, the Claimant says that her relationship with Ms Senda deteriorated and she felt that it was clear that Ms Senda bore her a grudge in respect of the expenses issue. Mr Curtin said that it was clear there was a coolness between them, and that this was inevitable because he had instructed the Claimant to keep a close eye on Ms Senda's dealings and Ms Senda was aware of this. He said that after a time Ms Senda had regained her composure and resented the Claimant overseeing her. The Claimant says that Ms Senda made clear that she disliked being questioned by the Claimant and she was resistant to reforms that the Claimant introduced relating to financial controls and fee structures. The Claimant found Ms Senda to be controlling. The Claimant acknowledged in cross-examination that these were all features of Ms Senda's working style that she had observed before the expenses issue arose, but she said that before the expenses issue there had been no hostility or animosity, but afterwards there was. Mr Curtin also acknowledged that Ms Senda had been reluctant to relinquish the finance function to the Claimant after the Claimant commenced employment and that there had been tension between them prior to the issue with the expenses.

55. Ms Senda in her witness statement gave examples for the purpose of illustrating her case that following the issue with the expenses her relationship with the Claimant was very amicable and she expanded on these examples under questioning. These examples were put to the Claimant, but each example the Claimant said did not show that the relationship was amicable. The examples included:

    55.1. They shared a room on a business trip to Milan. The Claimant said that this was because Mr Curtin asked them to. Ms Senda said it was an obvious pairing because of their seniority.

    55.2. Ms Senda providing support for the Claimant when her father was ill. Ms Senda said the Claimant cried on her shoulder. The Claimant denied this.

    55.3. Ms Senda said the Claimant told her first about her pregnancy and said that she was now going to tell Mr Curtin; the Claimant said she told Mr Curtin first and then her assistant.

55.4. Ms Senda said she organised a baby shower for the Claimant, booked the restaurant and bought the balloons. The Claimant said it was two other employees who organised it even if Ms Senda might then have made the booking.

55.5. Ms Senda organised office birthday presents for the Claimant, but she did that for everyone.

55.6. The Claimant's husband quoted for redecorating Ms Senda's house and the Claimant had gone along with her child. However, the Claimant said it was only because they were on their way somewhere else and afterwards Ms Senda had not even said thank you or replied to the quote.

55.7. When the Claimant was subject to an anonymous letter campaign, Ms Senda acted as the Claimant's 'trusted person' in the interview with the police, but the Claimant said that was not the case.

56. In oral evidence Mr Stanton said, and we accept, that there had been a 'personality clash' between the Claimant and Ms Senda, in particular because the Claimant tended to do what Mr Curtin wanted her to do, whereas Ms Senda would challenge Mr Curtin. He said that there were occasional tensions between them, but it was not a permanent state of affairs.

57. Both Ms Senda and Mr Stanton gave evidence, which we accept as it is reflected in later emails, that they had from time to time been frustrated with the Claimant's approach to budgeting issues.

58. Drawing the above evidence together, we find that the position following the expenses issue was that the Claimant and Ms Senda had a functioning professional relationship, but it was not a warm one personally and they had occasional clashes on various issues. Because we found the Claimant on the whole to be the more reliable witness for the reasons we have already set out, we accept the Claimant's evidence regarding the examples that Ms Senda gave regarding their relationship between 2012 and 2018, but we do not find that the evidence in relation to those years in itself proves that Ms Senda was harbouring a grudge against the Claimant in respect of the expenses issue. There is evidence that their relationship had not been wholly amicable before the expenses issue because of Ms Senda's resentment of the Claimant being allocated more responsibilities for finance, and the personality clash noted by Mr Stanton goes some way to explaining ongoing elements of tension in their relationship.

59. Nonetheless, it is clear that the expenses issue was a significant episode, that Ms Senda was at the time very embarrassed about it, and that she was fully aware that it was the Claimant undertaking the investigations as a result of their conversations and emails about it and the fact that at the end of the day she gave the cheque for £929 to the Claimant. She would have been aware that it was the Claimant who was providing evidence to Mr Curtin about which

he then spoke to her. Although Ms Senda was very busy at the time and many or even most of the expenses may have been legitimately incurred but receipts simply not retained, there is unfortunately here enough evidence for us to conclude, applying the civil standard of the balance of probabilities, that Ms Senda had cause to feel guilty about her actions at this time: this includes in relation to the shortfall in Euros paid into the bank account, in relation to the forged Sheraton Hotel receipt, the forged water taxi receipts and the £200 cash that she returned to the drawer. That she did feel guilty about it is in our judgment demonstrated by her mendacious down-playing of the episode to Mr Hodge at the appeal stage. While she may not have realised quite how much the Claimant knew about what she had done, we find that Ms Senda must have known that the Claimant considered she had (in general terms) misconducted herself and misused Company funds and that the Claimant had disclosed information to Mr Curtin that tended to show that. That is why she returned the £200 cash and wrote the £929 cheque. We find it entirely plausible that Ms Senda would have felt a sense of resentment toward the Claimant as a result of this episode, the Claimant's part in it and her knowledge of conduct about which Ms Senda felt embarrassed and guilty. We therefore accept as correct the Claimant's perception that this episode soured their relationship. We also accept that the reason why Ms Senda's resentment towards the Claimant did not manifest itself in any particular detrimental conduct prior to the MBO is because the Claimant was up until that point protected by Mr Curtin's continuing presence in the business. That changed after the MBO.

First maternity leave

60. Between March 2016 and November 2016 the Claimant was absent on a first period of maternity leave. Cover was provided by Matt Lorrimore FCA on a self-employed basis at a rate of £350 per day. A job description drawn up for the purpose of recruiting Mr Lorrimore sets out key responsibilities in relation to finance, including working with the bookkeeper and Nunn Hayward accountants, maintaining financial controls and providing ad hoc strategic input on the future growth at the CEO's request (p 409).

61. Ms Senda was also absent on maternity leave from August 2016. Both the Claimant and Ms Senda were paid full pay for the whole of their first maternity leaves, at Mr Curtin's discretion.

62. While Ms Senda was on maternity leave, Mr Curtin worked closely with Mr Stanton in managing the Company. During that time he found a number of accounts that Ms Senda had been working on that he considered had been badly mismanaged. On Ms Senda's return he informed her that he was happy with the way the business had been run in her absence and that he was accordingly making Mr Stanton joint managing director and changing her role in significant respects. Ms Senda was very unhappy about this and maintained in oral evidence that this had led her to be particularly keen to treat the Claimant properly in relation to her maternity leave. This may have been in her mind, but we do not accept that this had any significant impact on

how she behaved toward the Claimant in practice as we have seen no evidence of her taking any particular care, other than possibly by deferring any decision in relation to the Claimant's role until shortly before the Claimant was due to return from maternity leave, but that decision appears to replicate what Ms Senda had found difficult about her own return from maternity leave. Indeed, we formed the impression that the reality was that Ms Senda considered that as she had been poorly treated on her return from maternity leave, that was also the time to do the same to the Claimant.

Second maternity leave commences

63. In April 2018 the Claimant discovered she was pregnant again and notified Mr Curtin of this and that she planned to take maternity leave. Arrangements for her maternity leave were confirmed in a letter from Mr Curtin dated 10 September 2018 (p 301). The Claimant was to be paid full salary for the first two months of maternity leave, and thereafter statutory maternity pay.

64. The Claimant was asked to recruit her maternity cover and Raj Parmar was selected. His role was deliberately to be more limited than the Claimant's, just covering the finance aspects of her role rather than the administrative aspects of her role. He commenced work with the Company on a freelance basis on 1 October 2018. He was a self-employed accountant with prior experience as an Interim Credit Controller, which was also his title with the Company. Mr Parmar asked for £300 per day, but the Claimant negotiated a rate of £275 per day. He wanted to work a four-day week and so that was agreed. His contract was for a fixed term, but could have been terminated earlier on the giving of 1 month's notice or extended.

65. The Claimant commenced her second maternity leave on 12 November 2018. Her last day in the office was 2 November 2018 as she had annual leave to take.

Management buy-out (MBO) discussions

66. By 2018 Mr Stanton and Ms Senda were unhappy with Mr Curtin's management of the company. Mr Curtin had had problems with alcohol for some years and eventually had a period of time away from the Company in 2017 in rehabilitation. On his return, he was also unhappy about some decisions that they had taken while he was away from the business. Other senior employees were also unhappy with Mr Curtin and three senior employees resigned close together, which led to a significant downturn in the Company's turnover and profitability. One of those employees was Mr Carey. Mr Curtin tried to persuade Mr Carey not to resign by paying him a £20,000 bonus, but Mr Carey decided to resign anyway with the intention of leaving in early 2019.

67. On 17 July 2018 the Company held its annual reception in the House of Commons for existing and prospective clients. On the morning of the event,

Mr Curtin called the Company's Team Leaders to a meeting and upbraided them about how to behave when doing business. He then did not turn up to the reception. Mr Stanton and Ms Senda felt that this could not go on and decided to investigate the possibility of a management buy-out (MBO).

68. There was a series of meetings with Roger Bright (who chaired the Company's Advisory Board) in the summer to try to resolve matters within the Company. Mr Curtin did not participate in those meetings because he wanted the other directors and employees to be able to talk freely. Mr Curtin does not now consider that these meetings concerned the possibility of an MBO, but he does accept that in July 2018 the conflict between him, Ms Senda and Mr Stanton had become so bitter that he offered to resign. In that context, we accept that the individual Respondents thought an MBO was a possibility at this point, in large part because it had hitherto always been Mr Curtin's intention to transfer the business to Ms Senda as his successor. However, there is no dispute that, whatever the discussions were, they did not result in an MBO at that point because Mr Curtin did not want to sell at this time (or, so far as the individuals Respondents were concerned, changed his mind about selling).

69. In August 2018 Ms Senda, frustrated with the discussions and Mr Curtin's management, gave notice of resignation, and took preliminary steps towards setting up her own company, which she registered with Companies House as Harwood Communications Limited (Harwood). She did not leave immediately, however, but sought to negotiate a leaving date with Mr Curtin. There was a period of uncertainty. At the end of October 2019, Ms Senda arranged a meeting with Mr Curtin to discuss her leaving date. At that meeting she told Mr Curtin that she did not want to leave, she had wanted her and Mr Stanton to take over the company. Mr Curtin then decided to sell. Accordingly, negotiations for an MBO started (or re-started, so far as the individual Respondents were concerned). This was just before the Claimant was due to start her second period of maternity leave.

70. Mr Stanton and Ms Senda say that they asked the Claimant in the summer of 2018 (Ms Senda was specific that this was at meetings on 7 August and 14 August) if she wanted to participate in the MBO and she said 'no'. The Claimant denies that an MBO was ever discussed with her. She says that she first heard about it when, just before she commenced maternity leave in November 2018, Mr Curtin told her that he wished to step away from the business and that Mr Stanton and Ms Senda had offered to buy the company. Mr Stanton and Ms Senda say that because the Claimant had previously indicated she was not interested, when the possibility of an MBO re-emerged at the end of October 2019, they did not see any need to ask her again. They also assumed that as Mr Curtin was liaising closely with her, he would have said if the Claimant was interested in being part of it. The Claimant gave birth 10 days after commencing maternity leave and was understandably preoccupied with that. She did not propose to Mr Curtin that she should be involved in the MBO, and nor did he suggest that.

71. On this issue, we reject the Respondents' evidence that the Claimant was specifically asked in a conversation with Roger Bright in the summer of 2018 whether she wished to participate in an MBO, but we accept that the Respondents gained the impression that she would not be interested. Given the inchoate and obviously fractious discussions at this time, which at least as between Mr Curtin, Ms Senda and Mr Stanton appear to have been to a certain extent at cross purposes, we do not consider that the Claimant was specifically asked at any point (even, as the Respondents contend in a conversation with Roger Bright at which Mr Curtin was not present) whether she was interested in participating in an MBO. However, we do accept that because the Claimant's loyalties lay principally with Mr Curtin she would not have wanted to 'side' with the individual Respondents against him and would have given the Respondents the impression that she was not interested in participating in an MBO (and, indeed, there is no evidence that she was in fact interested in participating at any point). However, we also find that, whatever was said in the summer of 2018, by the time that the possibility of an MBO resurfaced in November 2018 the individual Respondents were not interested in having the Claimant join them in an MBO. Had they been, they would not have relied on Mr Curtin to communicate with her, but would have approached her themselves, especially when they were finding it difficult to raise the necessary funds to purchase the business. That they did not do so makes it clear that they did not want her to be involved in the MBO.

72. Mr Curtin saw the MBO as the best move for the business as the tensions within the senior members of the Company had been bad for business and the Company was not performing well financially. By the end of December 2018 the Company was reporting pre-tax losses of £188k for the first 9 months of the 2018/19 financial year. Mr Curtin stepping away from the business would in itself save the Company c£15k per month in salary payments, although it was his intention to take the more lucrative crisis-management side of the business with him. Mr Curtin's name was to remain attached to the business and he was keen that the business should continue to be run in a way that reflected his values and reputation.

73. Heads of Terms for the MBO were drafted in November 2018. Between November 2018 and January 2019 negotiations for the MBO continued. Mr Curtin informed the Claimant that these negotiations were happening, but he did not give her details. Indeed, he says that he did not himself know the details as he thought he was selling his shares to Ms Senda and Mr Stanton (through Ms Senda's company, Harwood) and was unaware that Dr Harvey and Mr Carey were also involved. Mr Stanton and Ms Senda say that they did tell Mr Curtin that they wanted Mr Carey and Dr Harvey involved too, but that Mr Curtin said he only wanted to negotiate with Ms Senda and Mr Stanton. We find that Mr Stanton and Ms Senda did tell Mr Curtin about Mr Carey's and Dr Harvey's involvement, but because he did not want to know, he immediately put that information from his mind and did not tell the Claimant.

Business plans and potential redundancies

74. When discussions started in the summer, Mr Carey said that Mr Stanton and Ms Senda would need financial advice and introduced them to his accountant, Mr Cox. Mr Cox provided advice informally in the summer of 2018 and then again in a meeting with the four individual Respondents at the Liberal Club bar on 7 November 2018. At that meeting Mr Stanton provided him with the Company's accounts and certain other information. Subsequently, his accountancy firm was formally instructed to perform 'light touch' due diligence in relation to the business for the purposes of the MBO and when it became apparent that the individual Respondents were struggling to raise the finance for the MBO, he agreed to invest too, and also to loan some money to the Company (via Harwood).

75. When first shown the accounts in the Liberal Club, Mr Cox identified a potential excessive cost in the Finance Director function. He regarded a salary of £90,000, plus bonuses, as being excessive for the finance function in a business of this size, particularly given that bookkeeping was outsourced in any event. He considered that the function ought to be costing about half that. He jokingly suggested when chatting to Ms Senda and Mr Stanton *"could I be hired to do that job"*. He said that the salary being paid to the Claimant was more in keeping *"with a Senior Financial Role in a large company which would have a strategic element to the role and in which the job holder had either extensive financial qualifications or significant ability"*. Mr Cox also identified other areas where cost-savings could be made.

76. Following the conversations with Mr Cox, and in the context of the negotiations Ms Senda, Mr Carey, Mr Stanton and Dr Harvey drew up a draft business plan, at least two drafts of which were circulated in November 2018 (pp 444 and 460). These drafts, the first of which was sent by Ms Senda on 15 November 2018, indicate that the Claimant's salary and bonus (minimum £90k to maximum £120k including bonus) had been identified as a 'cost to cut', together with the bookkeepers (at a cost of £2,000 pcm), to be replaced with a bookkeeping/credit control function on a three-day per week contract with monthly oversight from an appointed accountant. One version of the plans notes the effect of Mr Cox's advice that *"the total cost of the finance function (excluding personnel bonuses) is currently £145,000 per year which advice has told us is roughly twice what it should be in a company of our size"*. Together with other costs that might be cut from 1 February, it was noted that the Company's costs would be reduced from £155,000 pcm to c £125,000 pcm. The possibility of three "redundancies" of individuals including two men and one woman none of whom were on maternity leave is also identified. There is a reference to an intention to invite voluntary redundancies, and HR advice being sought with regards to the Claimant *"given that she is now on maternity leave*" (p 335). Around the same time (on 15/16 November 2018: p 906) in emails exchanged between Ms Senda, Mr Carey, Mr Stanton and Dr Harvey, Mr Carey identified that *"HR advice"* was needed in relation to the Claimant and whether it would be cheaper to make her redundant before or after her return to work. Ms Senda added a comment on his *"I'm not convinced, other than [the Claimant], we need to make a big deal out of it and*

would suggest asking for voluntary redundancy candidates subject to an additional £1k pay off or something. … [The Claimant's] current contract is to be paid two months at full salary and then SMP (c £130 per week) so a 'loss of office' payment may be attractive." To the latter Dr Harvey added *"This is the one we'll need to be legally tight on, sorry for stating the obvious"*. In fact, it was not *"HR Advice"* that was sought at that time but legal advice. The Respondent's position is that although advice was sought none was received; the Claimant does not accept this based on a response by the Respondent's solicitors to a request for information, but that response is ambiguous and in any event it is not material as the advice would have been privileged; in any event, we accept the Respondent's evidence on this point.

77. At the end of November 2018 Mr Cox provided some further advice which is reflected in an email exchange between Mr Stanton and him on 29 November 2018 (p 980-1). Mr Stanton's understanding was that if the Claimant did not want to sell her shares as part of the MBO, there were *"Drag & Tag provisions in the shareholders agreement which will enforce this"*. There was discussion about how Mr Curtin should be compensated for the loss of his employment and whether he could be made redundant retrospectively with his (foregone) November and December salary payments counting as redundancy payments. Mr Cox said that he saw *"no harm (subject to legal advice)"* in making a similar *"loss of office"* offer in respect of the Claimant's employment.

78. In his witness statement, Mr Stanton says that he did not consider it appropriate to look closely at the Claimant's role at this stage, for various reasons:- she had just given birth and it was not an appropriate time to talk to her about the finance function; he considered it possible that the financial performance of the business might have improved before she was due back from maternity leave; he also thought that there was the possibility she might want to extend her maternity leave or come back on a part-time basis. He said that if she had not been on maternity leave, they might have addressed the role earlier. Ms Senda also states that no decisions had been made at this point. She said that as the Claimant was on maternity leave and they were not paying her full salary there was no immediate need to look formally at her role and she felt it would have been unfair to do so while the Claimant was on maternity leave. All the individual Respondents maintained under cross-examination that no decisions had been taken at this point. They say that these were just ideas that were being discussed while they tried to gain an understanding of the Company's finances. They all said, in various ways, that they were contemplating investing their 'life savings' in the Company, that they did not have the kind of money that Mr Curtin had and which he had loaned to the Company as needed when it was struggling financially, and that they were very concerned to ensure that they could make the business profitable.

79. The Claimant contends that in reality a decision was taken by the individual Respondents in November 2018 to make her role redundant and that thereafter this was a *fait accompli*. We understand why the Claimant thinks this because the business plans and emails from November 2018 make it look as if the Respondents' thinking regarding her role was very advanced and that

there was a clear plan to make her redundant. However, they had a lot to think about with the MBO, and a lot of work to do to retrieve a business that was losing significant amounts of money. They appear from the documents to have thought that they could not (or, at least, should not) take any steps with regard to the Claimant while she was on maternity leave. They did not feel that they needed to take any decisions because she was on maternity leave, was receiving only statutory maternity pay and her intended date for return to work was six months off, during which time the circumstances of either the Company or the Claimant may have changed significantly. In fact, it is clear from Ms Senda's emails of 8 February 2019 (p 510) and 16 April 2019 (p 524) (which we deal with below) that she did not at the time she wrote those emails think that the Claimant would definitely need to be made redundant: other options were still in her mind, such as changing the Claimant's duties or hours. We have considered very carefully whether we should regard these emails by Ms Senda as genuine or not, particularly in the light of our conclusion (for reasons set out below) that Ms Senda did subject the Claimant to detriments for making protected disclosures and did not explore the possible options for retaining her in employment. However, we are nonetheless persuaded that the level of detail in the February email about the role that the Claimant might come back to, and the apparently guileless reference in the April to the possibility of 'reducing hours' as an alternative to redundancy, indicate that Ms Senda did not make a final decision on redundancy until after 16 April 2019. The other individual Respondents appear to follow Ms Senda's lead, so in the circumstances we find that no decision had been made at November 2018 to make the Claimant redundant, but we do find that there was, from November 2018, a settled intention on the part of all the individual Respondents to do something very significant to reduce the costs of the Claimant's role, given its cost to the business and the trenchant advice they had received from Mr Cox.

The assurance given to the Claimant

80. The structure for the MBO that was discussed was for the Claimant and Mr Stanton to relinquish their shares in the Company to Mr Curtin, who would then sell his shares to Harwood, so that Harwood would become the sole owner of the Company. (Ms Senda had already relinquished her shares when she resigned earlier in 2019.) Those participating in the MBO would become shareholders in Harwood and by the purchase of shares would fund Harwood's purchase of the Company from Mr Curtin. As part of the deal, the Company was also to repay Mr Curtin's loans. The figures initially proposed were for Mr Curtin to receive £350,000 for his shares and £150,000 loans to be repaid in instalments. Mr Curtin was anxious to get the sale completed as soon as possible (he wanted it done by Christmas) and the individual Respondents were also keen to move quickly, partly because Mr Curtin had effectively left the business once he had decided to sell and with the individual Respondents distracted by the sale as well the Respondent's financial difficulties were being exacerbated.

81. On 18 December 2018, Mr Stanton sent Mr Curtin (copying in Ms Senda, Mr Cox and Mr Nunn) a draft contract for sale. Mr Curtin forwarded it straight on to the Claimant on her personal email address 'without reading it carefully'. This draft agreement included proposals for Mr Curtin and the Claimant to resign both their directorships and (in square brackets) employments with the Company. The Claimant replied to Mr Curtin querying whether *"they are expecting me out from the employment?"*. Mr Curtin was not happy about that and subsequent drafts accordingly not only removed reference to the Claimant resigning her employment but made explicitly clear that she was not resigning. The Claimant had forgotten that it was Mr Curtin who had forwarded the first draft of this agreement to her and had maintained in her witness statement that it was the Respondents who sent this direct to her and who had failed to disclose the email. The document was only located after the Tribunal at the hearing suggested that it was likely Mr Curtin had forwarded this document to her and a check was then made by the Claimant of her personal email account.

82. Mr Curtin also asked Ms Senda and Mr Stanton to provide reassurance to the Claimant about her future employment with the Company. Ms Senda was reluctant to provide that assurance because she did not want to mislead the Claimant. In her witness statement she said that she felt that everything was up in the air and they were reviewing the position. In an email to Dr Harvey and the other MBO participants at the time she wrote as follows:

> Could you please contact [their lawyer] about sending a letter with reassurances about Sanja's employment. Essentially Tom has promised her one which I don't want to do but also think we probably have to based on her maternity leave anyway.
>
> In short, I would like to make sure that it is clear that her responsibilities are able to be changed due to the takeover. As I understand it, her title and salary have to remain but we can amend the job description so that needs to be clear.
>
> See attached the letter I received at the end of my maternity leave which puts clear statements of what I had to do in it. I'm not sure we want to be that specific at this stage but we can send something similar in future.
>
> My preference would be for a short and simple (and legal sounding) letter which says 'your statutory rights have not been amended as part of the management buy-out process. Your role and job description wlll be discussed further in the month before your return to work based on the trading of the company and any changes which have been implemented due to the change in management structure.
>
> To be clear this is not my no. 1 priority but Tom is insisting so anything short and sharp and suitably vague would be great.

83. On 8 January 2019 Mr Stanton signed his stock transfer form and asked the Claimant to sort hers out. She replied on 8 January at 10:13 (p 1000) *"If someone could send me the forms I'll sign"*. The forms were sent by return, together with a form for her to sign as her resignation as a director of the Company. However, her printer was not working and it was agreed between her and Mr Stanton that a colleague would drop the documents round to her

for signing on the evening of 8 January. The Claimant took the opportunity to ask Mr Stanton to counter-sign her baby's passport form.

84. On 9 January 2019 Mr Stanton emailed the Claimant (p 503) to confirm that following the MBO her contract of employment would remain with the Company and all terms in it would remain unaltered. In response to further queries from the Claimant as to whether her job title would remain as it was and whether all of her duties would remain the same, Mr Stanton on 10 January 2019 provided further assurances as follows:

> Your job title and remuneration will remain the same as your existing contract.
>
> We are not certain as to how the company will be forced to change over the coming months given the current poor trading position. There may inevitably be some changes to the tasks you currently carry out but any such changes will be in line with your Finance Director title and pay. We will of course discuss this with you if or when appropriate.

85. In connection with the MBO the Claimant took private legal advice on her position from Chris Cook of SA Law. He observed, echoing Mr Stanton's language, that changes would be *"inevitable"* whether or not she resigned her directorship and he saw no problem with her resigning her directorship. Having taken that advice, the Claimant confirmed to Mr Stanton that, on the basis of the assurances in his email, she was happy to resign her directorship.

86. As is apparent from the emails on 8 January 2019, the Claimant had been content to relinquish her shares without any assurance about future employment. The Claimant had not paid for the shares when they had been transferred to her in 2015, although they had a face value of just under £15k at that time, and she transferred them back to Mr Curtin for no consideration. We note that, based on the original sale price proposed of £350,000 the Claimant's 5% share would have had a value of somewhat over £17k, but on the ultimate sale price of £150,000 her 5% share was only £7,500.

87. The Respondents' witnesses all said (in various terms) that they were comfortable with the terms of the assurance given to the Claimant because it was merely an assurance that her employment rights would be respected, and they consider they were as the redundancy was dealt with by reference to her existing role and job title. However, we find that the assurance given was misleading in that it suggested that although her duties may change her remuneration/pay (as well as title) would remain the same. In circumstances where we have found as a fact that there was a settled intention to do something significant to cut the costs of the Finance Director role, this assurance was misleading, indeed false, as the consequence of reducing the costs of the Finance Director role would have been that (even if she remained in employment in some capacity) the Claimant's remuneration/pay would not remain the same.

Completion of MBO and events of early 2019

88. On 11 January 2019 the MBO completed. The final agreement was that Mr Curtin was paid £150,000 for his shares, and £75,000 of his loans were to be repaid. Mr Curtin resigned his employment with the Company, but it was agreed he would take with him the Company's crisis management business, which was his particular area of expertise in any event. Mr Curtin and the individual Respondents parted on amicable terms, with Mr Curtin continuing to write a regular piece for the Company's website *gratis*. Following the MBO, the Company's shares were wholly owned by Harwood, and Harwood's shares were owned by Ms Senda and Mr Stanton (as majority shareholders), with Mr Carey, Dr Harvey and Mr Cox (through his pension scheme) owning smaller shareholdings. The statutory directors of the Company following the MBO were the four individual Respondents. The statutory directors of Harwood were the same, plus Mr Cox.

89. The Associate Director referred to in the draft business plans as a potential 'redundancy' was dismissed in January 2019. He was regarded as a poor performer and was not replaced. The other two individuals referred to in the draft business plans as potential redundancies were not dismissed, but left and were not replaced in November/December 2019.

90. At the beginning of 2019 the Company's financial performance continued to be poor. The position at this stage was that the Company had reported a profit of £23k in the year ended March 2018, and losses of £188k in the 9 months to December 2018 (p 415). In January and February 2019 it reported losses of £27,517 and £20,697. It made a small profit of £4,000 in March. Mr Curtin's £75k loan (or a substantial proportion of it) was repaid by the Company in the early part of 2019, but this was a balance sheet item which was not included in the Company's profit and loss account.

91. During the first half of 2019 the Respondents looked to make savings where they could, seeking to negotiate a rent holiday and moving to monthly payments for rent. Mr Parmar was asked to review the Company's expenditure and savings on office and administrative costs were identified where possible. The directors also took voluntary pay cuts, but were paid nearly equivalent amounts after receiving dividends from Harwood. Mr Cox advised that this would be more tax efficient as it would enable the directors' levels of remuneration to be broadly maintained at less cost to the Company. The Company 'paid' Harwood monies (the inverted commas indicate that no money actually moved because the companies were sharing the same bank account) in the form of a management charge that covered those dividends, together with funds required to pay various professional fees incurred by Harwood in connection with the MBO and to repay a loan which Mr Cox had made to Harwood to fund the purchase of the business. The management charge was £20k per month for the first three months of 2019 and then reduced to nil by December 2019, so that the total charge paid over the calendar year was £140k. As the dividends decreased, director's salaries were increased again, so that the directors did not earn significantly less in

2019 than their salaries would have been (although they did defer their salary payments at least once to assist with Company cashflow issues).

92. In early February 2019 the Claimant asked to meet with Ms Senda and Mr Stanton. Ms Senda wrote to Dr Harvey and Mr Stanton about this by email of 8 February 2019 (p 510). From this email, it is apparent that there are changes planned to the Finance Director role, but there is no mention in that email of deleting the role or not bringing the Claimant back into it. Ms Senda's proposal for what should be said to the Claimant, subject to legal advice, was that changes are being made to the structure driven by poor financial performance, *"following a full review being undertaken by Mike and Raj of the accounts process, the book keepers have been given notice and a lot more of that function will be coming in house which she will be expected to run following a handover from Raj", "Finance now also runs all project budgets so she will be expected to do that…", "Paul has taken a greater role in HR and will continue to do so"*. She concluded: *"To me, all of that is perfectly in keeping with the title of Finance Director and, if anything, more so than the role before"*. Ms Senda does, however, say, with regard to meeting the Claimant, *"As you can imagine, I'm not madly keen but I suppose we have to"*. In her witness statement, Ms Senda explained that the reason she said this was because there had still been no decision about the Claimant's role, but it was something that was under review and needed to be discussed and for this reason she felt awkward about meeting with the Claimant. We accept Ms Senda's evidence in this respect as far as it goes, but we also find that the other reason for her awkwardness at this point was her settled intention to reduce the costs of the finance function which she knew would have an obvious impact on the Claimant and her role, but which she did not consider she could mention while the Claimant was on maternity leave (as she had made clear in her 9 January 2019 email regarding giving the Claimant an assurance about her job title and remuneration).

93. Ms Senda also said in cross-examination that there had been consideration of whether the Claimant could be trained to do the bookkeeping function. We do not accept that Ms Senda actually considered re-training the Claimant as a bookkeeper not only because Ms Senda's credibility is damaged by the lies she told about the expenses issue, but also because this evidence although obviously relevant to an unfair dismissal claim was not mentioned until oral evidence at this hearing and was not a suggestion that Dr Harvey was aware of.

94. On 15 February 2019 the Claimant attended the Company offices. She brought her baby Alex in to introduce him to staff. Then she left Alex with a colleague while she, Ms Senda and Mr Stanton had a meeting in the Board Room. The Claimant made a note of that meeting (p 512). Her impression was that it was a friendly meeting. Details were not discussed. It was agreed there would be a further meeting before her return to work, which she reminded them was due to be on 13 May 2019. At the meeting Mr Stanton asked her if she would be coming back and the Claimant said she would.

95. On 16 April 2019 Mr Cox, Mr Stanton and Ms Senda reported Mr Parmar as saying, in the context of discussion about the scope of the finance function, that he could have done the normal day-to-day finance role in two days per week rather than the four days he had been hired for. We accept this evidence as to what Mr Parmar said as it is reflected in the email from Ms Senda following the meeting. This comment had a significant impact on Ms Senda who felt that they had been paying Mr Parmar unnecessarily and that when the Claimant returned her salary would be further unnecessary cost. She emailed Dr Harvey, Mr Stanton and Mr Carey asking Dr Harvey to take advice on what to do with the Claimant (p 524) and explaining *"Raj has just said that he could do the job in two days per week without all of the major budgeting stuff etc which she hasn't been capable of doing previously so we need to find out when and how we can start a redundancy process or reduce the hours required etc. (in my view, unless anyone disagrees)."*

96. On 17 April the Claimant by email sought a second catch up meeting with Ms Senda and Mr Stanton. She received no reply. Ms Senda gave evidence that she was very busy at this point and she did not know what to say to the Claimant in the light of the conversation with Mr Parmar the previous day.

97. Ms Senda by email of 22 April 2019 to Mr Stanton, Dr Harvey and Mr Carey (p 513) asked them to look at a draft business plan and noted that *"The gaping hole is finance which I am really concerned about"*. She said that Mr Parmar evidently regarded himself as 'coming to the end of his tenure' and not wanting to take on responsibility for putting a new budget together, while the Claimant *"has proven that she isn't capable"* so that it would be necessary to pay Mr Cox and his team. Mr Cox's firm, Cox Costello & Horne was appointed to take over the accountancy work that the Company had previously outsourced to Oculus and Nunn Hayward and they started this work in April 2019.

98. Ms Senda told us that her view that the Claimant was not 'capable' related principally to the question of a Company budget. She said, and this had evidently been a source of frustration for her, that the Company had never had a proper budget. What were called 'budgets' were in her view aspirational documents based on figures 'plucked from the air' by Mr Curtin. We accept so far as it goes that this was what Ms Senda had consciously in mind, but we note that we have been shown no material to demonstrate a lack of capability on the part of the Claimant and, further, that the way Ms Senda expressed her view, particularly in the email of 22 April 2019, suggests a dismissive attitude toward the Claimant by Ms Senda and that Ms Senda had wider concerns about the Claimant's capability than she has admitted to in these proceedings.

99. The redraft of the business plan produced by Ms Senda on 22 April 2019 contained the same text about the Claimant's salary and bonus being a 'cost to cut' and the advice received about the finance function. It did not include the Claimant in the 'redundancies' identified even at this stage, but noted that a solution was to be discussed and agreed at a Board Meeting on 23 April 2019.

100. There was a Board Meeting on 23 April 2019 but it was not minuted (notwithstanding the requirements of s 248 of the Companies Act 2006). The directors approved the 2018 accounts which Mr Cox had prepared. Despite the documentation prepared the previous day, none of the Respondents' witnesses recalled any particular discussion of the Claimant's role at this meeting, but it is apparent from what follows that on or around this date the individual Respondents agreed to take advice about a redundancy process for the Claimant's role, and decided that Dr Harvey and Mr Carey should conduct the redundancy process as they had a bit more 'distance' from the Claimant than Ms Senda and Mr Stanton. We find that the reason there is no record of this meeting and none of them recall any significant discussion on 23 April is because as we have found there had long been a settled intention to reduce the costs of the finance function and we infer that after the conversation with Mr Parmar on 16 April, they felt there was nothing more to discuss as the way forward was obvious to all of them.

101. On 26 April the Claimant chased again for a second catch up meeting with Ms Senda and Mr Stanton. Again, she received no reply. Again, Ms Senda's explanation for this is that things were 'up in the air' with the Claimant and she did not know what to say, but this does not explain her failure even to provide a holding response.

102. The proposal about the Claimant's redundancy was discussed by Ms Senda and Mr Stanton with Mr Curtin by telephone on 8 May 2019 (p 533). This conversation was vague. Mr Curtin did not appreciate that it was intended to make the Claimant redundant immediately. He cut them short when they tried to talk about it, saying that the business was theirs now and the decisions were theirs to take. Ms Senda reported this to Dr Harvey, Mr Carey and Mr Stanton as being that Mr Curtin *"was more fine than expected"* about it.

Redundancy risk notification

103. On 1 May 2019 a staff meeting was held at which external parties were present. A positive message was given to staff that the Company was *"back in profit so we can invest"* (p 530). This message was more positive than the Company's financial position at that stage warranted as the new directors wished to boost employee morale. As already noted, the Company had reported that it was loss-making for some time. Small profits of £3.5k and £7.5k were made in March and April, and May did subsequently prove to be a good month with £16.5k profit. Thereafter, however, the Respondent reported losses in its management accounts every month for the remainder of 2019 giving a cumulative loss for the calendar year of c £236k (p 800).

104. On 8 May 2019 Dr Harvey telephoned the Claimant and left a message that he wanted to speak to her about her return to work. The Claimant called Mr Curtin before calling Dr Harvey back and Mr Curtin advised her to record the call, which she did, although she now realises that she should not have done. In the call, Dr Harvey informed her that her role was potentially redundant

although no decision had been made. The Claimant said she was surprised and shocked. In her appeal and in her claim in these proceedings the Claimant complained that in this call Dr Harvey said that it would not be in her interests to return to the office. She withdrew this allegation at the start of the hearing, but she still maintained that was what he had said. The transcript of the call (p 1065) shows Dr Harvey saying *"there is no expectation on our part … in terms of coming back into the office on Monday, but we would like to meet with you on Tuesday"* and, in answer to the Claimant's question *"So you don't want me to come back on Monday"*, he said *"I'm saying you don't have to and it would help you to review the consultation and meet with us …".* Later in the conversation the Claimant said a second time *"you don't want me to come back to work on Monday and is that what you're saying?"* to which the transcript shows Dr Harvey as responding (with some words unclear): *"[baby crying] in your interests that [in the sense of OR in terms of] being decent on this but that is not the case you there's no [unclear] it's perfectly your choice"*. The Claimant was upset by the way that Dr Harvey spoke to her in this call, but there is nothing untoward that we can see in the transcript in what he said and he did not say as the Claimant alleges that it was not in her interests to return to the office. We accept, however, that this was genuinely misconstrued by the Claimant as we accept her evidence that she did not listen again to the recording she made and Dr Harvey very nearly does say what she alleged. The Claimant spoke to Mr Curtin about it afterwards who said that he was surprised that Dr Harvey had called her.

105. On 9 May 2019 Mr Curtin emailed Ms Senda, Mr Stanton, Ms Carey and Dr Harvey expressing his shock at their 'callous and unfair action' in telling the Claimant that she was being made redundant just before she was due to return to work, by directing her to meet offsite at accountant's offices giving the clear impression that decisions had been made and she was not wanted. He continued by upbraiding the individual Respondents for their failure to respect his prior generosity to them, asking them to reconsider and saying that if they continued he would 'disavow all my association' with the Company.

106. Dr Harvey replied on 10 May saying that it was a difficult situation for all concerned, but sought to reassure Mr Curtin that the Company had not reached the decision lightly, they intended to follow a full, fair and reasonable consultation process and no decision had been made regarding the outcome (p 538).

107. A letter to the Claimant of 9 May 2019 warned her of the potential redundancy and invited her to a consultation meeting (p 535). The rationale for the redundancy was explained in the letter as being because of the Company's financial performance. The Company was said to have made a loss of £120k in the 12 months to December 2018 and a loss of £94k in the first three months of 2019. These figures were not quite correct, but they were not an overstatement. In fact the Company's management accounts show a loss of £188k in the 9 months to December 2018 and about £43k (cumulatively) in the first three months of 2019. It was indicated that the intention was to cover her duties either with other people in the business or external providers. The letter mentioned that the Respondent wished to discuss ways of avoiding

redundancy, including potential alternative employment. The Claimant misread this letter finding it *"very confusing on the one hand saying that my duties will be dealt with by other persons or external providers and then saying no decision has been made"*. In fact, the letter clearly states that all aspects are a proposal. It could have used *"would"* rather than *"will"*, but we find the meaning of the letter to be clear and it is reading too much into it to suggest that this letter indicates a final decision has been made.

108. On 10 May 2019 at 08:17 Dr Harvey confirmed that the Company would be appointing different solicitors in the light of her concerns about conflict of interest. He said again it was up to her whether she attended work next week and that she could take paid leave if she wished.

109. On 10 May 2019 at 14:32 the Claimant emailed Dr Harvey, Ms Senda, Mr Stanton and Mr Carey confirming that she would be returning to work on Monday and was committed to helping the business meet its future objectives (p 542). Ms Senda replied to all (save the Claimant) saying *"I honestly have no idea what the work she was doing or is intending to do is"* and saying that the Claimant could go on the spare bank of desks until Mr Parmar leaves *"which I wouldn't imagine goes against any rules"*. When cross-examined on this point Ms Senda denied that she was frustrated at the Claimant coming back to work, and said that it was her choice, but she did not think there would be much work to do because all that needed to happen was the handover from Mr Parmar, budgeting had already been handed to Team Leaders and it was the middle of the month so there was not much administration to do.

<u>Return to work</u>

110. On Sunday 12 May 2019 Ms Senda sent three emails to Mr Parmar and the Claimant with instructions for work to be done (pp 404A-B, 408-10 and 406-407). This was her first contact with the Claimant since February 2019, but she did not address the Claimant by name or express any pleasure at her returning to work or even acknowledge that this would be her first day back. Ms Senda in cross-examination did not accept that this was inappropriate. She said that she was trying to be nice by setting out tasks so the Claimant would know what to do and because she thought otherwise there would not be enough work for the Claimant to do given what Mr Parmar had said about the role.

111. On 13 May 2019 the Claimant returned to work. As suggested by Ms Senda she was put on the spare bank of desks. Mr Stanton said that he had suggested as a practical arrangement during handover that the Claimant and Mr Parmar should work together on the spare bank of desks where they could 'spread out'. In his witness statement he specifically said *"I … moved Raj"*. However, we reject his evidence on this point. We prefer the evidence of the Claimant, which is consistent with Ms Senda's suggestion in her email, and also with commonsense as if Mr Stanton had 'moved Raj' the Claimant's desk would then have been empty so she could have returned to it. There is no

dispute that once Mr Parmar had left on 17 May 2019 the Claimant returned to her own desk.

112. Ms Senda was not in the office on 13 May. At 14:30 the Claimant emailed Ms Senda, copying in Mr Parmar and Mr Stanton apologising for the late email as her email was not working until around lunchtime when Netstar fixed it, but that she and Mr Parmar were now working on what had been requested. Ms Senda did not reply to the Claimant but forwarded this email to Dr Harvey stating *"Not true – I have seen her working on her emails, forwarding things and deleting others so there was nothing wrong with them"* (p 546). Ms Senda was able to say this because she had had access to the Claimant's emails while she was absent, and still had access, and so could see what the Claimant was doing in her mailbox. In her witness statement, Ms Senda's explanation for sending the email to Paul in the terms she did was that she did this in order to make Paul aware in case it was raised by the Claimant in the redundancy process. Counsel for the Claimant submitted it was sinister that Ms Senda had been monitoring the Claimant's emails. We find that this episode shows Ms Senda's hostility to the Claimant and that she did not trust her for some reason: she had retained access to her emails, she checked up on the Claimant rather than trusting what the Claimant said in her email, she did not reply to the Claimant, but she accused the Claimant of lying in a message to Dr Harvey that she thought might be 'of use'.

113. On 14 May 2019 Ms Senda was back in the office. She said hello to the Claimant but little else. The Claimant said that Ms Senda barely spoke to her during the time she was in the office after her return to work. Ms Senda denies this, saying it is a small open plan office and she spoke to the Claimant frequently. On this issue, we prefer the Claimant's evidence because it is clear from Ms Senda's emails at this time that she was hostile to the Claimant: that is demonstrated by her failure to respond to the Claimant's April emails, her failure to address the Claimant by name or welcome her back in the email of 12 May, in her comments about the Claimant not having work to do, her accusing the Claimant of lying and her failure to respond to the Claimant regarding her emails. We consider that this hostility would have had its counterpart in her oral communications in the office, which we find were minimal.

114. Mr Parmar spent four days handing over to the Claimant. He said that not much had changed in the way that work was done, save that he had not produced Advisory Board papers as she had done before commencing maternity leave. One thing that the Claimant did notice that was new was that payments were going out of the account for a company car. She emailed Mr Stanton and Ms Senda about it, but they did not reply. When she asked Mr Stanton about it in the office, he said it was a company car for Ms Senda. In the course of these proceedings, Mr Cox confirmed that the directors were repaying the Company for the car hire and said that this was just a tax efficient way of doing it.

115. Another change on the Claimant's return was that her access to HR files had been revoked. None of the Respondent's witnesses claimed responsibility for

actually revoking the Claimant's access, but Ms Senda says that the reason for it was because of GDPR requirements and because the Claimant no longer needed access to HR files as she was no longer a statutory director. It was also suggested that Dr Harvey had taken over the HR function so she no longer needed access to the files. Although Dr Harvey had said in the call with the Claimant on 9 May that he was supporting the directors on HR issues, there was no formal communication to the Claimant that he was now assuming HR responsibility, or that her responsibilities in that respect had been reduced. The Respondents' witnesses maintained that if the Claimant had required access she could have been granted it on an 'as needed' basis.

116. The Claimant felt very stressed by the situation and her health began to suffer.

First consultation meeting

117. On 14 May 2019 a first consultation meeting took place at Mr Cox's offices, which were also the registered offices of Harwood. It was proposed to have a lawyer from SA Law present at the meeting, but the Claimant objected on the basis that there was a conflict of interest as a lawyer from SA Law had previously advised her personally in relation to the MBO. The Claimant had wrongly thought that this meeting was to be rearranged, but the day before the meeting at 2.30pm Dr Harvey informed her that an HR consultant, Chris Marshall, would be attending the meeting with him. He asked whether she would be accompanied. In response, the Claimant said that it was short notice (although she had in fact been notified of the date in the letter of 9 May) and that she would not therefore have a work colleague with her. However, she raised no objection to the meeting going ahead. The Claimant was unhappy about the meeting not being held at the Company's offices, but she did not object to the location at the time. It was Mr Carey's suggestion for the meeting to be held at Mr Cox's office because, based on his own experience of being made redundant, he thought it was preferable for the meeting to be off-site rather than in the office where everyone would have known about it.

118. The meeting was attended by the Claimant, Dr Harvey, Mr Carey and Chris Marshall. Dr Harvey used a script at the meeting that was prepared by the Company's solicitors. He stuck closely to that script. Legal professional privilege has been asserted in relation to it, so we have not seen it. The Claimant at this meeting said that she had seen that the Company was returning to profitability and believed that March had generated a profit of £18,000. She said she had also seen a £20,000 'management charge' going monthly to Harwood, which the Claimant believed to be in substance 'profit'. The Claimant asked about alternative roles (it was her who raised this first in this meeting, not the Respondent, although the need to consider alternative employment had been set out in the 9 May letter). Ms Marshall said that the Claimant should put her thoughts on alternative roles in writing. It was agreed there would be a second meeting on 22 April and at the Claimant's request it was agreed that this would be in the Company's offices.

119. The Respondent's Handbook indicates that in redundancy situations retraining will be considered (p 238). However, Dr Harvey did not recall the suggestion of training being discussed with Ms Senda or the other directors and he did not raise this possibility with the Claimant.

120. As with all the consultation meetings, notes were taken by Ms Marshall, shared with the Claimant and she provided comments on them.

Events between the second and third consultation meeting including redirection of Mr Parmar's emails

121. The Claimant continued attending work and was busy.

122. On 16 May 2019 Dr Harvey and Mr Carey spoke by telephone to discuss the Claimant's revisions to the Respondent's notes of the meeting. It was agreed that Dr Harvey should put together a written document on the business rationale for the redundancy which he subsequently did. They also discussed the points that the Claimant had raised in the meeting, but thought that the savings that the Claimant had suggested in relation to telephones and so on were already cost savings that were being explored.

123. By letter of 16 May 2019 the Claimant was invited to a second consultation meeting.

124. Also on 16 May 2019 Raj Parmar's engagement with the Company was terminated. The Claimant in these proceedings has argued that if the Respondents were genuine in their need to make savings in the finance role, they would have terminated Mr Parmar's employment earlier. The Respondents did not consider this. We accept their reasons for not considering this option because they are plausible and consistent with the documents before us. He was being paid significantly less than the Claimant (taking into account that he was part-time and the rate was gross without on costs), they needed his assistance with getting to grips with the Company's finances following the MBO and insofar as they considered it at all they wrongly thought he was on a fixed term contract, due to last the whole of the Claimant's maternity leave. By the time he told them on 16 April 2019 that he could do the role he had been doing (without the budgeting etc) in two days' per week, it was only a month until his scheduled departure in any event so they could not then have terminated his engagement any earlier.

125. Following Mr Parmar's departure on 17 May 2019 Ms Senda emailed Netstar the Respondent's IT provider asking them to redirect Mr Parmar's email account to her and Mr Stanton *"and nobody else"*. She also asked for the password to be changed. In their witness statements, Ms Senda and Mr Stanton said that this was the new standard procedure. Mr Stanton said that it was applied in relation to four other leavers, none of whom involved a maternity cover or a handover. Ms Senda confirmed that only one person had left between the MBO and this point and that person was junior so that email redirection was not a particular issue. In oral evidence, Ms Senda said that

she was concerned that because Mr Parmar had been working on the MBO redirecting his mail to the Claimant might result in her having access to material that was personal to the directors and only they should know about. On this issue, we reject the evidence given by Mr Stanton and Ms Senda in their witness statements. Although they may have taken over the email accounts of other leavers, none of those were similar situations of an employee returning from a leave of absence to resume a role covered by someone else. It would have been both normal and useful for the returning employee to have access to the cover employee's email accounts. We find that the real explanation is closer to what Ms Senda said in oral evidence: the Respondents were concerned to ensure that the Claimant did not have access to information not only about the MBO that might have been personal to the directors. However, we do not find this to be the whole explanation and our conclusions in this respect are set out in the Conclusions section of our judgment below.

126. As he had discussed with Mr Carey, Dr Harvey created a business rationale for the redundancy (p 570) and then a more formal note with a role analysis included (p 575) which he sent to Ms Marshall on 20 May. This was the first time that Dr Harvey had put thoughts to paper in terms of the business rationale. In summary, the Respondent's rationale as explained in this document was that the Company was making losses and needed to make savings where it could; other cost-saving measures had already been undertaken; the cost of the finance function was too high and it had been identified that savings of up to 85% could be made by outsourcing the whole function; the Finance Director role is the most costly role in the Company as both Managing Directors have taken a pay cut since the MBO and represents 15% of the Company's payroll; the Company does not have any vacancies for internal (i.e. non-client-facing roles); there are no suitable alternative roles available. In the role analysis section Dr Harvey based his analysis of the Claimant's role on her job descriptions and information gained from the other directors. He identified that some of her functions were no longer required, some of them had been absorbed by other employees and some of them could be outsourced. In the process of drawing up the rationale, Dr Harvey had realised that he got some of the financial figures wrong previously and highlighted this in an email to Ms Marshall. Specifically, what he considered he had got wrong was the £94k figure mentioned in the 8 May 'at risk' letter.

Second consultation meeting

127. In advance of the second meeting the Claimant prepared a set of bullet points outlining her proposals for avoiding her role being made redundant and sent it to Dr Harvey on 21 May 2019 (pp 592-3). This included suggestions for cashflow management, cost saving with IT, telephone contracts and other office expenditure, review processes and procedures to help fee earners earn more. She set out her arguments as to why the finance role should stay 'in-house'.

128. There was email correspondence between Ms Senda, the Claimant and others at this time in which it is noted that the Company is 'back in the black' for the first quarter of 2019, but on 22 May 2019 the Claimant notified Ms Senda, Mr Stanton and Mr Carey that the bank balance would be close to zero after paying staff salaries and an overdraft facility was discussed (p 607).

129. There was an email exchange between the Claimant and Dr Harvey about whether she could bring a friend rather than a work colleague to the meeting, but Dr Harvey refused this request. The Claimant then asked Mr Stanton to accompany her and he agreed but Dr Harvey then said that Mr Stanton was 'conflicted' and invited her to name another colleague and postpone the meeting to 23 May 2019.

130. At the meeting on 23 May 2019 the Claimant was accompanied by a colleague Joanna Christophides. The Claimant took notes of this meeting (pp 473-475). As with the first meeting Dr Harvey used a script provided by the Company's lawyers which he hid under the table from her. Dr Harvey began the meeting by saying that there was a mistake in the first letter of 9 May as the Company had only made a loss for the final four calendar months of 2018 not the whole year. The Claimant responded that she was well aware what the figures were. Dr Harvey then went through the points that the Claimant had raised in her email of 21 May and explained what the Company had already done to save costs.

131. He then went on to explain the business rationale for the redundancy, although he did not convey to her the detail of the financial position as set out in the business rationale that he had prepared, or share that document with her. Dr Harvey said that the Claimant's was the highest paid role in the company, and that the Managing Directors had taken a pay cut. The Claimant responded that it did not look like that because although salaries had reduced, dividends had been paid. The Claimant also said that the Company was now trading profitably and the staff had been told that in a meeting on 1 May 2019. The Claimant also argued that it was important to distinguish between a Company that was trading profitably and cash-flow issues.

132. At this meeting it was indicated that it was for the Claimant to identify alternative employment or ways to avoid redundancy. Dr Harvey said that there were no vacancies in the Company at the moment and all recruitment was on hold (p 621). Ms Marshall at the end said that a further meeting should be arranged which was likely to be a 'notice of redundancy meeting'.

133. At the meeting Dr Harvey also said that by removing her role an 85% saving would be made and the Claimant requested details of how the 85% saving was to be achieved and Dr Harvey promised to provide that. On 24 May he then emailed Mr Cox and Mr Cox provided detailed figures to Dr Harvey on 28 May (p 902 and 910). In Mr Cox's costings, he apportioned the Claimant's role as "50% credit control" and "50% other administrative tasks". This reflected his view (stated in his witness statement, and based on information provided to him by Mr Stanton and Ms Senda and not on the Claimant's job descriptions, which he had not seen) that the only substantial finance element

of the Claimant's role, given the functions that were outsourced, and the Claimant's lack of financial qualifications, was debt collection and credit control.

134. The day after the second consultation meeting (on 24 May 2019) the Claimant proposed reducing her salary by £15,000 (pp 509-510). The Claimant received no response to this suggestion in writing and asserted in her witness statement that Mr Carey and Dr Harvey did not share the proposal with anyone. However, Mr Stanton says that it was discussed but that he did not think that even a £15,000 drop in salary was workable and he explained why in the third consultation meeting. We accept that Dr Harvey and Mr Carey did discuss the Claimant's offer, but it was obvious to them that reducing the Claimant's salary to £75,000 was not going to achieve the savings that they required as it would have meant they were still paying over £50k more for the finance function than they had concluded was necessary.

135. Email exchanges between Ms Senda, Mr Carey, Dr Harvey and Mr Stanton on 29 May 2019 (p 914) show them costing the possibility of a two-day per week Credit Controller role and a part-time book-keeper two days per week. Mr Cox advised that a part-time credit controller would be *"maximum £30-£35k pa"*. Ultimately, the individual Respondents decided that a part-time book-keeper role was not required, whether in addition to or as an alternative to using Mr Cox's company on an outsourced basis. They decided that all that was required a two-day per week Credit Control role.

Third consultation meeting

136. A third consultation meeting took place on 30 May 2019. In this meeting, Dr Harvey summarised what had been discussed in the previous meeting regarding the Company's finances and efforts that had already been made to save costs by reviewing office expenditure. He explained how the figure of an 85% saving on the Claimant's role had been arrived at, based on the information that had been given to him by Mr Cox. He did not share Mr Cox's actual costing document. He then discussed with the Claimant the analysis that he had done of what he considered to be her role, although he did not give her a copy of that document. He went through the various duties. The Claimant did not object to his description of her role, save to point out that she was no longer responsible for booking Mr Curtin's flights, travel and accommodation, but 'oversaw' what was done by the Office and Events Manager. He explained that the Company considered that the HR/administrative aspects of her role were either not needed or could be done by other people, and that there was no longer a need for a senior finance role in the Company. He said that Mr Parmar had been carrying out a number of the Company's finance functions while she was away and his view was that those jobs he had been tasked with could be carried out in two days per week. This was the first meeting at which Dr Harvey told the Claimant about this view of Mr Parmar's that had been expressed on 16 April 2019.

137. Dr Harvey explained that other finance functions would be distributed across other members of the team in addition to their existing duties. He said that the Company had considered her proposal for a salary reduction, but that it could not be accommodated because the Company did not need a senior finance role on that level of salary. Dr Harvey offered the Claimant the new part-time credit control role that the four individual Respondents had decided the Company needed. He said the role would be based on a salary of £35,000 per annum pro rata, two days a week paying £14,000 pa. Dr Harvey said that no other roles were available and that a recruitment freeze was in place.

138. At this meeting the Claimant referred Dr Harvey and Mr Carey to the assurance she had received on 10 January 2019 from Mr Stanton as part of the MBO. The Claimant says that Dr Harvey and Mr Carey appeared to be unaware of this assurance and asked for a copy of it, but we find that they were aware of it and asked for a copy in order to be sure which one the Claimant was referring to. This is clear both from the fact that they were involved in discussing the assurance at the time and from Dr Harvey's email following the meeting in which he refers to the Claimant having 'called out' this assurance, which is expressed in terms that make it clear he was aware of it and acknowledges that the Claimant regarded it as misleading. On 3 June Dr Harvey emailed the Claimant regarding the assurance, making clear that the Company did not regard that assurance as binding, the Company was in financial difficulties and entitled to review the role, which no longer existed.

139. On 31 May 2019 the Company posted on LinkedIN (p 700) a general recruitment advertisement which mentioned no specific roles. In response to a request for further information by the Claimant, the Respondents' solicitors on 11 March 2020 (p 868) stated that this advertisement referred to four vacancies: Credit Control Manager, Graphic Designer, Account Director and Internship. However, Dr Harvey said that the only vacancy as at 31 May was actually the Credit Control role. He said that Mr Curtin placed adverts on LinkedIN all the time whether or not they were recruiting and they continued that practice following the MBO. He said that the other roles were not available until later and the Claimant was told about them on 12 August. The Respondents' evidence on this is unsatisfactory. The response from the solicitors on this point was very clear and specific and it is apparent from the letter of 12 August that by that stage they were at an 'advanced stage' of recruiting for the Graphic Designer and Account Director roles. In those circumstances, we consider that Dr Harvey was wrong to tell the Claimant on 30 May that there was a 'recruitment freeze' and that it is most likely that he had considered the Graphic Designer and Account Director roles (which must at least have been contemplated by this point) to be obviously unsuitable for the Claimant and so did not factor them into his thinking in the consultation process.

140. Following this meeting when Mr Cox asked Mr Carey and Dr Harvey how the meeting went, Mr Carey responded *"Ok but very cold. Called out Nick's email of 10 Jan about no change to the title and role"*.

141. By email of 4 June 2019 to Dr Harvey and Mr Carey the Claimant understandably rejected the offer of the Credit Controller role.

142. The Claimant in these proceedings contended that she should have been offered a role with Harwood, but in cross-examination she accepted the Respondent's evidence that Harwood has no independent business and no substantive employment roles.

Notice of termination

143. There was a meeting between Mr Carey and the Claimant on 10 June 2019. Dr Harvey was supposed to attend but did not. At that meeting the Claimant was given notice of termination of her employment and given a letter dated 10 June 2019 which formally confirmed the termination and informed her she would be placed on garden leave for the full period of her notice. This was because the Company did not have the cash-flow at that point to make her a payment in lieu of notice. The letter gave her the right to appeal against her dismissal.

144. On her way out of the building the Claimant was met by the Business Development Director who said *"I cannot believe that they are sacking you now, are they going to sack me too because I'm going on a maternity leave soon?"*. In fact, the Business Development Director, who went on maternity leave in December 2019, returned to work in 2020, following an extended period of maternity leave, on a part-time basis at her request. Although the Respondent suggested that the Claimant should be disbelieved on this because she had not mentioned it prior to her witness statement, we consider this is most likely to be because she (or those advising her) did not consider that the comment would carry much weight, rather than because it did not happen. We accept the Claimant's evidence as it is plausibly the sort of comment that one colleague might make to another in the situation that the Claimant and the Business Development Director found themselves.

145. Mr Carey sent an email to all staff on 11 June informing them of the Claimant's redundancy, thanking her for her contribution and wishing her well for the future.

Appeal

146. The Claimant appealed against her dismissal and raised a grievance by letter of 17 June 2019 sent by her solicitors to SA Law (p 719), who they wrongly assumed would be solicitors acting for the Respondents in relation to this matter.

147. The Respondents decided to appoint an independent person to consider the Claimant's appeal. They also decided on the basis of legal advice that as all of the matters raised by the Claimant in her grievance/appeal letter related to

the decision to terminate her employment it should all be dealt with as part of the appeal. This meant that the Claimant did not have the benefit of the Respondent's grievance procedure which provides for a three-stage process of: initial investigation and decision, followed potentially by two appeals to higher levels of management. However, this particular point was not raised by the Claimant at the time and we find that the Respondents' witnesses had not considered it, but simply acted on the basis of legal advice.

148. We should also record here that the Respondent's grievance procedure does not deal with the situation where there is an overlap between a grievance and a redundancy appeal, but it does deal with the situation where a grievance is raised in the course of a disciplinary process and what it says about that is that the grievance procedure should not be used to lodge appeals against disciplinary sanctions and that: *"when an employee raises a grievance about a disciplinary procedure involving them, ACAS guidance suggests that disciplinary hearings may be suspended for short duration while the grievance is investigated. The Company will assess the exact nature of the grievance and will have the final say over suspension of a disciplinary procedure."*

149. By letter of 21 June 2019 solicitors for the Respondents wrote to the Claimant informing her of these decisions and seeking further particulars of her whistle-blowing allegations (p 731). The Claimant's solicitors responded on 28 June 2019 insisting that the Claimant was raising a grievance which must be dealt with and saying that she would not participate in a stand-alone appeal process (p 746). They argued that the decision not to treat the Claimant's grievance as a separate process was itself a further act of discrimination/victimisation or detrimental treatment.

150. Mr Hodge was selected as the independent person. He is a solicitor with over 25 years' experience of employment law who formerly worked for a number of large solicitors' firms, but who now operates independently providing HR services and conducting independent investigations. In his witness statement he explained, that it is important to him professionally to be properly independent and on occasions when he has been instructed by a client to make a particular decision, he has refused to work for that organisation. However, we found that in cross examination Mr Hodge was strikingly determined to defend Ms Senda. While we would not have expected him to say that the evidence that has emerged would necessarily have changed his conclusions, given the extent to which the evidence before us shows that Ms Senda misled him on the expenses issue, we would have expected him at least to accept that the picture he was given did not accord with the evidence that has now emerged. However, we acknowledge that it is possible that Mr Hodge had not been following the proceedings sufficiently closely to appreciate the full picture of what has emerged during the hearing.

151. Mr Hodge had a briefing conversation with Dr Harvey and Mr Carey on 27 June 2019 and was provided with a pack of documents by the Respondent's solicitors. This pack did not include the solicitors' correspondence of 21 and 28 June 2019. Nor did it include any of the documentation relating to the individual Respondents' business plans in November 2018 or the assurances

given to the Claimant regarding her employment in January 2019, or any documentation related to the expenses issue of 2012. The individual Respondents expected Mr Hodge to ask for any additional documentation that he considered he needed, and he did ask for some.

152. Mr Hodge viewed his task on appeal as being to review the decision that had been made by looking at the paper record of what has happened and speaking to those involved. If he considers he needs additional documentation, he will request it. He said that he applies a 'range of reasonable responses'-type approach rather, considering whether the process is fair and whether anything unlawful has occurred.

153. Mr Hodge wrote to the Claimant on 28 June 2019 inviting the Claimant to meet with him to discuss her appeal. On 5 July 2019 the Claimant by email indicated that she would not participate in the appeal process as she felt that her right to raise a grievance had been denied.

154. As part of the appeal, Mr Hodge spoke to Dr Harvey and requested further documents. He also spoke to Ms Marshall and to Ms Senda. On 1 August 2019 he emailed the Claimant again (p 751) inviting her to pass on any further information or thoughts regarding the appeal if she wished to do so.

155. As part of the appeal, Mr Hodge was not provided with the emails of 9 and 10 January 2019 from Mr Stanton providing the Claimant with an assurance about her continued employment, or any of the draft business plans or other correspondence from November 2018 showing the Respondents' cost-cutting plans at that point.

156. On 12 August 2019 Mr Carey wrote to the Claimant regarding the Credit Control Manager role which they were then planning to offer on a three-day per week basis, rather than two days, as they thought it would be easier to recruit. They also informed the Claimant about alternative vacancies which had arisen for a Graphic Designer and an Account Director, which were both client-facing roles. The letter stated that the Company was at an 'advanced stage' of the recruitment process in relation to those roles. Mr Carey did not consider the Claimant had the skills or experience for these roles, but informed her of them nonetheless. The Claimant did not consider any of the roles to be suitable.

157. Mr Curtin emailed Ms Senda, Mr Stanton, Mr Carey and Dr Harvey later on 12 August (p 767) accusing them of continuing to harass the Claimant and refusing to let her resume her rightful role in the Company. He said he had sold the Company at a discount presuming that they would continue to behave in a fair and open manner, and reminding them of his generosity towards them. He said that he had secured the assurance of continued employment for the Claimant as part of the MBO and that this 'binding letter' should have been honoured. He asked for all reference to him to be removed from the Company website and in connection with the Company.

158. On 13 August 2019 Mr Hodge sent a draft appeal outcome to the Company's solicitors for comment and also to Dr Harvey for his comments on factual accuracy. He made clear that the decision was his own. The version on which the solicitors commented has not been disclosed because it is subject to legal professional privilege.

159. By letter of 28 August 2019 Mr Hodge informed the Claimant that her appeal had not been upheld. His report is 10 pages long and apparently the product of thorough and careful consideration. He concluded that there was a genuine redundancy situation and that the Claimant's dismissal was attributable to that, and that the fact that she had taken maternity leave, was a woman and may have made protected disclosures was not part of the reason for her dismissal. The following elements of Mr Hodge's report have proved to be particularly material in these proceedings (p 772):

    159.1. At paragraph 4.10 he refers to the Claimant have been assured at around the time of the MBO that *"her substantive role and rate of pay would continue while that remained sustainable"*. That is not quite what Mr Stanton said in his emails of 9/10 January 2019, and Mr Hodge was not shown those emails.

    159.2. At paragraphs 6.2-6.3 Mr Hodge recorded what Ms Senda had told him about the 2012 expenses issue and it includes: *"She also accepts that she lost a receipt for a particular item of expenditure and that management spoke to her about this. There was an allegation that CS had misrepresented her expenses. CS was herself angry about this allegation and some sort of argument ensued. CS was unaware that SV had any particular involvement in this, though as the person who looked after finance, it does not surprise CS that SV knew about it. However, CS does not believe that she ever had any direct conversations with SV about the issue." "CS does not accept that she paid any money back to the company as a result of this. She was in fact somewhat outraged that her integrity was being questioned in this way and there was some tension within the business as a result. CS says that she was subsequently treated to a very expensive lunch by way of apology. Be that as it may, in CS's mind this was very much an issue between her and senior management which had been resolved, and not as an issue between her and SV personally."*

    159.3. At para 6.5, Mr Hodge concluded that although he could not rule out the possibility of CS retaliating against the Claimant because of the expenses issue, it was unlikely she had done so because if she wished to do so she would have been dismissed at the time of the MBO rather than assured at that point that her substantive role and pay would continue as before. Mr Hodge also noted his understanding that it was Mr Cox who had identified the Claimant's role as an 'expensive luxury'.

160. In cross-examination Mr Hodge was asked if he would have taken a different view of the Respondent's assurance in January 2019 had he seen the actual

emails or the November 2018 business plans and associated emails. He said he would not: he viewed the assurance as being a fairly standard assurance that her employment rights would be protected. He thought it was *"unlikely"* he would have put in his report that Ms Senda told him she had *"lost a receipt"* if she had actually spoken more generally, and we therefore find that she did refer only to one receipt to Mr Hodge. He was not sure whether Ms Senda had misled him about whether she had repaid money to the Company, and did not think she had underplayed the expenses issue to him, although he conceded that her *"characterisation was rather different"*. His focus was elsewhere on the question of whether there was any 'animus' on the part of Ms Senda towards the Claimant. He thought that Ms Senda had appeared willing to talk to him about the expenses issue, she emphasised that she had been very busy at the time and her 'outrage' (referred to in his report) was because she had been working very hard for the Company but then harassed in relation to missing receipts. He did not consider that even if she had underplayed the expenses issue to him it would have changed his overall conclusion because he did not see the link between the events of 2012 and the Claimant's dismissal.

161. Although Mr Hodge did not accept that Ms Senda had misled him, we find that she did. We find that she was untruthful in suggesting that she had lost just one receipt when in fact she had lost a very large number of receipts and spent some time looking for them before writing a cheque for £929-worth of expenses for which she had no receipts. We find that Ms Senda misled Mr Hodge in saying that she did not believe she had any direct conversations with the Claimant about the issue as it is in fact clear that it was the Claimant who first raised matters with her and who liaised with her over the period of about a month by email and in person and the Claimant to whom she gave the cheque at the end. We find that she misled Mr Hodge when she said that she had not paid money back to the Company. Although the cheque was not cashed, the fact that she did write a cheque was evidence that she intended to pay money back to the Company. Further, she did in fact pay back £200 in cash. Withholding that information from Mr Hodge was misleading. Given all the foregoing, together with the forged Sheraton Hotel and water taxi receipts, it was also misleading for her to present this episode to Mr Hodge as an 'outrage' for which Mr Curtin offered her an apology. We do not accept that these are all matters that Ms Senda could have forgotten given their significance and her embarrassment about it all at the time. We find that Ms Senda mendaciously downplayed the expenses issue, and the Claimant's involvement in it, to Mr Hodge.

<u>The finance function since the Claimant's departure</u>

162. Since the Claimant's departure, the Company has engaged a self-employed credit controller for £1,320 pcm (£15,840 pa) to do credit control, raise invoices and send invoices to clients. The Office Manager took over paying suppliers (p 583). The book-keeping and accounts functions continued to be outsourced to Mr Cox's company.

These proceedings

163. The Claimant contacted ACAS on 12 July 2019 and on 16 July 2019 ACAS issued early conciliation certificates in relation to all Respondents.

164. On 13 September 2019 the Claimant commenced these proceedings.

165. The Respondent filed its ET3 and Grounds of Resistance on 28 November 2019.

166. The Claimant's employment terminated on 10 December 2019 at the end of her notice period.

Events post dismissal decision

167. The Claimant found her dismissal very distressing and she considers it has adversely affected her health.

168. Ms Senda had a further period of maternity leave subsequent to the Claimant's dismissal.

169. Mr Curtin was so angry with the individual Respondents for how they had treated the Claimant that he requested that all reference to him be removed from the Company website and he has had nothing more to do with the Company.

170. An Account Executive resigned in November 2019, along with the Office and Event Manager and an Account Manager resigned in December 2019. None of these roles were replaced.

171. The Company continued to have financial difficulties and cash-flow issues during the remainder of 2019. In August 2019 Mr Stanton, Ms Senda and Dr Harvey postponed their own salaries for a week in order to pay for other staff. The Company reported making a loss in excess of £100,000 for 2019 (having paid the Claimant's salary up until the end of the 2019).

172. The Business Development Manager went on maternity leave in December 2019 and the Respondent did not recruit maternity cover for her. She returned from maternity leave in November 2020 on a part-time basis (at her request).

173. The Company is still looking to reduce costs and has not renewed its lease but moved in February 2021 to smaller less expensive premises when the lease expired.

Conclusions

Protected disclosures

The law

174. Section 43A ERA 1996 defines a protected disclosure as a qualifying disclosure, which is in turn defined in s 43B (at the time relevant for the purposes of these proceedings where the alleged disclosures were made prior to the amendment of the ERA 1996 by s 17 of the Enterprise and Regulatory Reform Act 2013 with effect from 25 June 2013) as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more"* of a number of types of wrongdoing. These include, (a) *"that a criminal offence has been committed, is being committed or is likely to be committed"* and (b), *"that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"*.

175. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA 1996, including, under section 43C, to the worker's employer.

176. In the light of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, paras 24-26, it was for a time suggested that a mere allegation could not constitute a disclosure of information. However, in *Kilraine v Wandsworth LBC* [2018] ICR 1850 the Court of Appeal clarified (at paras 30-36) that *"allegation"* and *"disclosure of information"* are not mutually exclusive categories. What matters is the wording of the statute; some 'information' must be 'disclosed' and that requires that the communication have sufficient *"specific factual content"*. The case of *Dray Simpson v Cantor Fitzgerald Europe* (UKEAT/0016/18/DA), unreported 21 June 2019, makes a similar point in relation to the use of questions in an alleged protected disclosure. In that case, the Employment Appeal Tribunal held (para 42) that the fact that a statement is in the form of a question does not prevent it being a disclosure of information if it *"sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation"*.

177. What must be established in each case is that the Claimant has a reasonable belief that the information disclosed tends to show one of the legal failings or other matters in s 43B(1). 'Tends to show' is a lower hurdle than having to believe the information 'does' show the relevant breach or likely breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) at para 66.

178. The Tribunal must then consider whether the Claimant had a reasonable belief that the information disclosed tended to show the relevant matter. In the light of *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026 (paras 74-81), what is necessary is that the Tribunal first ascertain what the Claimant subjectively believed. The Tribunal must then consider whether the Claimant's belief was objectively reasonable, i.e. whether a reasonable

person in the Claimant's position would have believed that all the elements of s 43B(1) were satisfied. The Court of Appeal in *Babula* emphasised that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not. As such, it is not necessary that the disclosure identify or otherwise refer to the legal obligation (or any of the matters in s 43B(1)), although whether it does or not may be relevant to the reasonableness of the Claimant's belief that the information disclosed tends to show a relevant breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) at paras 87 and 103-104 *per* Linden J.

179. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: *Darnton v University of Surrey* [2003] ICR 615. It is to be assessed in the light of all the surrounding circumstances and as such witness evidence will be relevant to determining whether or not a written disclosure satisfies the statutory requirements or not. What was or was not known to the Claimant and relevant witnesses at the time will be relevant to whether or not the Claimant could reasonably believe that the disclosure met the statutory requirements: see *Twist* ibid at paras 57-59.

Conclusions in relation to the alleged protected disclosures

(a) On around 20 September 2012 to Tom Curtin (former Managing Director) verbally that R2 had that day underpaid a cash float repayment into the R1 's bank account (§40 GoC).

180. We accept that this is a qualifying disclosure within the meaning of the legislation. We have found it took place on 21 September 2012 and is the second alleged protected disclosure in the chronological order. The Claimant in this conversation disclosed information to Mr Curtin that there had been a shortfall in the money paid into the account by Ms Senda and that, to be sure about her concerns, she had been down to Barclays and that they confirmed that the money was put into the Company's account but in pounds only, not Euros (as Ms Senda had said), and that there were no foreign transactions showing on the account whatsoever. She also told Mr Curtin that there had been suspicious cash withdrawals from the Company's debit card. This is a disclosure of specific information that tends to show that Ms Senda had taken money from the Company. That was potentially a criminal offence and/or a breach of her duties to the Company as a director and employee and accordingly it was a disclosure of information that we accept she reasonably believed tended to show that Ms Senda had failed to comply with a legal obligation.

(b) On around 20 September 2012 to R2 verbally, by informing her that the repayment to R1 's bank account was short, and asking to see a receipt for the transaction (§44 GoC).

181. This was the first alleged protected disclosure in the chronological order. The Claimant's evidence of what she said to Ms Senda was: *"I informed her that*

the amount deposited in the account appeared to be short, and I asked her to provide me with the cash deposit receipt. She said she did not have one and this surprised and concerned me, as I would expect her to have kept that. Catherine then asked why I needed it. I said it was to confirm the exchange rate as the amount paid in looks to be less than the current exchange rate. Catherine then told me that she had paid the Euros directly into Curtin&Co's bank account and that she could not see a problem with that. At this point I was very concerned that a director of the company, as well as an employee, was acting inappropriately and unlawfully. I related it to one of the cases I studied for my exam in Business Law. … I was certain that it was illegal for a company director to use company funds for his or her own benefit."

182. This was the first alleged protected disclosure chronologically. We find that this was not a qualifying disclosure. The information the Claimant disclosed was that the money in the account appeared to be short. However, this might have been because of the exchange rate, or because Ms Senda had another explanation for the discrepancy. We do not consider that at the time that the Claimant made the disclosure she believed subjectively that the information she was disclosing tended to show a breach of a legal obligation or that a criminal offence had been committed. Rather, her suspicions were raised by Ms Senda's response, and she then conducted further investigations with the bank which provided further evidence for her suspicions. It is only once she had conducted the further investigations with the bank that she could in our judgment have had not only a subjective suspicion but also a reasonable belief that Ms Senda had retained some Company monies for herself. By the time she had got the information from the bank it was apparent to her that Ms Senda had lied about paying the money in in Euros and that based on the exchange rate the amount deposit was in fact short. However, at the time she made the disclosure she did not have that subjective belief, and she could not have had a reasonable belief to that effect.

(c) On 5th October 2012 to R2 in writing, by informing her that Muhammed was going through the bank statements, that a withdrawal of £200 as petty cash had been highlighted and asking what the money had been used for (§44 GoC).

183. We find that this was a qualifying disclosure. In so finding, we recognise that very little information was disclosed in this email, but it is the context that is important at this point, and we find that the necessary elements of a qualifying disclosure are present here. First, the Claimant discloses information. She discloses that there has been a petty cash withdrawal of £200 on 21 September the purpose of which is not known to the Claimant or the book-keeper. At this point she subjectively believed that Ms Senda had been using Company funds for her own purposes and we find that belief was objectively reasonable because of what she had already found out about the deposit of the excess Euros from the Venice trip. Further, we find that in disclosing this information to Ms Senda, the Claimant believed, and reasonably given the previous incident and the context of the investigation generally, that this 'tended to show' a further misuse of Company funds by Ms Senda, conduct

which would (if proved) be a breach of Ms Senda's obligations to the Company as an employee and company director and also potentially a criminal offence. Of course, there may have been a perfectly innocent explanation for this £200, but the threshold for a protected disclosure does not require that the information disclosed must show that on the balance of probabilities there has been a breach of a legal obligation or that a criminal offence has been committed: all that is required is that it 'tends to show' such a breach. In this case, as a matter of fact and in context, the email did 'tend to show' the necessary breach because Ms Senda subsequently returned £200 in cash. We therefore find that this was a qualifying disclosure.

(d) On around 26 October 2012 to Tom Curtin verbally that R2 had fabricated an expenses receipt for a meal at a hotel in Amsterdam on 24 August 2012 and other expenses receipts such as the taxi boat receipts from Venice (§41 , 44 GoC).

184. This is a qualifying disclosure. It was a disclosure of information that showed that Ms Senda had forged the Sheraton Hotel receipt. That act of forgery was in itself a breach of Ms Senda's duty of fidelity to the Company and the Claimant's belief to that effect was plainly reasonable. It also tends to show (although it does not prove) that Ms Senda had misused Company funds in breach of her obligations as a director and potentially also the criminal law as if the expense were legitimate, one would not expect it to be necessary to create an elaborately forged receipt. In any event, that was the Claimant's belief and it was also a reasonable one.

The detriments claims

The law on protected disclosures detriments

185. Under s 47B(1) ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of her employer done on the ground that the worker has made a protected disclosure. Under s 47B(1A)(a) ERA 1006 a worker has the same right not to be subjected to a detriment by another worker of the employer done in the course of that other worker's employment. Where a worker is subjected to a detriment by anything done by another worker as mentioned in s 47B(1A), that thing is treated as also done by the worker's employer.

186. The statute requires that the protected disclosure must be a material factor in the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at paras 43 and 45. This requires an analysis of the mental processes of the worker who is alleged to have subjected the claimant to a detriment, in the same way as for cases of direct discrimination: see *London Borough of Harrow v Mr M S Knight* [2003] IRLR 140 at paragraph 15 *per* Recorder Underhill QC (as he then was).

187. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.) The Court of Appeal has recently confirmed that the same approach to 'detriment' is to be applied in whistle-blowing cases as in discrimination cases: *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180, [2020] ICR 965 at paragraph 42.

188. We have also had regard to the Supreme Court's judgment in *Royal Mail Ltd v Jhuti* [2019] UKSC 55 and our analysis of that case is potentially of relevance to both the dismissal claim and the detriments claims, but we set it out in this part of our judgment for convenience.

189. *Jhuti* concerned a claim of automatic unfair dismissal for having made a protected disclosure contrary to s 103A ERA 1996. The situation was one which the Supreme Court described at paragraph 41 as *"extreme"* and *"not … common"*. The dismissal decision had been taken in good faith by a manager on the basis of evidence of poor performance presented by the Claimant's line manager. However, the Tribunal found that the line manager had dishonestly constructed the evidence of poor performance in response to a protected disclosure made by the employee. At paragraph 60 the Supreme Court concluded as follows:

> 60. In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X , courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

190. It is convenient also to note here that the EAT has confirmed that what is said in *Jhuti* about the circumstances in which the knowledge or conduct of person other than the person who actually decided to dismiss can be attributed to the employer is equally relevant to the question of the fairness of the dismissal

under s 98(4) ERA 1996: *Uddin v London Borough of Ealing* (UKEAT/0165/19/RN) per HHJ Auerbach at para 78.

191. We consider that there is no reason why the principle in *Jhuti* about the circumstances in which the state of mind of one employee can be attributed to the corporate employer should not apply to detriments cases brought against the employer under s 47B(1) as it does to automatic unfair dismissal cases under ss 98(1) and 103A. This is because both causes of action require the corporate employer's 'reason' or 'ground' for acting to be shown. However, we accept Ms McCann's submission that *Jhuti* has no role to play in relation to the detriments claims against the other individual Respondents under s 47B(1A) since those claims require us to consider the state of mind of those Respondents individually: see *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) *per* Choudhury J at paras 86-90.

192. The potential significance of the *Jhuti* principle in this case is therefore as we see it as follows: if Ms Senda's reason for wanting to dismiss the Claimant was solely or principally her protected disclosures, but she hid that behind the 'invented' reason of redundancy that was then adopted by the other individual Respondents as decision-makers and thus becomes the employer's reason for dismissal, then *Jhuti* applies and Ms Senda's reasons are to be attributed to the corporate Respondent. The same is potentially true in relation to any of the alleged detriments claims against the Company if the actual decision-maker in any case was acting on reasons supplied by Ms Senda (and she was materially influenced by the Claimant's protected disclosures). However, it is less clear that *Jhuti* assists if the position as we find it to be in relation to dismissal (or any of the detriments) is that the four individual Respondents reached a joint decision for different reasons. If that is the position, we consider that we would (in relation to the unfair dismissal claim) have to be satisfied that Ms Senda's reason (if it was the alleged protected disclosures) was in fact the decisive sole or principal reason for the collective decision and (in relation to the detriments claims) we would have to be satisfied that Ms Senda (again if motivated by the alleged protected disclosures) was a material part of the collective decision to subject the Claimant to a detriment. If not, then Ms Senda's reasons are not to be attributed to the corporate Respondent.

The law on leave for family reasons detriments

193. By s 47C(1) ERA 1996 an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason. The reasons are prescribed in regulations and include by reg 19(2)(d) of the *Maternity and Parental Leave etc Regulations 1999* (the MPLR 1999) that the employee *"took, sought to take or availed herself of the benefits of, ordinary maternity leave [OML] or additional maternity leave [AML]"*. By reg 19(3) and (3A), for these purposes, a woman avails herself of the benefits of OML or AML if, during the relevant OML or AML period, she avails herself of the benefit of any of the terms and conditions of her

employment preserved by (respectively) ss 71 or 73 of the ERA 1996 and reg 9 of the MPLR 1999.

194. That requires consideration of ss 71 and 73 ERA 1996. Section 71 deals with OML. Section 73 deals with AML and for present purposes is in identical terms to section 71 so we do not consider it separately. Section 71 clarifies that an employee, who exercises her right to be absent from work at any time during a period of ordinary maternity leave, is (per s71(4) ERA):

    (a) entitled to the benefit of the terms and conditions of employment which would have applied if she had not been absent; and
    (b) bound by any obligations arising under those terms and conditions; and
    (c) entitled to return from leave to a job of a prescribed kind.

195. The scope of the "terms and conditions of employment", which an employee has an entitlement to the benefit of during her OML is clarified in s71(5) as:

    (a) including matters connected with an employee's employment whether or not they arise under her contract of employment, but
    (b) not including terms and conditions about remuneration.

196. Reg 9 of the MPLR 1999 mirrors s 71 and, as with s 71, gives the benefit to the employee only to those terms and conditions *"which would have applied if she had not been absent"*.

197. The entitlement provided for in s 71(4)(c) ERA to return from leave to a job is that prescribed by the separate regs 18 and 18A MPLR 1999.

198. In this case the Claimant has at times put her case on the basis that she was subjected to detriments because she sought to exercise the right to return from maternity leave. The Respondent argued in closing submission that, thus put, the claim did not fall within s 47C or reg 19 of the MPLR 1999 because the right to return to work is not itself OML or AML or a benefit thereof, but a separate right for which provision is made in regs 18 and 18A of the MPLR 1999.

199. The Claimant recognises (but does not concede) the difficulty identified by the Respondent but seeks to argue in the alternative that the 'right to return' is part of her terms and conditions of employment and therefore a right preserved by s 71 ERA 1996 and reg 9 of the MPLR 1999.

200. Neither counsel was able to refer us to any authority on this point so it falls to us to decide it as a matter of principle. We have decided that the Respondent's interpretation of the legislation is correct. Although we cannot see what policy reason there might be for dealing differently with the 'right to return' from maternity leave as distinct from the taking of maternity leave so far as detriments claims are concerned, or why drafters of the regulations have decided that the mechanism for enforcing the right to return from maternity leave should be essentially limited to the unfair dismissal route, we

consider that the effect of the legislation is so clear that there is no room to interpret it any other way. The effect of regulations 19(3) and (3A) is plainly to limit detriments complaints to complaints suffered because a woman took or sought to take OML or AML, or availed herself of the terms and conditions of employment that are preserved by ss 71 and 73 ERA 1996 and reg 9. Those terms and conditions include the right to continue as an employee while on leave (i.e. the essence of the right to take OML and AML) but they do not include the right to return because that right is dealt with separately in regs 18 and 18A. Further, the right to return (whether arising under contract or the legislation) is not a term or condition which *"would have applied if she had not been absent"* as provided for in s 71(4)(a) and the equivalent provision of s 73. Since the right to return only applies if the woman is absent, it is not a right preserved by ss 71 or 73. On that latter hurdle, therefore, the Claimant's alternative argument falls.

201. However, the significance of this point may not be so great. It means that we must consider whether or not the Claimant was subjected to any detriment because she took maternity leave or availed herself of the benefits of the terms and conditions of her employment that applied while she was on leave. In deciding whether the reason for any detriment was the prescribed reason of maternity leave, despite the slight difference in the statutory language, neither party has suggested we should apply any different approach to that which applies for the protected disclosures detriments, i.e. we consider whether the Claimant's taking of maternity leave materially influenced the treatment complained of. Since a woman cannot exercise the right to return unless she has taken maternity leave, there are going to be very few cases where the distinction made by the legislation between the taking of maternity leave and the exercise of the right to return will matter. In most cases, if there has been detrimental treatment as a result it is likely that the fact that the woman took maternity leave will be a material influence on that treatment, even if part of the reason for the detriment was because she exercised the right to return. In this case, we must simply consider what the Respondent's motivations for the alleged detriments were on the basis of the facts before us.

The law on maternity discrimination

202. By s 18(4) of the EA 2010 a person discriminates against a woman if he or she treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to OML or AML. By s 39(2)(c) and (d) of the EA 2010 an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment. In the EA 2010 there is no further provision such as is found in reg 19 of the MPLR 1999 and discussed above as to what is meant by *"exercising or seeking to exercise … the right to [OML] or [AML]"*. We can therefore straightforwardly ask, in common with other forms of direct discrimination claims under the EA 2010 and the detriments claims above, *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065

at para 29 *per* Lord Nicholls). It will be unlawfully discriminatory if the fact that the Claimant took maternity leave was a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

203. The significant difference between a maternity discrimination claim and other forms of direct discrimination, of course, is that no comparator is required. In this respect a maternity discrimination claim operates in the same way as a victimisation claim under the EA 2010 and a detriments claim under the ERA 1996.

204. We have also reminded ourselves that if a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic (including maternity leave), but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at paragraphs 33-36 *per* Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will normally be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated.

The law on direct sex discrimination

205. A claim for direct sex discrimination can only be brought under the EA 2010 if what has happened is not maternity discrimination, including (so far as relevant in this case) maternity discrimination under s 18(4): see s 18(7)(b). Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in dismissing the Claimant or subjecting her to any other detriment, discriminated against her by treating her less favourably than it treats or would treat others because she is a woman. The concept of 'detriment' and the principles to apply in determining whether the protected characteristic is a reason for the treatment are the same as for the detriments and maternity discrimination claims set out above. The additional requirement is that there must be 'less favourable treatment'. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010).

Burden of proof

206. For the claims under the EA 2010, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal

could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931.

207. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at paragraph 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

208. The position is different for the detriments claims under the ERA 1996. The burden of proof is on the Claimant to establish a protected disclosure was made and/or that she took or sought to avail herself of the benefits of maternity leave, and that she was subject to detrimental treatment. However, s 48(2) provides that it is then *"for the employer to show the ground on which any act, or deliberate failure to act, was done"*. It has been held that, although the burden is on the employer, the Claimant must raise a *prima facie* case as to causation before the employer will be called upon to prove that the protected disclosure/maternity leave was not the reason for the treatment: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at para 40 (deciding this point so far as protected disclosure dismissal cases are concerned, persuasive *obiter* on the same point for detriment cases). As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at paras 115-116 and *Dahou* ibid at para 40.

209. Finally, we must remember that the fact that someone is treated unreasonably does not mean that they have been discriminated against: *Glasgow City Council v Zafar* [1998] ICR 120. However, we also bear in mind that where the evidence shows that the complainant is the only employee who has been subject to unreasonable treatment, the Tribunal must *"consider carefully and with particular scrutiny"* whether discrimination has played a part in the

treatment: *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust* UKEAT/0269/15/JOJ at para 48 *per* Langstaff J. We consider that these principles apply equally to the detriments claims in this case.

Conclusions on the detriments claims

210. Applying the legal principles set out above, we now consider all the detriments relied on by the Claimant in order to determine whether they were detriments and, if so, whether the reasons for them included any of the prohibited reasons on which she relies, i.e. the protected disclosures that we have found to be established, the fact she took maternity leave, or that she is a woman who was less favourably treated that an actual or hypothetical male comparator. We have done so without regard in the first instance to how the Claimant pleaded her case on these issues. Given that we had heard all the evidence and the question of how the Claimant had pleaded her case was only raised in Closing Submissions, and applications to amend only made at that point, we considered that we should not determine the amendment applications until we had made our findings of fact.

211. We say at the outset that we have seen no evidence, nor has this really been suggested by the Claimant, that she was less favourably treated at any point because of her sex rather than because she took maternity leave. We therefore find that there are no direct sex discrimination claims here. This claim appears only to have been made because those instructing the Claimant misunderstood the effect of s 18 of the EA 2010.

a) By R1-R5 inducing the Claimant into relinquishing her shareholding in R1, by a false representation made on 10 January 2019 that her salary and title would be preserved (§10 GoC).

212. The representation on 10 January 2019 by Mr Stanton did not induce the Claimant to relinquish her shareholding as she was willing to do that without the representation, but it did induce her to relinquish her directorship of the Company, and she relied on it as an assurance that her job was secure notwithstanding the MBO. Further, for the reasons we have set out above, we find that the assurance was false and misleading so far as concerns the Claimant's pay and remuneration because the individual Respondents had formed a settled intention prior to giving this assurance to do something very significant to reduce the costs of the Claimant's role which would inevitably have meant a reduction in her pay (at least). Although the Claimant has not established that the whole of the detriment happened in the way she pleaded it, we accept that the giving of the false and misleading assurance was in itself something that the Claimant could reasonably regard as a detriment. She acted on the basis of it at the time and this in our judgment meets the threshold for being a detriment even if there was in reality no other option for

the Claimant but to resign both her shareholding and directorship at this point. It is reasonable to regard it as detrimental to be misled before taking such a significant step even if there were no other options: the sense of having been 'duped' is sufficient to constitute a detriment. For this reason, while we recognise that as a result of it only becoming apparent at the time of Closing Submissions that the Claimant had been prepared to relinquish her shareholding before this assurance, and that it was the resignation of the directorship to which the assurance was actually critical, the Respondent's counsel was not able to fully explore this point in cross-examination, we do not consider there is any prejudice to the Respondent in this respect. Accordingly, if and to the extent that our findings on the facts require an amendment to the Claimant's case, we have granted that amendment for the reasons set out further above.

213. We then consider the reasons for this false assurance. One reason is clear from the terms of Ms Senda's email at the time on 9 January 2019: Ms Senda believed that because the Claimant was on maternity leave her title and salary could not be changed. The fact that the Claimant had taken maternity leave is accordingly straightforwardly a material part of the reason why the Claimant was given an assurance that her pay/remuneration would stay the same, despite the individual Respondents having formed a settled intention to make a significant reduction in those costs.

214. We have then considered whether the protected disclosures that the Claimant had made played any material part in Ms Senda's reasons for subjecting the Claimant to this detriment. We find that they did. For the reasons we have already set out in our findings of fact above, the Claimant had made one protected disclosure directly to Ms Senda and two others to Mr Curtin, the essential content of which so far as concerns the protections for whistle-blowers under the legislation was known to Ms Senda, i.e. we have found as a fact that Ms Senda knew that the Claimant had disclosed information to Mr Curtin that tended to show that she, Ms Senda, had breached her legal obligations to the Company, or potentially committed criminal offences. Moreover, we have found the Claimant's subjective belief in this wrongdoing was objectively reasonable and, indeed, in some respects it has been proved in these proceedings to be correct. We have further found as a fact that the expenses episode, and quite specifically the fact that Ms Senda knew that the Claimant knew about her wrongdoing, had soured their relationship.

215. The evidence that Ms Senda remained hostile to the Claimant during the events with which we are concerned is clear: it is revealed in her cold and, at times, callous emails. This includes not only those towards the end of the Claimant's employment on which we have made specific findings elsewhere in this judgment (i.e. her failure even to send a holding response to the Claimant's April 2019 emails; her failure to address her by name or welcome her back in her email of 12 May 2019; her comments in the email about the desk as to it being unclear what work the Claimant thinks she is going to do; her failure to respond to the Claimant's email about email access and instead her monitoring of the Claimant's emails and accusation to Dr Harvey that the Claimant was lying; her denying the Claimant access to Mr Parmar's emails,

etc), all of which was reflected in her hostility towardthe Claimant in person too as we have found. It also includes in her earlier emails and treatment. In particular, we have in mind the fact that (as we have found) Ms Senda did not want the Claimant involved in the MBO, the absence of any apparent concern for or warmth toward the Claimant by Ms Senda at any point notwithstanding the length of time they had worked together, Ms Senda's reference in her email of 9 January 2019 to the giving of an assurance to the Claimant 'not being her no. 1 priority', and her reference in February 2019 to 'not being madly keen' to meet with the Claimant. We also have in mind her snide remarks in other emails about the Claimant's capability, which at times (in particular in the email of 22 April) appear to express wider concerns about the Claimant's capability than Ms Senda has admitted to in these proceedings. There has been no adequate explanation by Ms Senda for her hostility towards the Claimant. Indeed, she has sought to deny it: she gave evidence, which we rejected, as to how good her relationship with the Claimant was between 2012 and 2018; she denied that she had been hostile towards the Claimant on her return to the office and sought to maintain that she had been friendly toward her even though it is clear she was not. She did not accept there was anything inappropriate in her first communication to the Claimant in 4 months on 12 May 2019 being one in which she did not address the Claimant by name or welcome her back. She provided explanations for three of the detriments about which the Claimant complains below (the email redirection, the desk and the access to HR files) which we have found to be inadequate. In the circumstances, we are left with an evidential gap: there has been no adequate explanation for why Ms Senda was so hostile to the Claimant. We acknowledge that we are not bound to conclude that the reason is that proffered by the Claimant, i.e. the protected disclosures, but in this case we are driven to the conclusion that it was. The evidence that there were difficulties in their relationship prior to the expenses issue and the occasional personality clashes acknowledged by Mr Stanton do not go far enough in our judgment to explain this hostility. Although the protected disclosures were made seven years' previously, the expenses issue was a significant and serious one about which Ms Senda still feels awkward enough that she misled Mr Hodge about it at the appeal stage. In the circumstances, we consider that the protected disclosures provide the most satisfactory explanation for the extent of Ms Senda's hostility toward the Claimant.

216. In relation to this particular detriment, where Ms Senda agreed to the giving of an assurance to her despite it being false and misleading given the prior discussions, we find that Ms Senda's hostility to the Claimant has played a part in why she acted as she did. Moreover, although on this as on other issues, Ms Senda is only one of four decision-makers it is plain that she is the 'driver'. She had long been identified as Mr Curtin's successor, it is in response to her final plea in October 2018 that he agrees to sell the business, it is she who 'makes the running' on the drafting of the business plans at all stages (both in November 2018 and May 2019), on the terms of the assurance to be given to the Claimant, on what should be said to her when she comes to the office in February 2019, on the move towards making her redundant following the meeting with Mr Parmar on 16 April, as to what should happen with her desk on return, on the redirection of Mr Parmar's emails, and so on.

For this reason, we find that where a collective decision has been taken in this case if Ms Senda was materially motivated by the protected disclosures, then so was the collective decision and thus the decision of the Company *qua* employer. We accept, however, that the other individual Respondents were not so motivated so protected disclosures claims against them as individuals must fail.

217. We therefore find that this detriment was one to which the Claimant was subjected because she had taken maternity leave. It is therefore in principle both a detriment under s 47C ERA 1996 and an act of discrimination under s 18(4) EA 2010. In addition, it was a detriment to which she was subjected by the Ms Senda and the Company for having made protected disclosures, contrary to s 47B(1) and (1A).

(b) By notifying the Claimant on 8 May 2019 that her role was at risk of redundancy (§11 GoC).

218. This was plainly a detriment. We have considered carefully whether it was a detriment to which the Claimant was subjected because she took maternity leave, but we conclude that this had nothing to do with it. What drove the redundancy, and the handling of it, was the fact that the Respondents had decided to make significant savings in the cost of the finance function and came to the realisation in April 2019 following the conversation with Mr Parmar on 16 April that the way to do that was to delete the Claimant's role and replace it (putting it in general terms for present purposes) with a lower grade, narrower finance role on fewer hours. The fact that the Claimant was on maternity leave explains why this was not done earlier, and the fact that the Claimant was about to return from maternity leave explains why it was done when it was done, but the fact that the Claimant had exercised her right to take maternity leave was not part of the reasons of any of the individual Respondents for deciding to place the Claimant's role at risk of redundancy.

219. In reaching this conclusion, we take into account that the Claimant's absence had provided the opportunity for the Respondents to see how the business could be run without her, to reapportion some of her functions and to have a maternity cover (Mr Parmar) in covering the role who gave them a different perspective on what sort of finance role they needed, but all of these matters are 'but for' causes of what happened, not part of the Respondents' conscious or unconscious reasons for making the decisions they did in relation to the redundancy. We are satisfied that if the Claimant had not been on maternity leave, she would still have been made redundant, but it would have happened sooner rather than later. Moreover, the fact that they did not move to dismiss Mr Parmar earlier also does not indicate that the Claimant's maternity leave was a material factor in their thinking. We in our findings of fact accepted their reasons for not terminating Mr Parmar's employment earlier. Those reasons provide a full and adequate explanation for why they acted as they did regarding Mr Parmar. We find that the Respondents have discharged the burden, which had shifted to them, of showing that the decision to place the Claimant at risk of redundancy was not discriminatory. That is not to say that

we were satisfied that the Respondents' explanations wholly explained how the Claimant was treated in relation to the redundancy, but insofar as it they did not, we have found that in this case it is the protected disclosures which provide the 'other explanation' to use the language of s 136(2) EA 2010.

220. We have then considered whether the Claimant's protected disclosures played a material part in Ms Senda's decision to place the Claimant at risk of redundancy and, through her also in the decision of the Company *qua* employer (the reasons we attribute Ms Senda's motivation to the Company itself having been set out above). We find that the protected disclosures did play a material role in Ms Senda's reasons for acting at this point. We so find because we see in the way that the redundancy was approached evidence of Ms Senda's hostility to the Claimant, hostility which we have for the reasons set out above concluded must be attributed to the protected disclosures. In the context of the decision to place her role at risk of redundancy, and the subsequent process, this is seen in Ms Senda's failure to look for ways of retaining the Claimant. There were various creative options available here which could have been explored, including the possibility of retraining the Claimant, and/or offering her a combined book-keeper/credit control function for a total of four or five days per week (possibly ceasing the outsourcing arrangements), and/or creating a role that permitted the Claimant to continue with her non-finance duties (or some combination thereof) or negotiating a more significant salary reduction than that offered by the Claimant. None of these are options that would have achieved all the savings that the Respondents wished to achieve and, as we explain below, these are not options which we consider a reasonable employer needed to consider and the Respondents' failure to consider them does not render the decision to dismiss unfair. However, the absence of efforts to consider how to keep the Claimant (coupled with the other evidence we have identified of Ms Senda's hostility) is what leads us to find that the protected disclosures were a material factor in Ms Senda's decision to place the Claimant's role at risk of redundancy (and ultimately to make her redundant).

221. It follows that this was a detriment to which the Claimant was subjected by Ms Senda and the Company because she made protected disclosures, but the other heads of claim fail in relation to this detriment.

(d) By R2 on 21 May 2019 denying the Claimant access to the email account of the Claimant's maternity cover (Raj Parmar) (§13 GoC) .

222. We find that this was a detriment for several reasons: in principle it was going to make it more difficult for the Claimant to resume her role as she would not be able to see readily Mr Parmar had been doing while she was away and would rely on Ms Senda and Mr Stanton forwarding any new emails to her; the terms in which it was done (which were seen by the Claimant at the time) *"and nobody else"* were pointed and suggested hostility towards her; and, it gave (or added to) the Claimant's impression that the redundancy decision was a foregone conclusion.

223. We find that this decision was not taken by Ms Senda and Mr Stanton because the Claimant had taken maternity leave. That was a 'but for' cause but it was not in our judgment a material factor in their decision-making. We have not had to resort to the burden of proof so far as discrimination is concerned because although for the reasons given in the next paragraph we were not wholly satisfied with the explanations for this detriment given by Ms Senda and Mr Stanton, we have found that the evidential gap is properly filled in this case by the inference that the protected disclosures were the reason for the treatment and not the Claimant's maternity leave. In other words, in the language of s 136(2) of the EA 2010, there is another explanation in this case.

224. As to the protected disclosures claim, in our findings of fact above, we reject the explanation for this decision given by Mr Stanton and Ms Senda in their witness statements. We find that although they may have taken over the email accounts of other leavers, none of those were similar situations of an employee returning from a leave of absence to resume a role covered by someone else. It would have been both useful for the returning employee to have access to the cover employee's email accounts, and was what had happened when the Claimant returned from maternity leave previously. We find that the real explanation is closer to what Ms Senda said in oral evidence: the Respondents were concerned to ensure that the Claimant did not have access to information not only about the MBO that might have been personal to the directors. However, we consider that this is not by itself sufficient to explain this particular decision, or the way in which it was done. That is partly because we found that the Respondents did not give the true reasons in their witness statements, and partly because of Ms Senda's hostility to the Claimant revealed in this and other incidents. There is 'something more' here and again we conclude that the 'something more' is Ms Senda's hostility to the Claimant because of her protected disclosures.

225. Accordingly, we find that this was also a detriment to which the Claimant was subjected by Ms Senda and the Company because the Claimant had made protected disclosures, but the other heads of claim in relation to this detriment fail.

(e) By denying the Claimant access to relevant HR files in 2019 (§13 GoC).

226. We find that this was a detriment. The Claimant had prior to maternity leave been responsible for personnel and HR matters. As such, it was her job to deal with HR issues. Although Dr Harvey had said in the call with the Claimant on 9 May that he was supporting the directors on HR issues, there was no formal communication to the Claimant that he was now assuming HR responsibility, or that her responsibilities in that respect had been reduced. The revoking of her access to HR files was thus a clear indication that part of her role had been removed without notification to her.

227. We now consider the reasons for it. The Respondents' witnesses have not given an adequate explanation for this decision. Although Ms Senda assumed responsibility for it, none of them admitted to actually taking the necessary steps to revoke the Claimant's access and it is unclear when it happened. The explanation Ms Senda provided is that it was because of GDPR requirements and because the Claimant no longer needed access to HR files as she was no longer a statutory director. However, we were provided with no evidence of any particular GDPR review or advice and we cannot see that this would justify preventing the person whose job it was to look after HR matters from having access to the files. It is not an appropriate to response to say that if she had asked she could have been granted access to particular files; the having to ask makes the Claimant's job more difficult and smacks of a demotion. Nor does the fact that the Claimant was no longer a statutory director explain why she should no longer have access to personnel files. Whether or not someone needs access to personnel files depends on whether that is part of their job, not on whether they are a director of the Company or not.

228. We find that the real reasons why the Claimant was denied access to the HR files were because she had taken maternity leave and because she had made protected disclosures. We find that maternity leave is part of the reason because the Respondents have not provided us with an adequate alternative explanation, and because on the facts we find that what had happened was that because the Claimant had gone on maternity leave the HR part of her role had been given to Dr Harvey. Unlike other aspects of this case where we find the Claimant's maternity leave was merely a 'but for' cause, here we find it was actually part of the reason for the treatment as it was because she was on maternity leave that her HR duties were given to Dr Harvey and it is because she had taken maternity leave that they remained with him after she returned even though she had not at that point been made redundant.

229. We also find that the Claimant's protected discosures were a material influence on how Ms Senda handled this as well. Again, this is an incident that exemplifies Ms Senda's hostility and coldness towards the Claimant in simply removing part of her role and revoking her access to HR files without even discussing it with her or informing her of the decision that had been made.

230. Accordingly, this was a detriment to which the Claimant was subjected because she had taken maternity leave under s 47C ERA 1996 and discrimination because she had taken maternity leave under s 18(4) EA 2010, and it was a detriment to which she was subjected by Ms Senda and the Company because she made protected disclosures under s 47B(1) and (1A).

(f) Requiring the Claimant to sit at a different desk upon her return to work in May 2019 (§13 GoC).

231. Although this was only for a few days before Mr Parmar left, we find that it was a detriment which made a significant contribution to making the Claimant feel unwelcome on her return to the office.

232. As to the reasons for it, we find that the Respondents have provided no adequate explanation. There was no good reason for not asking Mr Parmar to move from the desk to the spare desks so that the Claimant could have her own desk when she returned to the office. This was effectively confirmed by Mr Stanton's evidence that he had asked Mr Parmar to move. Although we rejected that evidence and found that it did not happen, the fact that he suggested this shows that it would have been perfectly possible. The reasons it did not happen, we find are again two-fold. First, we find that the reason the Claimant did not have her own desk back immediately on her return was because she Claimant had been on maternity leave and because Ms Senda considered that because she had been on maternity leave it would be fine for her to sit on the spare bank of desks while she and Mr Parmar did the handover. The Claimant's maternity leave is thus a material part of the reason for this treatment. However, again, this does not fully explain it. Again, Ms Senda's email dealing with what is to happen with the Claimant on her return from maternity leave betrays a hostility that on the evidence before us we find is explained by the fact that the Claimant made protected disclosures for the reasons we have already set out above.

233. Accordingly, this was a detriment to which the Claimant was subjected because she had taken maternity leave under s 47C ERA 1996 and discrimination because she had taken maternity leave under s 18(4) EA 2010, and it was a detriment to which she was subjected by Ms Senda and the Company because she made protected disclosures under s 47B(1) and (1A).

(g) By R2, R3 or R5's participation in the decision to make the Claimant's role redundant and / or dismiss her (in the case of R2-R5 only).

234. On the facts of this case we can see no difference between detriment (b) (the decision to place the Claimant at risk of redundancy) and this detriment. Our reasoning in relation to that claim applies equally here. The only difference is that because (following *Timis v Osipov* [2018] EWCA Civ 2321, [2019] ICR 655) dismissal cannot be claimed as a detriment against the Company, only against an individual, the protected disclosures claim in relation to this detriment succeeds against only Ms Senda under s 47B(1A). The Company is vicariouaIy liable for that under s 47B(1B), but it is not directly liable under s 47B(1) and none of the individual respondents are liable.

(h) By R2 - R5 between January - May 2019 creating a false or exaggerated case in order to conceal the real reason for the Claimant's selection for redundancy (namely, discrimination or protected disclosure victimisation) (§21-28 GoC), in particular by–

i. Exaggerating the financial difficulties of R1 (§21, 22 GoC)

235. In the Claimant's grounds of resistance, it was pleaded that the Respondents had exaggerated the Company's financial difficulties because: (i) it had taken on the expense of providing company cars to directors; (ii) it had been paying a management charge of £20k per month (£240k per year) to Harwood; and (iii) its profits for May 2019 were really £30k. In closing submissions, the Claimant made slightly different points. She did not seek to dispute the Respondent's reported levels of profits or losses for May 2019 or for the rest of 2019 as we have set out in our findings of fact. She confined herself to complaining that explanations for the management charge, the dividends paid to directors from Harwood in lieu of salary reductions and for the company cars had been provided by the Respondent only late in the day (in some cases in oral evidence). However, she did not advance any reasons why we should not accept that evidence, and we have in fact accepted it in our findings of fact above. She added a further question about the loan repayments to Mr Curtin of £73,530 agreed as part of the MBO, but as noted in our findings of fact above this was a balance sheet item that did not affect profits and in any event it had been agreed as part of the MBO so it is not a source of 'exaggeration'.

236. The Claimant has thus not in the end identified any specific respect in which at the time the Respondents exaggerated their financial difficulties. Dr Harvey gave her some wrong figures in the 9 May 2019 'at risk' letter that he corrected, and he was perhaps somewhat disingenuous in seeking to present the directors as having taken salary cuts without acknowledging that directors were receiving dividends in lieu via Harwood, but the Claimant was aware of that and pointed it out to Dr Harvey immediately he mentioned it in the redundancy consultation meeting on 23 May 2020. Mr Cox's advice to the Respondent on accounting led to a number of not entirely transparent transactions (including regarding the car hire and the management charge) about which it was reasonable for the Claimant to express her doubts, but ultimately the figures provided to her as part of the redundancy process were not exaggerated based on the evidence we have received.

237. Since this detriment is not made out on the facts we do not have to consider the reasons for it.

ii. Not terminating the fixed term contract of C's maternity cover, Raj Parmar (§23 GoC);

238. For the reasons set out already in our findings of fact and above, we have accepted the explanations given by the Respondents for not terminating Mr Parmar's fixed term contract earlier. We do not find that the Claimant's maternity leave was a material factor in their thinking in this respect. Nor does

the fact that the Claimant had made protected disclosures have anything to do with this particular decision. This claim fails.

iii. Telling staff at a meeting on 1st May 2019 that R1 was doing really well and making profits (§24 GoC);

239. The Claimant was not even present at this meeting and we do not accept that it is a detriment to her that, at a meeting that took place before she returned to work, the Respondents overstated their financial position with a view to boosting staff morale and presenting a positive picture to a third party who was present. This was nothing to do with the Claimant and she could not reasonably have considered it placed her at a detriment, particularly as she had access to the Respondents' finances in any event and could see what the position was. In any event, for the same reasons, this has nothing to do with the Claimant's maternity leave or her protected disclosures. This claim fails.

iv. By the decision that C's duties could allegedly be dispersed to other colleagues (§27 GoC);

240. We accept that this constituted a detriment as it was a step on the way to making the Claimant redundant. However, we do not find that this decision was taken because the Claimant had taken maternity leave or because of her protected disclosures. So far as maternity leave is concerned, it is clear that the Claimant's absence provided the opportunity for the Respondents to see how the business could be run without her, to reapportion some of her functions and to have a maternity cover (Mr Parmar) in covering the role who gave them a different perspective on what sort of finance role they needed. However, all of these matters are 'but for' causes of what happened, not part of the Respondents' conscious or unconscious reasons for making the decisions they did in relation to the Claimant's duties. We are satisfied that if the Claimant had not been on maternity leave, the Respondents would still have concluded that some of her duties could be dispersed to other colleagues. This decision is an inextricable part of the decision to make her redundant which we have already found for the reasons set out above was not materially influenced by the fact that she was on maternity leave. In so finding, we add, lest the parties be unsure as to why we have rejected this claim, but accepted the claim in relation to the Claimant's access to HR files, which rested in part on our finding that the Claimant's maternity leave was a material part of the reason why Dr Harvey took over responsibility for HR functions, that so far as the HR files were concerned the detriment to the Claimant was that she did not have access to HR files when she had returned and this was in part because those responsibilities had been removed from her because she was on maternity leave. The Claimant's other duties, however, she resumed when she returned from maternity leave. They were not taken away from her while she was still employed: the reason they were reallocated was because it was decided her role could be made redundant, not because she had taken maternity leave.

241. We do, however, consider that the Claimant's protected disclosures were a material influence on Ms Senda's decision regarding this detriment. This is because as we have already found above there were various creative options available to avoid the Claimant's redundancy which could have been explored, including the possibility of permitting the Claimant to continue with her non-finance duties in combination with other options. As we explain below, these creative options are not options which we consider a reasonable employer needed to consider and the Respondents' failure to consider them does not render the decision to dismiss unfair, but the absence of efforts to consider how to keep the Claimant (coupled with the other evidence we have identified of Ms Senda's hostility) is what leads us to find that the protected disclosures were a material factor in Ms Senda's decision to place the Claimant's role at risk of redundancy and reallocate some of the Claimant's duties to others.

242. It follows that this was a detriment to which the Claimant was subjected by Ms Senda and the Company because she made protected disclosures, but the other heads of claim in relation to this detriment fail.

(i) Failure to treat the Claimant's grievance as a grievance, instead treating it as an appeal against dismissal (with the consequence of there being no right of appeal).

243. We accept that this could reasonably have been regarded by the Claimant as a detriment because it meant that her grievance was not treated separately as she wished it to be at the time (and she did not participate in the appeal as a result). It also meant that it was not dealt with in accordance with the Respondent's grievance procedure as an issue separate to her dismissal and she did not have the opportunity to appeal any decision made on the grievance to two further stages.

244. However, we do not consider that the fact she had taken maternity leave or raised protected disclosures had anything to do with this decision. By this point both parties had instructed lawyers and the question of how the letter from the Claimant's solicitors of 26 June 2019, labelled both appeal and grievance, should be handled strikes us as being quintessentially the type of issue on which the Respondents would defer to legal advice. We therefore accept their evidence that that is essentially what they did do, albeit that Ms Senda in particular accepted that she understood she had to take responsibility for that decision. It is actually quite a technical legal issue how that letter should have been dealt with and we cannot see any evidence that anything other than the legal advice played a material part in that decision. In this respect, we note that the approach taken by the Claimant's counsel in cross-examination of the Respondent's witnesses on this, specifically to suggest that the failure to treat the letter as a grievance meant that the Claimant did not gain the right to two further appeals under the grievance procedure was not a point that either she or her solicitors made at the time and nor did she make it in her witness statement. We do not consider that it

crossed the Respondents' witnesses minds that in treating the letter as an appeal rather than a grievance they were avoiding the possibility of two further appeals and therefore avoiding more scrutiny of their actions. So far as they were concerned, they were already engaging a wholly independent consultant to review their actions and so were opening themselves up to scrutiny in any event. This claim fails.

(j) by R1 conducting an unfair appeal process by:-

i. withholding material documents from the appeal officer;

245. Mr Hodge was not provided with any of the documentation relating to the individual Respondents' business plans in November 2018 or the assurances given to the Claimant regarding her employment in January 2019, or any documentation related to the expenses issue of 2012. It is understandable (and reasonable) that no search for documentation from 2012 was made at this stage given the passage of time, the fact that the Claimant had decided not to participate in the appeal and that the focus was (rightly) on whether whatever had happened in 2012 had influenced the decision to dismiss. However, the position is different in relation to the November 2018 business plans and emails. Given that they set out the individual Respondents' first proposal to cut the costs of the Claimant's role (and thus potentially to make her redundant), we consider that these documents were obviously relevant to the matters that Mr Hodge was to consider on appeal. Moreover, as we have found, they put a very different complexion on the assurance that the Claimant was given by Mr Stanton on 10 January 2019, and which Mr Hodge made a central plank of his reasoning in relation to the Claimant's whistleblowing claims at paragraph 6.5 of his report. Not providing these documents to Mr Hodge was accordingly a detriment to the Claimant.

246. The individual Respondents' explanation as to why some documents and not others were provided to Mr Hodge is because the selection was made by the Respondents' solicitors and they then regarded it as being up to Mr Hodge to ask for anything further he considered he needed. We accept that explanation as it is plausible and there is nothing to countermand it. It follows that we find that although material documents were withheld from Mr Hodge, the reason for that was nothing to do with the fact that the Claimant had taken maternity leave or because of her protected disclosures. This claim fails.

ii. its solicitors editing and/or revising the appeal report, thereby compromising independence of the appeal officer?

247. While we understand why the Claimant was concerned at seeing that Mr Hodge's draft report had been subject to review by the Respondents' solicitors, we do not consider that it was reasonable of her to regard this as a detriment. Both parties had instructed lawyers and as one would expect and, as is entirely commonplace, the Respondents' lawyers provided advice on Mr

Hodge's draft report. From the line of questioning in cross-examination, there appears to have been a misunderstanding that Mr Hodge, being a solicitor, should not have required legal advice, but Mr Hodge was not acting as a solicitor in conducting the appeal, he was acting as an independent HR consultant and it was appropriate for him to provide a draft of his report to the Respondents' lawyers for comment just as an internal appeal manager would have done. In any event, even it is a detriment, the Claimant has adduced no evidence from which we could conclude that this had anything to do with the fact that she had taken maternity leave or made protected disclosures. This claim fails.

iii. by R2 lying to and/or withholding material information from the appeal officer.

248. For the reasons set out in our findings of fact, we decided that Ms Senda misled Mr Hodge regarding the expenses issue and mendaciously downplayed both the issue and the Claimant's involvement in it. This was a detriment to the Claimant as it made it much more likely that Mr Hodge would dismiss her appeal than would have been the case if Ms Senda had told the truth. However, we do not consider that this detriment had anything to with the fact that the Claimant had taken maternity leave. Nor did Ms Senda lie to Mr Hodge because the Claimant had made protected disclosures. We find that she lied to Mr Hodge because she felt guilty and embarrassed about the expenses issue, which was not known to her fellow directors, and she wished to protect her own reputation by hiding as much of the episode as possible from Mr Hodge and her fellow directors. This claim fails.

Victimisation

The law

249. Under ss 27(1) and s 39(2)(d) EA 2010, the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act. There is no dispute that the Claimant's appeal/grievance letter of 17 June 2019 was a protected act within the statutory definition. In deciding whether the reason for the treatment was the protected act, we apply the same approach as for discrimination set out above.

Conclusions

250. The victimisation claim concerns the Respondents' decision to treat the Claimant's grievance only as an appeal against dismissal. For the same reasons as we have given in relation to this claim as a maternity discrimination / protected disclosure detriment, this claim fails. It was a detriment, but the reason for it was because, on the technical legal question of how the Claimant's solicitors' letter of 17 June 2019 should be treated, the Respondents followed the legal advice received and this had nothing to do

with the fact that the letter made a complaint of discrimination under the EA 2010.

The dismissal: unfair dismissal / automatic unfair dismissal / maternity discrimination

The law

251. We have already set out above the law that we must apply to decide whether the Claimant's dismissal was an act of direct discrimination because she had taken maternity leave under s 18(4) EA 2010.

252. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. in this case redundancy, or (if we permit the Respondent to resile from the list of issues) some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at paragraph 44). There are exceptions to that approach, as identified in *Jhuti*, and discussed above in relation to the detriments claims. We take those exceptions into account at this stage of our decision-making process too.

253. The burden of proof operates in the same way as for the detriments claims.

254. If the Claimant fails in her primary argument that protected disclosures were the reason for her dismissal, then we have to consider, first, whether the Respondent has proved that the definition of 'redundancy' in s 139(1)(b)(i) ERA 1996 is satisfied, i.e. whether the requirements of the Company *"for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish"* and whether the dismissal is *"wholly or mainly attributable"* to that state of affairs. The House of Lords in *Murray and ors v Foyle Meats Ltd* [2000] 1 AC 51 made clear that these are questions of fact for us as a Tribunal. Lord Irvine observed that the language of the statute *"is in my view simplicity itself"* and was to be applied without gloss. Lord Clyde elaborated slightly, observing that care must be taken since the statute does not refer to *"employees of a particular kind"* or to *"work specified in their contracts of employment"* but to *"the requirements of the business for employees to carry out work of a particular kind"* (emphasis added).

255. In deciding what the requirements of the business are for the purposes of s 139, the parties are agreed that Tribunals are not to investigate the commercial and economic reasons behind an employer's actions: *James W Cook and Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716. However, in this case, we accept that investigation of the reasons is relevant to the first issue we

have to decide, which is what was the sole or principal reason for the dismissal.

256. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

257. In redundancy cases, in deciding whether the dismissal is fair in all the circumstances within s 98(4) the principles in *Williams v Compair Maxam* [1982] ICR 156 apply (as adjusted to dismissals where there is not union involvement), i.e.:

    (1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered;

    (2) The employer must consult as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible;

    (3) The employer must establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service;

    (4) The employer must seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection;

    (5) The employer must see whether instead of dismissing an employee he could offer him alternative employment."

258. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at para 48. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and

may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at para 54 *per* HHJ Eady QC.

Conclusions on the dismissal

259. We have considered, first, whether a redundancy situation within the meaning of s 139(1)(b)(i) arose in relation to the Claimant. We are satisfied that it had. The Company no longer required a full-time Finance Director, it wanted a part-time credit controller. That was work of a different kind that was much less senior and attracted much lower rates of pay. In any event, even if it was not a different kind of work, there was less of it and only a part-time employee rather than a full-time employee was required. That has remained the position since the Claimant's departure. Although the Claimant has urged us to question this business decision by the Respondent, that is not relevant to deciding whether a redundancy situation had arisen. We are satisfied that it had.

260. Further, we are satisfied that the Claimant's dismissal was mainly attributable to that situation and that redundancy was the principal reason for the Claimant's dismissal. Our reasons for concluding that the Claimant's maternity leave played no material part in the decision and thus that this dismissal was neither an act of direct discrimination under s 18(4) EA 2010 nor (*a fortiori*) automatically unfair under s.99(3)(b) ERA 1996/ regulation 20(3)(d) MPLR 1999 are the same as our reasons for rejecting the detriment claim (b) in relation to the decision to place the Claimant at risk of redundancy.

261. So far as the protected disclosures claim is concerned, our reasons are essentially also to be found above in relation to detriment (b), but whereas that claim succeeds because we found the protected disclosures were a material part of the reason why Ms Senda placed the Claimant at risk of redundancy (and therefore why the Company did, given that Ms Senda was the lead decision-maker), the automatic unfair dismissal claim fails because we are satisfied that the protected disclosures were not the principal reason for dismissal. The principal reason for dismissal was that the Claimant's role was redundant. This was the only reason referred to in the dismissal letter and we find that it was as a matter of fact the principal reason for dismissal. That decision was a joint decision made by all four individual Respondents. The Respondents' business rationale for making this role redundant is clear and compelling. On any view, the Claimant's salary represented a substantial cost to the business. It was a cost that Mr Cox had advised the Company did not need to incur and which the Respondents had found in the Claimant's absence (during which cover was provided by a part-time credit controller rather than a finance director) they could do without – a decision confirmed by the fact that the Company has continued to date without making any further changes to its finance arrangements. Each of the individual Respondents had invested their 'life savings' in the business and they were collectively concerned to reduce the Company's costs, a desire that was very

understandable given its reported losses during the 2018/2019 period. We consider that redundancy was therefore the principal reason for the Claimant's dismissal. Her protected disclosures formed a small but significant part of why Ms Senda made that decision, but it was not the principal reason for Ms Senda's decision and Ms Senda was only one of four directors who made the decision (albeit the lead director), so it was *a fortiori* not a principal part of the collective decision that was made.

262. It follows that we find the principal reason for dismissal was redundancy and we do not need to consider the Respondents' alternative case on SOSR.

263. We then consider whether dismissal by reason of redundancy was fair in all the circumstances. We find that it was. The reasons that we have set out above for finding that redundancy was genuinely the principal reason for dismissal also explain why consider it was reasonable for the Respondents to identify the Claimant's position as being redundant. We further find that it was reasonable for the Respondents to dismiss the Claimant for that reason, having regard to the *Williams* factors.

264. First, no question of a selection process arises here because the Claimant was the only person doing her role and it was her role that the Respondents had (reasonably) decided they did not require.

265. Secondly, we find that the Respondents carried out genuine and appropriate consultation. The decision was not a *fait accompli* and the consultation process was not a sham. Although there had been a settled intention from November 2018 to make significant savings in relation to the Claimant's role, and that in practice left very few options on the table, the actual decision that the Claimant's role was redundant and therefore the Claimant was at risk of redundancy was not taken until after the conversation between Mr Stanton, Ms Senda and Mr Parmar on 16 April 2019. It was this conversation that crystallised for the individual Respondents that they did not need anyone employed full-time in the finance function and that therefore the Claimant's position was redundant. But even then, and although the reality was that there were no other options on the table that would achieve the savings that the Respondents wished to achieve, we do not find that the consultation was a sham or otherwise conducted unreasonably. We appreciate that there were a number of elements about the way the consultation was conducted that gave the impression to the Claimant that the Respondents were merely 'going through the motions'. We have in mind:

    265.1. Dr Harvey apparently reading from a script;
    265.2. The creation of the detailed business rationale and role analysis document, and Mr Cox's analysis of the savings, only after the consultation had started, making it clear that those documents were efforts in post-hoc rationalisation of a decision that was made on the basis of much simpler information, in particular how things had run during the Claimant's absence, the fact that Mr Parmar had said he could do most of the finance role in just 2 days' per week and the

fact that Mr Cox had advised them that they could save a lot of money on the finance function;

265.3. Dr Harvey taking a reductionist view of the content of the Claimant's role and not engaging with her fully regarding it, but working from old job descriptions and other people's understanding of her role;

265.4. Dr Harvey not sharing with the Claimant his rationale and role analysis document or the detailed costings by Mr Cox;

265.5. The fact that the offers of alternative employment came later in the process rather than at the outset and that the Claimant was not told about all the roles offered on 12 August 2019 as soon as they became available; and

265.6. Dr Harvey's presenting the directors as having taken salary cuts without immediately himself acknowledging that they were receiving dividends in lieu.

266. All of these are points of process and approach where the Respondents did not adhere to what might be termed 'best practice'. Likewise, the suggestion by Dr Harvey that the Claimant may wish not to attend work during the consultation, and the decision to have the first meeting off-site also upset the Claimant, but we accept that the Respondents genuinely considered that being away from the office would be easier for everyone including the Claimant. Once it was clear that the Claimant did not want that, the Respondents accommodated the Claimant's wishes in this respect.

267. However, we do not consider that the above points mean that the procedure adopted by the Respondent was outside the range of reasonable responses. We find that Dr Harvey and Mr Carey did engage with the Claimant in the course of the three consultation meetings. When she questioned the rationale for the redundancy, they provided detailed, carefully considered responses. Although they did not share the detailed documents with her, they went through the points in the documents in the meeting. When she suggested alternative means by which savings could be made, they considered them but concluded that all those steps had either already been taken or would not achieve anything like the savings that would be achieved by dismissing the Claimant. Those were reasonable conclusions in the circumstances because nothing the Claimant proposed would have achieved equivalent savings to dismissing her. When she proposed reducing her salary to £75,000 they also considered that and responded to her on that point in the next meeting. While they might have made some counter-offer at an even lower figure, we do not consider that it was unreasonable of them not to. Even if the Claimant had reduced her salary to £75,000, that would still have meant paying her about £60,000 more per year than the Respondents have in fact had to pay the part-time credit controller who has replaced her. There was such a big gap between the parties that we accept that not entering into negotiations fell well within the range of reasonable responses.

268. Thirdly, as to alternative employment, this is something that was raised first by the Respondents in the 9 May 2019 'at risk' letter. It was unfortunate that the Respondents did not decide at an earlier stage precisely what they wanted regarding alternative finance role(s) so that these could have been offered to

the Claimant at the outset of the process rather than in the middle and afterwards following prompting by her, but it is apparent from the email of 29 May 2019 that the Respondents had genuinely not decided what the alternative role was going to be until later in the process. Once they had decided, the role was offered to her, and further roles were offered on 12 August. We agree with both parties that all of those roles were obviously unsuitable for the Claimant, so the offering of the roles does not negate in any way our findings above that the Respondents, driven by Ms Senda (who was motivated by the Claimant's protected disclosures) were not trying to retain the Claimant in employment as they might have done had the Claimant not made protected disclosures, but nonetheless an employer is not obliged to create a role that it does not want in order to avoid a redundancy, in particular a role that would add significantly to its payroll costs. We find that the offering to the Claimant of all roles that were actually available means that the Respondents did all they could reasonably be expected to do in the context of a redundancy situation.

269. Finally, we consider the appeal. In general terms, Mr Hodge did everything that could be expected at the appeal stage, given that the Claimant did not participate. He conscientiously reviewed the documents with which he was provided, carried out interviews with the appropriate witnesses and produced a report that considers conscientiously all the points raised by the Claimant and reaches well-reasoned conclusions. We have also already found above that Mr Hodge's impartiality was in no way undermined by the fact that the Respondent's solicitors provided advice on his draft report. That is entirely normal practice. However, we have also already found that the Respondents withheld relevant documents from Mr Hodge, and that Ms Senda misled him. We have therefore carefully considered whether these faults were sufficient to render the appeal, and the dismissal as a whole, unfair. We have decided they are not. This is principally because we do not consider that it would have made any difference to the outcome if these things had not happened. While we find it unlikely that Mr Hodge would have placed so much reliance on the assurance given to the Claimant on 10 January 2019 in his reasoning if he had seen the business plans and emails from November 2018, we do not consider it would have led him to consider the dismissal was unfair (since he said it would not, and it is not led us to that conclusion either), nor would it have led him to conclude that the dismissal was influenced by the protected disclosures (both because he said it would not have done, and because those documents have not had a particular bearing on our own conclusions in relation to the protected disclosures issue). Likewise, while we considered that Mr Hodge ought to have been more ready to acknowledge that Ms Senda had misled him regarding the expenses issue, if she had been more frank about it, she would still have maintained that it had nothing to do with the Claimant's dismissal and, given the passage of time and the fact that we would not have expected him in an internal appeal to have delved much more deeply into the events of 2012 than he did, we consider that he would still have concluded that there was no material connection between the expenses issue and the dismissal. That is what he said he would have done, and what we would likely also have concluded had we not had the benefit of the fuller picture that has emerged in the course of these proceedings, including in

particular the disclosure of documents from 2012, and evidence from the Claimant and Mr Curtin. Further, standing back, it is hard to escape the obvious point that the most significant element missing from what ought to have happened at the appeal stage was that the Claimant did not participate in it. Given that she did not participate, and thus was not in a position to present any real challenge to Ms Senda's account, or provide Mr Hodge with any other material to work with, we do not consider that the other flaws in the process are material.

270. In the premises, we find that the decision to dismiss the Claimant by reason of redundancy, and the process followed in order to do so, was within the range of reasonable responses. The unfair dismissal claim therefore fails.

Time limits: the detriments and maternity discrimination claims

The law

271. Under s 48(3)(a) ERA 1996 there is a primary time limit of three months beginning with the effective date of termination for bringing claims of detriments under that provision (including here the protected disclosures and maternity detriments). By virtue of s 48(3)(b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the primary time limit, a claim will fall within the Tribunal's jurisdiction if it was presented within such further period as the Tribunal considers reasonable. These provisions are subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 207B of the ERA 1996, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period.

272. In computing the primary time limit, where an act or omission is part of a series of similar acts or omissions, the three month limit runs from the last of them: s 48(3)(a) ERA 1996. This requires that there be some link between the acts which makes it just and reasonable to treat them as having been brought in time: *Arthur v London Eastern Railway* [2007] IRLR 58. An act may also be regarded as extending over a period under s 48(4), in which case time runs from the last day of the period over which the act continues. For this purpose conduct extends over a period if it amounts to a 'continuing state of affairs': see *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686, [2003] ICR 530. In discrimination cases it has been held that an in-time act that is not unlawful cannot provide the 'link' to an unlawful out-of-time act: see *South Western Ambulance Service NHS Foundation Trust v King* (UKEAT/0056/19/OO) at paras 32-33. We see no reason why the same principle should not apply to protected interest disclosure cases.

273. The time limit for bringing detriments claims is the same as applies in unfair dismissal cases. The tribunal must first consider whether it was reasonably

feasible to present the claim in time: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] IRLR 562. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. Where an employee has knowledge of the relevant facts and the right to bring a claim there is an onus on them to make enquiries as to the process for enforcing those rights: *Trevelyans (Birmingham) Ltd v Norton* [1991] ICR 488.

274. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*: 'If a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them.' This rule is commonly referred to as the 'Dedman principle'.

275. If the tribunal finds it was not reasonably practicable to present the claim in time, then the tribunal should consider whether the claim has been brought within a reasonable further period, having regard to the reasons for the delay and all the circumstances: *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA.

276. For discrimination cases under s 123(1)(a) EA 2010 a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of. This is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so. In computing the primary time limit, conduct extending over a period is to be treated as done at the end of the period (s 123(3)(a)). Failure to do something is to be treated as occurring when the person in question decided on it, which includes doing something inconsistent with doing it or on the expiry of the period in which the person might reasonably have been expected to do it (s 123(3)(b) and (4)).

277. The burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time. In *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 374, [2003] IRLR 434, CA, the Court of Appeal stated (para 24) that when employment tribunals consider exercising the discretion under what is now s 123(1)(b) EA 2010, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it

that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

278. Although the Tribunal has a broad discretion, two factors are almost always relevant: the length of, and reasons for, the delay; and whether the delay has prejudiced the Respondent: see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194 at para 19.

Conclusions in relation to time limits

279. In this case, given the date when the ET1 was presented and the dates of early conciliation, any complaint about a detriment which happened before 10 June 2019 is potentially out of time. 10 June 2019 was the date on which the Claimant was given notice of dismissal. That was therefore the date on which the last of her protected disclosures detriments occurred, as we have found them to be. We are therefore satisfied that all the protected disclosures detriments against Ms Senda are in time. This is because they form part of a series of similar acts or failures because they all relate to the detrimental treatment of the Claimant by the same person (Ms Senda) over a relatively short period of six months which followed the MBO and the departure of Mr Curtin whose presence had protected the Claimant from Ms Senda. The incidents all happened during the period in which the Claimant's role had been identified as (at least) being one where significant cost-savings could be made, so that this provided a further common thread in their interaction at this time in addition to the link of the protected disclosures. Alternatively, for the same reasons, we consider that there was here a 'continuing state of affairs' as between the Claimant and Ms Senda. Since that continued up to 10 June 2019, the protected disclosures detriments claims against Ms Senda are in time under ERA 1996 s 48. By virtue of s 47B(1B) the Company is vicariously liable for those claims.

280. That is not quite the position for the protected disclosures claims against the Company directly under s 47B(1), however, because the decision to dismiss itself cannot be brought as a detriment against the Company as confirmed in *Timis v Osipov*. However, the last protected disclosure detriment to succeed against the Company under s 47B(1) was detriment h.iv (the decision that the Claimant's duties could be allocated to others). We consider that the nature of that act is one that extended over a period up to the date of dismissal (i.e. the date when it was finally decided *not* to keep the Claimant) and that accordingly the detriments claims against the Company directly are also in time.

281. For the maternity discrimination claims / maternity detriments claims, the detriments or discrimination that we have found occurred (i.e. the denial of access to the HR files, and the failure to let her return immediately to her desk) happened in May 2019 when the Claimant returned to work. Since we have not found any maternity detriment or discrimination that was in time, these acts are *prima facie* out of time, so we have to consider whether it would be just and equitable to extend time for the discrimination claims or whether it

was not reasonably practicable for the Claimant to present the maternity discrimination claims in time and, if not, whether they were presented within a reasonable period thereafter. Applying the legal principles set out above, we are satisfied that it would be just and equitable to extend time for the discrimination claims. Although the Claimant had engaged solicitors by 17 June 2019 at the latest and thus could have been advised to commence her claim earlier, this is not determinative on a just and equitable test. It is entirely understandable why the Claimant did not commence her claim earlier, it is because she was subject to a redundancy process that led up to a dismissal and she (and presumably her lawyers) regarded what had happened to her as a continuous process culminating in the notice of termination being given on 10 June 2019 and they calculated time limits accordingly. In the circumstances, on a just and equitable test, we do not consider that the Claimant should be penalised for this potential error of judgment (or calculated risk). The period of delay is very short and since we have found the claims to be meritorious following a full trial we consider that the prejudice to the Claimant of not granting an extension of time significantly outweighs that to the Respondents of refusing an extension since they would otherwise escape liability on what is in the context of this case really a technical point.

282. The same result cannot be reached applying the reasonable practicable test applicable to the maternity detriments claim however. On that the *Dedman* principle means that we must lay the 'fault' at the door of the Claimant's solicitors. While it is understandable in this case that they treated the date of dismissal as being the critical date, that always risks earlier detriments being found to be out of time. They had been instructed by 17 June 2019 at the latest and could therefore have acted to ensure that these claims were brought in time. We must therefore hold that it would have been reasonably practicable for the maternity detriments claims to have been brought in time and those claims are accordingly not within our jurisdiction.

Polkey

The law

283. The *Polkey* principle is one that has developed in the law of unfair dismissal, but the same principle applies where a dismissal is found to be unlawful for other reasons: see *Chagger v Abbey national plc* [2009] EWCA Civ 1202, [2010] ICR 397. If the Tribunal concludes that a dismissal was unlawful but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been lawfully dismissed at some point, the Tribunal must determine when that lawful dismissal would have taken place or, alternatively, what was the percentage chance of a fair dismissal taking place at that point: the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46.

This case

284. In this case, the only respect in which we have found the Claimant's dismissal to be unlawful was that we found it to be a detriment to which she was subjected by Ms Senda because she had made protected disclosures contrary to s 47(1A) ERA 1996 (for which the Company is vicariously liable under s 47(1B) ERA 1996). However, as is apparent from our findings on the unfair dismissal claim, we are satisfied that the Claimant was fairly dismissed for redundancy. It follows that we are satisfied that it is likely that the Claimant would have been dismissed lawfully in any event for redundancy even if Ms Senda had not unlawfully subjected her to detriments for having made protected disclosures. Nonetheless, we identified in the course of our judgment that there were various 'creative options' available here that could have been explored, including the possibility of retraining the Claimant, and/or offering her a combined book-keeper/credit control function for a total of four or five days per week (possibly ceasing the outsourcing arrangements), and/or creating a role that permitted the Claimant to continue with her non-finance duties (or some combination thereof) or negotiating a more significant salary reduction than that offered by the Claimant. None of these are options that would have achieved all the savings that the Respondents wished to achieve, so there is a good chance that the Respondents would not have offered them even if Ms Senda had not been so hostile toward the Claimant as a result of the protected disclosures. There is also a good chance that the Claimant would not have accepted any such offer: we know she was not interested in either a two-day or three-day per week credit controller role as she refused these offers, but she was willing to reduce her salary to £75,000 and, were it not for the hostility of Ms Senda, if more open negotiations had taken place the parties may have been able to reach an agreement as to an ongoing role for the Claimant on a mutually satisfactory basis. We do not put the chances of that very high however: we consider that there is a 10% chance that the Claimant's employment would have continued at a reduced salary had the unlawful acts not happened. (We will hear submissions at the remedy stage as to what that reduced salary might have been.)

Uplift for failure to follow ACAS Code of Practice by treating the Claimant's letter of 17 June 2019 as raising a grievance in addition to an appeal against dismissal

The law

285. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section in principle applies) *"it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%"*.

This case

286. The Claimant's written closing submissions on this issue did not assist us because they fail to address whether the Code of Practice (as distinct from the Respondent's internal grievance procedures) applies to her letter of 17 June 2019. However, we understand the Claimant's case to be that since what constitutes a grievance under the Code of Practice is widely defined as *"concerns, problems or complaints that employees raise with their employers"*, the letter constituted a grievance and should have been dealt with as such. The Respondents submit that the Code of Practice does not apply to redundancy dismissals and so it follows that, since the letter of 17 June 2019 was in substance an appeal against a redundancy dismissal, the Code of Practice did not apply to that either.

287. We consider the Respondents are right. We do not think it can be correct that an employee can cause the ACAS Code of Practice to apply to redundancy dismissals by labelling their appeal against a redundancy dismissal a 'grievance' rather than (or in addition to) an 'appeal'. It may be an accident of formatting, but that interpretation appears to be reinforced by paragraph 1 of the Code of Practice which makes the point about the Code not applying to redundancy dismissals in the same bullet-point as that dealing with grievances, suggesting that an employee cannot raise a grievance against a redundancy dismissal as a way of circumventing the non-applicability of the Code. This does not mean that an employee could not raise something that is genuinely a separate grievance in the course of a dismissal procedure that would need to be dealt with as such, but if in substance the employee's complaint is that they have been dismissed, then in our judgment that complaint falls to be dealt with as an appeal against dismissal rather than as a grievance.

288. We have taken into account in this respect that the Code itself makes provision (at paragraph 46) for overlapping grievance and disciplinary cases, and provides *"Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."* This makes clear that an employee raising a grievance during a disciplinary process should have it dealt with even if it is 'overlapping' with the disciplinary procedure, although it gives the employer the option of either suspending the disciplinary process and dealing with the grievance (and grievance appeal) before resuing the disciplinary process, or dealing with both issues 'concurrently', which would presumably permit an appeal against dismissal to be dealt with as both that and the first stage of a grievance process, with a further grievance appeal to be held thereafter. In other words, even where a grievance is 'overlapping' with a disciplinary process, and dealt with concurrently, the full grievance procedure still applies – paragraph 46 does not provide for one procedure to take precedence over the other in those circumstances. However, we do not consider that this undermines our interpretation of what should happen where an employee's 'grievance' is not just 'overlapping' with a disciplinary procedure, but entirely coterminous with

it. If an employee appealing against a disciplinary dismissal labelled their appeal 'grievance', we do not consider that the Code would require the employer to treat it as a grievance: to take that approach would be to elevate form over substance.

289. Accordingly, in this case, we consider that the task for us is to decide whether the Claimant's letter of 17 June 2019 was in substance an appeal against dismissal or whether there was any separate (even if overlapping) grievance raised therein. We have concluded there was no separate grievance. The whole letter is directed towards the dismissal decision. It was in substance an appeal and since it was an appeal against a redundancy dismissal the Code of Practice does not apply.

290. We add only this: it would in our view be particularly egregious if in this case the position was as the Claimant contends it to be, since it would mean that by labelling her appeal as a grievance, she would have created the possibility for the Respondent to face an uplift on any compensation awarded as a result of any failure to comply with the grievance procedure, while herself facing no decrease on her compensation for not participating in the appeal. It cannot be right that it is for the employee to pick and choose the legal framework that applies in such cases, given the potential financial consequences for the parties of doing so.

Overall conclusion

291. For the reasons set out above, the unanimous judgment of the Tribunal is:

(1) The Claimant's claims of unfair dismissal and automatic dismissal for having made protected disclosures and/or exercised her right to maternity leave are not well-founded under Part X of the ERA 1996, and are dismissed.

(2) The Respondents did contravene s 18(4) and s 39(2)(d) of the EA 2010 by discriminating against the Claimant because she had exercised her right to maternity leave in relation to the detriments identified in the judgment as detriments (a), (e) and (f).

(3) The Respondents did not contravene s 13 and s 39(2)(c)/(d) of the EA 2010 by discriminating against the Claimant because of her sex. Those claims are dismissed.

(4) The Respondents did not contravene s 27 and s 39(2)(d) of the EA 2010 by victimising the Claimant. Those claims are dismissed.

(5) The Claimant's claims that she was subjected to detriments for having made protected disclosures are:

a. well-founded as against the First Respondent under s 47B(1) of the ERA 1996 in respect of the detriments identified in the judgment as detriments (a), (b), (d), (e), (f) and (h)(iv);
b. well-founded as against the Second Respondent under s 47B(1A) of the ERA 1996 in respect of the detriments identified in the judgment as detriments (a), (b), (d), (e), (f), (g) and (h)(iv), and the First Respondent is vicariously liable for those detriments under s 47B(1B);
c. not well-founded and therefore dismissed as against the other Respondents and in respect of the other detriments against all Respondents.

(6) The Claimant's claims that she was subjected to detriments for having exercised her right to maternity leave under s 47C ERA 1996 are out of time and are dismissed.

(7) Any compensation to be awarded against the First and/or Second Respondent in respect of any loss flowing from dismissal is to be calculated on the basis of a reduced salary and subject to a 90% deduction to reflect the chance that the Claimant would have been lawfully dismissed for redundancy in any event.

(8) The ACAS Code of Practice on Disciplinary and Grievance Procedures did not apply in this case and therefore there is no adjustment to be made to any award under s 207B of the TULR(C)A 1992.

Employment Judge Stout

Date:26 March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

26th March 2021..

FOR THE TRIBUNAL OFFICE