EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Kirsty White		**TW White & Sons Ltd**

Heard at: London South Employment Tribunal **On:** 3, 4, 9, 10, 11, 12, 13, 16 & 17 December 2019
In chambers 18 & 19 December 2019 & 5 February 2020

Before: Employment Judge Hyams-Parish
Members: Mr M O'Connor and Mr R Greig

Representation:
For the Claimant: Ms D Masters (Counsel)
For the Respondent: Mr C Quinn (Counsel)

RESERVED JUDGMENT

The unfair dismissal claim is well founded and succeeds.

The direct sex discrimination claim fails and is dismissed.

The victimisation claim is well founded and succeeds.

REASONS

Claims and issues

1. By a claim form presented to the Employment Tribunal on 18 January 2018, the Claimant brings claims against the Respondent of unfair dismissal, direct sex discrimination and victimisation. All claims are denied

and defended.

2. The claims of direct sex discrimination are as follows:

   a. Disproportionately low levels of pay between 2011 and 2017;

   b. Disproportionately low non-contractual bonuses from 2011 to 2017;

   c. Being marginalised in her role as Finance Director as follows:

      i. The decision to change from a Hyundai dealership to a Mazda dealership at Weybridge on or around September 2015.

      ii. The decision not to pursue a £2.5M offer to purchase the Orpington site on or around December 2015.

      iii. The decision to commit £500,000 to the Mitsuoka project which started in 2014.

      iv. The decision to offer Alistair White ("AW") the role of Director of Business Development which he took up in February 2016.

      v. The decision about the salary to offer AW in his role as Director of Business Development.

      vi. The decision to create new roles for PD and SH around the beginning of 2017.

      vii. The decisions concerning changes to staff salaries for ES and LD in April 2017.

      viii. Holding senior management meetings without the Claimant's knowledge or involvement from around February 2016 onwards.

3. The comparator is hypothetical: a male Finance Director and member of the same family.

4. The detrimental treatment claimed as victimisation is the Claimant's suspension and dismissal because of protected acts dated 19 October 2016 and 7 April 2017.

<u>Evidence</u>

5. As can be seen from the findings of fact, the Respondent is a family

business and most of the witnesses are members of that family. Those who gave evidence during the hearing, in addition to the Claimant, are as follows:

Name	**Abbreviation**	**Role/relation to Claimant**
Neil White	NW	Managing Director Claimant's brother
Kate Basson (nee White)	KB	Director and shareholder Claimant's sister
Ian White	IW	Ex-Director and Shareholder Claimant's brother
Elise Smith	ES	Group Financial Controller No relation to Claimant
Jennifer Westwood	JW	Group Marketing Manager Claimant's niece and NW's daughter
Kate Hart	KH	Partner at accountancy firm, Roffe Swayne

6. The Tribunal was also referred throughout the hearing to documents in 5 lever arch bundles totaling approximately 3900 pages. It is not exactly clear how many pages there were in the bundles because the fifth lever arch file had its own system of numbering which did not follow on from the preceding four files.

7. Evidence and submissions concluded on the afternoon of 17 December 2019, with the first day taken up with pre-reading. The Tribunal met in chambers on 18 December 2019, the morning of 19 December 2019 and the morning of 5 February 2020.

<u>Background findings of fact</u>

8. The following findings of fact were reached by the Tribunal on the balance of probabilities, having considered the evidence given by witnesses and documents referred to by them during the hearing. As this is a very fact heavy case, only findings of fact relevant to the issues to be determined by the Tribunal have been made below. It has therefore not been necessary to determine each and every fact in dispute.

9. The Respondent is a new and used car dealer with locations in Surrey, South London and Kent, with a combined turnover of 38 million per annum.

10. The Claimant was born on 25 January 1963 and was aged 56 at the date of this hearing. She has an older sister, KB, born on 10 April 1958, aged 61. There is then an older brother, NW, born on 27 June 1955 and aged 64. The eldest sibling is IW, born on 24 March 1951, now aged 68.

11. The Claimant is the youngest child of Thomas White ("TW") and Elizabeth White ("EW). Sadly, EW died on 10 December 2014, aged 88, and TW died on 3 March 2018, aged 96.

12. The Claimant has two children from a previous marriage to Philip Diacono: Thomas (aged 19) and Anna (aged 16). KB also has two children from a previous marriage to Peter Basson: Gabby (aged 29) and Isobel (aged 26). NW is married to Jayne and they have three children: AW (aged 35), JW (aged 31) and Eleanor (aged 24). IW is married to Mel and they have two children: Megan (aged 28) and James (aged 25). All the children's ages were provided by NW in his witness statement and were correct as at the date of his statement dated 22 October 2019.

13. The business which later became the Respondent was started by TW when, in 1964, he answered an advert from the Regent Oil Company seeking tenants to run petrol filling stations throughout the UK. After an interview, TW was offered a Regent filling station in Leatherhead which traded as TW White. The filling station had a small workshop attached to it and TW split his time between working as a petrol pump attendant (this being before the days of self service) and doing repairs on customers' cars. As the business grew, in or about 1969, TW took on a second filling station in the form of a lease from Jet Petroleum at Capel in Surrey. During this time IW and NW had been helping out at the business after school and at weekends.

14. In 1969, IW went to Bradford University to study for a four-year sandwich degree in Applied Physics, which included three six-month placements in industry. Following university, in 1973, IW accepted a role in marketing at British Leyland. There then followed positions at ICI and other international roles in advertising and marketing.

15. In or about 1971, the business had become unprofitable and TW decided to sell it. He then acquired a lease on a service station in Milford, Surrey, with BP Petrol. The Milford business had self service petrol sales, a workshop that employed two mechanics, and space for the display of approximately 8 cars. By 1975 the Milford business was selling 50 used cars a year and turned out to be far more profitable than the Capel business. It had begun to specialise in selling prestigious used cars which were sold with a healthy profit margin. Over the years, the Milford site was developed and opened a large shop selling accessories, as well as expanding the space to display more cars.

16. In 1976, TW decided to incorporate the Milford business, then called TW White (Milford) Ltd ("TWWM"). TW took 7500 shares, EW was given 100 shares and each of the four children (NW, IW, KB and the Claimant) were given 600 shares.

17. By late 1978, IW had begun to work for TWWM, joining full time in 1979. At this time, NW was working for a company called Shulton GB Limited as a Regional Manager responsible for 5 middle managers and over 30 overseas distributors selling products including "Old Spice". NW had left school in 1971 with one 'O' level and then joined his father's business as a mechanic, with day release to Guildford College to study 'A' level English. In 1974 he moved to South Africa to join Crown Paints as a management trainee, later returning to the UK again to take up a position at Colgate Palmolive, before joining Shulton GB Limited. NW then started working for TWWM on 4 August 1980.

18. On 31 December 1980 the name of TWWM was changed to TW White & Sons Ltd ("TWWS"). Both IW and NW were appointed directors of TWWS and in 1981 they were each given an additional 700 shares, bringing their total shares to 1300 each. Later in 1981, TW gave a further 550 shares in TWWS to NW and IW bringing their shares up to 1850 each. At this time, both the Claimant and KB had 600 shares and EW had 200 shares.

19. The business of TWWS grew significantly between 1980 and 1984; the number of used car sales grew, and the company was very profitable. TWWS expanded into new sales and exports in addition to its traditional business. At that stage TW was concentrating on petrol sales, administration and after sales, whilst NW and IW concentrated on sales of new and used cars. In 1984 TWWS signed an agreement with Mazda to sell its cars.

20. By 1984, the Claimant had graduated from Kings College London with an upper second-class degree in pharmacology. It is accepted that the Claimant was the most academically able of her siblings and finished school with 9 'O' levels, including A's in English and Maths. She then studied for 'A' levels in Maths, Chemistry and Biology. Following university, the Claimant accepted a position as a pharmaceutical sales representative but decided it was not the career she wanted to do and left 9 months later in April 1985.

21. In April 1985, the Claimant spoke to her father about working in the business again. She had previously worked for the business in 1981 during a year out between school and university. She liked it and began working permanently from September 1985 as a financial controller.

22. On 19 November 1985, TWWS acquired Ken Barrington Motors Ltd in

Bookham and renamed it TW White and Sons (GB) Ltd, and then subsequently to TW White & Sons Ltd, which is the Respondent in this case. At the same time TWWS was renamed TW White & Sons (Holdings) Ltd and became inactive. Following these changes, the Respondent became Mazda suppliers across the Guildford area operating from sites at Milford and Bookham. It also acquired the lease of a Mazda dealer in Orpington. Turnover continued to rise, reaching in excess of 20 million in 1995 and 27 million in 1997.

23. In 1986, EW gave up her shares in the Respondent, dividing them equally amongst her four children, giving the Claimant and her siblings an additional 50 shares each. This resulted in each sibling having the following total number of shares: Claimant (650), NW (1900), IW (1900) and KB (650). TW retained his 4900 shares. The following year, in 1987, TW divested himself of 2,720 shares, giving 2000 shares to EW and a further 180 to each child. This left each sibling with the following shares: Claimant (830), NW (2080), IW (2080) and KB (830). This left TW with 2080 shares and EW with 2000.

24. In 1991, both the Claimant and KB received £50,000 each from their parents. It is not in dispute that NW and IW did not receive such payments.

25. In 1991, the Claimant was appointed as a statutory director of the Respondent.

26. In 1994, TW said he wanted to take more of a back seat in the business as he was approaching 65 and wanted to spend more time with EW and on the golf course.

27. In 1996 TW officially retired from the business. Upon his retirement, the shares that TW and EW owned were divided amongst the four children and placed in trust. At the same time there was a desire to equalize the shareholding given that there was a significant difference in the number of shares held by IW and NW as opposed to the Claimant and KB. An amount of 1670 shares were therefore placed in trust for the Claimant and KB whereas 420 were placed in trust for NW and IW. The end result was that whilst each sibling had 2500 shares in the Respondent, 1670 of those for the Claimant and KB were held in a trust, whereas a much smaller number, 420, were held in a trust for IW and NW. Under the terms of the trusts, TW and EW retained a significant control over the business in terms of what it could and could not do.

28. At the same time as TW retired, he appointed NW and IW joint Managing Directors and the Claimant as Finance Director.

29. Over the years the role of FD broadened significantly, partly due to the growth in the business both in terms of revenue and employees; the

number of employees had grown to over 100. During the hearing, NW sought to downplay the Claimant's role, alleging that despite the title of Finance Director, she did not perform the role; NW preferred to compare her role to that of a financial controller. NW said that the Claimant was not involved in the shaping of any form of financial strategy as this was done by NW and IW. NW argued that a fully trained finance director should make creative contributions and recommendations to the board to help the company operate more successfully. The Claimant denied that she was performing the role of a mere financial controller and gave evidence that she was performing all of the duties and responsibilities one would traditionally expect of a finance director, listing a number of examples, including the shaping of strategy. The Tribunal concluded that whilst there may be a “stereotypical” role of a finance director, the actual role and responsibilities of a finance director would doubtless vary from company to company, not least depending on the size and type of the business. The Respondent had appointed the Claimant to the role, and it is a role which she had held in the 28 years leading up to this hearing. The Tribunal rejected the Respondent's assertion that the Claimant was not a finance director in the true sense and considered it somewhat disingenuous to suggest so in these proceedings, which the Tribunal concluded was put forward as part of a strategy to defend the Claimant’s claims of sex discrimination, rather than out of a genuine belief that the Claimant was not performing the role.

30. IW and NW received £60,000 to compensate them for bonuses which they say they had been due, but had left in the business, in the years 1980-85 in the expectation that they would continue to own the percentages that they had then owned.

31. In July 1999, the Claimant took six months maternity leave following the birth of her son, Thomas. She returned to work in January 2000 and it was agreed that she could reduce her hours from 5 days to 2.5 days a week. Her salary was therefore prorated, and she was paid 50% of her normal salary.

32. In March 2003, the Claimant took a further period of maternity leave following the birth of her daughter, Anna. She returned to work in September of the same year.

33. In August 2004, NW took a sabbatical from the business to travel around Australia with AW. At around this time tensions had begun to surface between NW and IW which affected their working relationship. One reason for the tension was NW’s belief that he was working harder than IW; IW did not attend the office on a full-time basis and NW felt that he was not contributing to the business in the same way that NW was. However, the Tribunal also finds that the two brothers had developed different views on what was needed for the business to grow and disagreed about its future

direction. NW said in evidence that upon his return to the business in January 2005 "*Ian and I continued to get on very well – even if we disagreed about the future direction of the company*". The Tribunal observed that, during questioning, NW attempted to downplay the dispute between him and his brother despite there being a handwritten note [216] by TW which stated that the "*friction between the two parties has in recent times become serious. The situation as I see it today is mainly driven by Neil, and Ian had aired his grievances with a letter to the board*".

34. By January 2005, TW had become involved in an attempt to resolve the issues between IW and NW, which resulted in Darrel James being appointed to mediate the problems between them. TW also sought advice from the company's accountants about the possibility of splitting the business so that both NW and IW would take those parts and run them themselves. In 2007, the demerger took place, which saw IW exit the business and take sole ownership of the freehold and business assets of Milford. As well as the value of the business assets, there was a clear value in terms of on-going profits from a projected annual turnover of £5M from the separated business.

35. Shortly before the demerger in April 2007, the Claimant offered to sell her shares in the Respondent to IW and NW as she was strongly opposed to the demerger and had not been properly consulted about it. The Tribunal accepts that this was a decision that was effectively reached between TW, IW and NW. There was discussion about offering the Claimant £1.4M cash on condition that she resign and have no further involvement in the business. However, that sale did not go ahead.

36. Between 2009 and 2015, it is alleged by the Respondent that the Claimant committed a number of acts of "*unconscionable conduct*". This is a term that was first used in the response and continued to be used during the hearing. These acts of unconscionable conduct are relied on by the Respondent as explaining a deterioration, and eventual breakdown, in the relationship between the Claimant and the Respondent and (albeit not the Respondent's primary case) is pleaded by the Respondent as being an alternative reason for the Claimant's dismissal than the one set out in the dismissal letter. They are also put forward to rebut any suggestion that the reason the Claimant was dismissed was because she did a "protected act" for the purposes of the victimisation claim. Seven acts of unconscionable conduct are relied on by the Respondent notwithstanding only four acts were pleaded. They will be considered below in the order that they fall chronologically.

37. The first act of unconscionable conduct (not pleaded) is alleged to have occurred in 2009 when it is alleged that the Claimant removed a sum of money from TW's loan account to pay for school fees for the Claimant's two children. The issue of school fees, and whether TW/EW agreed, as it

was suggested, to pay for the school fees for the Claimant's children became a theme which ran through this case. In his witness statement, NW said that the Claimant wrote to him on 3 June 2009 informing him that she had taken £21,000 from the company without discussing this with him in advance. He said in evidence:

> **"*as if life was not hard enough, if Kirsty had asked to borrow the money from me, I would have lent it to her. The disturbing part of her email was that she appeared to be saying that what she was doing was wrong and and that she knew where to "hide stuff"....I spoke to my father about it and he told me that Kirsty was short of money and and had asked for help with school fees for her children but that my mother and he had decided not to help on this occasion as their own money was going down. I gather now that she took money from one of Dad's accounts the day before the year end so that her loan account was in debit, and then transferred the money back the following day. However rather than leaving things like that, she then transferred the money (indeed more money) again a few days later and never returned it to dad. It was not until the current proceedings were underway that I understood the detail of what she had done*".**

38. An email from the Claimant to NW on 3 June 2009 included the following [831]:

> ***...Hope you don't mind but found a way to clear off my loan!!! Long story involving prepaid directors salaries, loan account v Portugal and knowing where to hide stuff – will of course make it up to you, but since didn't have hope in hell of repaying it in any time soon, just seemed simplistic to lose it in this year, as by law not allowed to owe company money as a director anyway....***

39. In fact, this allegation has two separate parts to it. It is clear from the evidence that the Claimant took £21,039.05 from TW's loan account to clear the overdraft balance on her own loan account and bring it to a zero balance. The Tribunal was informed that this was required in order to avoid any overdrawn balances at the end of the tax year being subject to tax. The same amount was returned back to TW's loan account from the Claimant's account on 1 May 2009 creating a debit balance in the Claimant's account once again. The Tribunal accepts that this was a common practice in the Respondent company, and that no-one viewed anything particularly wrong or unacceptable about this.

40. In early June, however, it is clear that the Claimant took a total of £21,039.05, made up of three amounts from three different accounts:

    a. £971.42 from the "special income" account;
    b. £12,500 from the Chairman's Fees Account; and
    c. £7,567.63 from the TWW Loan P account.

41. Whilst there was a technical argument whether the accounts, from which

the above amounts were taken, held TW's money, the Tribunal accepts that the Claimant took this money. Whilst in many companies a Finance Director doing the same thing would be gross misconduct and a breach of trust, the Tribunal accepts that this is a family business in which it was commonplace for money to transfer to and from loan accounts. Moreover, it is clear that TW often gifted his children not insubstantial amounts of money, and the Respondent company operated in such a way that was not entirely orthodox (an issue that is illustrated further on in this judgment when referring to siblings paying for personal expenses using company money). The Tribunal does not accept that the Claimant attempted to hide this transaction. Indeed, NW said in evidence, when asked about the email from the Claimant on 3 June 2009 "*I didn't object at that time…I knew that we had had our salaries reduced and she had a double hit because her husband also worked for the company and she was obviously desperate for money and she was struggling for school fees. I let it go…I thought it best for the business to let it go….my sister was obviously struggling for money. I took a decision as MD at that time*". For the above reasons the Tribunal could not conclude in these particular circumstances that that it could correctly be categorized as the unconscionable conduct alleged.

42. In May 2011 the Claimant separated from her husband. She asked NW if she could borrow £150,000.00 in order to reach a clean break divorce settlement with him. The Claimant offered NW a share in her house, but NW agreed to loan the money to her on an interest free basis. In the background, EW had gifted to each of her children a share in a villa in Portugal worth approximately £340,000; therefore, each share was worth £85,000. The Claimant informed NW that he could have her share and that it could be offset against the £150,000 debt to NW.

43. The financial year 2011/12 was the worst on record for the Respondent, when they made significant losses. This coincided with a decline in a separate business in which NW held a 50% shareholding with his business partner, Mark Faulkner. The business was an exclusive members club located in Mayfair targeted at wealthy businessmen. In an email which NW wrote to his staff, he said:

> ***I take full responsibility for this loss – especially over the period January – April, when the losses for the year started to mount. As some of you may be aware, I had a business interest in a club in London and due to unforeseen circumstances was heavily distracted from the business at TW White & Sons between January and April this year. For this reason, I must apologise to you all. Needless to say I have now disposed of my interest in the club and I can once again fully focus on our motor trade business."***

44. In cross examination, NW sought to downplay his involvement in the separate business and to distance himself from this email, suggesting that it was just something he said to staff to explain the company's poor

performance and that his involvement in the separate business was not in fact to blame for the company's poor performance. The Tribunal did not accept NW's evidence in this regard and concluded that, whilst it could not be certain of the extent to which his involvement impacted on the company's financial performance, the time needed to jointly run a separate business was more than NW wanted the Tribunal to believe and that the email sent to staff at the time was, more likely than not, to have represented a significant reason for the company's performance, as NW in fact suggested in his email.

45. On 7 May 2013, there was a meeting between NW and the Claimant to discuss salaries. NW's evidence is that he approached the Claimant to discuss her salary and to offer her an improved bonus scheme. He said he and the Claimant talked for a couple of minutes. He said he gave her a proposal which the Claimant said looked generous but that she would want to take it away to look at it. The Claimant's account of what happened differs to that of NW. She said there was a discussion at that meeting about their salaries and that the conversation became heated when they discussed the basis on which their salaries had been calculated and the Claimant suggested that NW's salary was disproportionately high compared to the Claimant. She accepted that NW had his own proposal about the level of salaries and bonus. The Claimant also said that she complained about the additional hours she was working and wanted to be remunerated for them. The Claimant said that NW flatly rejected any proposition that her salary should be brought closer to his; rather he said that if her salary was to increase, then his should too.

46. The Claimant followed up the meeting on 9 May 2013 with an email timed at 15.42 [1121]. Having carefully read this email, the Tribunal concluded, on the balance of probabilities, that the meeting on 7 May 2013 had lasted more than a couple of minutes and that NW had started to become angry at the suggestion that the Claimant's salary was disproportionately low compared to NW. In the email, the Claimant refers to the discussion and says "*I do not accept that my value to the business ranges from zero to 37.5% of your salary (dependent on what you chose to measure) after 28 years of experience and based on a formula that had little rationale when it was first brought in over 24 years ago…*" The Tribunal concluded that the email from the Claimant was calm and measured and was, in all likelihood, intentionally so due to the angry reaction she received on 7 May 2013.

47. NW said in evidence that he was "*utterly stunned by her proposal*". He sent a holding response to the Claimant's email later that evening at 19.35 [1129], as he was at that time in Portugal, in which he said that parts of the Claimant's email had made him a mixture of "*angry, bewildered and sad*". He then sent a response on 24 May 2013 at 03:31 [1145] which started "*as you are aware I was angry and upset by your latest salary*

proposal for both of us which I received during my two day break in Portugal" The email goes on to state that NW was not prepared to accept a proposal that saw the Claimant receive a pay rise whilst his pay reduced. He continues to say "*we are at a very unhealthy position and unless we can BOTH see a way forward we should both look for an exit strategy that protects all shareholders and maximises all our returns…..However your proposal has memories that remind me of the start of the demerger….so let's not lose each other as family…rather than lose the company if it comes to it. I am sure TW would agree*".

48. The Tribunal concluded from the evidence on this issue that NW valued his own worth to the business as significantly more than the Claimant, despite her having worked for the business for 28 years by this stage. He said, "*she just seemed to take everything I did for the business and the work I put in to establish the business for granted*". He said that her proposal was "*fundamentally unfair to me and contemptuous of what I was doing. I was just furious that after all I had done for the business, and all she had taken from the business in the past without deserving it, she should write such a money grabbing letter*".

49. In July 2013, NW said in evidence that he was visiting his parents in Petersfield when his father told him that he would like to do something with the funds in his director's loan account. When he looked at the account, NW said that his father was shocked to discover that there had been withdrawals from the account totaling £22,000, authorised by the Claimant, comprised of £6,000 in April 2012, £7,000 in September 2012 and £9,000 in January 2013. This is relied on by the Respondent as an unconscionable act and, according to NW, marked a significant deterioration in his relationship with the Claimant.

50. NW said that he contacted the Claimant by telephone on 8 July 2013, informed her that he knew "*she had stolen £22,000*" from her father and that he wanted an explanation. There followed a family meeting and at some point, NW left the Claimant with EW and TW. He referred to leaving them saying in evidence, "*crying together in the lounge – as far as I was concerned, they needed to build some sort of relationship together*".

51. The Claimant's position was that she had not stolen the money from her father and that he had previously agreed to assist with school fees [1203]. Her position was that she had done no more than had been agreed between them. She went to the meeting with her father with all of the withdrawals set out and information as to what they had been used for.

52. In considering whether this represented "*unconscionable conduct*" on the part of the Claimant, the Tribunal finds that the parents had been very generous with their children, a point made in evidence by KB, assisting them when needed and given them gifts of a substantial value, including

shares and money. The Tribunal concluded that there had been a history of TW and EW assisting with the school fees for the Claimant's children, as well as other grandchildren. Indeed, NW conceded in evidence that his father would no doubt have given the money had the Claimant asked for it. The Tribunal further finds that TW was by then 92 and his memory was poor. The Tribunal did not find, on the evidence, that the Claimant had sought or attempted to hide the financial assistance given to her. The Tribunal concluded that there was at most a misunderstanding and that this did not constitute unconscionable conduct when taking into account the particular circumstances of this case. During NW's evidence he sought to respond to questions why he had not dealt with matters in a formal work context, or restrict the Claimant's access to certain accounts, to which he sought to distinguish family matters from work matters. The Tribunal concluded that this was one such example of a family dispute, which whilst inevitably connected to work given the family business, was a family issue and treated by NW as such. Accordingly, the Tribunal did not accept that these affected the working relationship between the Claimant and NW, as alleged by NW.

53. In his evidence, NW referred to a further withdrawal of £4,000 sometime later in August 2014. Once again, the Tribunal concluded that it was not satisfied on the evidence that the Claimant had done anything wrong or that she had stolen from her father. The Tribunal relies on the same reasons as provided at paragraph 52 above and rejected any assertion that this had any effect on a deterioration in the relationship between the Claimant and NW.

54. From the evidence, it is clear that NW became aware of the £4,000 when going through a process which NW described as "balancing out" his father's financial affairs, which NW said TW had asked him to do. In that email he says as follows:

> ***I have had several discussions regarding mum and dad's joint pay and the fact that for several years they have been underpaid by TW White & Sons. It has "come to light" that money has been diverted from their joint package to Kirsty and/or members of her family. I have asked dad about this, but he has no recollection of why or how this has happened. However, Kirsty replied to an email I sent her about this subject a couple of weeks ago and mentioned that this subject was a matter of discussion between her and mum and dad at Durford a couple of years ago. The fact that dad cannot remember any discussions does not constitute any impropriety by anyone concerned.***
>
> ***As far as I can see the amounts are £7500 per annum every four-year period between 09/10 and 12/13 (Total £30,000). Kirsty can you please confirm the amounts.***
>
> ***Dad has asked me to fairly "balance out" his family financial affairs especially after the stramash with his loan account some time ago when he questioned why the balance in his loan account was so low. There is***

absolutely no point in re-addressing the subject apart from the "fairness" that dad has asked for.

As far as I can see the four payments taken from the account by Kirsty are as follows: (total 26,000)

£6,000	***25/04/12***
£7,000	***07/09/12***
£9,000	***14/01/13***
£4,000	***01/08/14***

Kirsty, can you please confirm whether any more payments have been taken and also confirm that no further payments will be taken - either from the loan account (other than oil or expenses) or from dad's salary which is due to be paid in April this year.

While there is a tax exemption regarding "gifting out of normal income" the advice I have been given points to the fact that because these are such large amounts over a short spell of time and furthermore taking into account dad's gross and net income over the timeline, then HMRC are likely to apply this as a gift and apply tax to dad's estate at the prevailing rate…..

55. The Tribunal noted the distinct difference on the one hand to the tone of this email and which did not suggest that the Claimant's behaviour amounted to theft, and on the other, his evidence to the Tribunal which described the Claimant's behaviour in much stronger terms, using expressions such as having "*fiddled enough out of him and mum over the years*". It left the Tribunal with the impression that NW had sought to elevate the seriousness, during the hearing, of behaviour that had previously not been regarded as such.

56. The next act of alleged unconscionable conduct related to a pair of earrings which the Claimant said her father purchased for her. NW said in evidence that in January or February 2015, TW had asked him to check out his finances because his credit card had been refused. NW said that when he checked TW's bank statements, NW discovered that there had been a transfer of £12,000 to a jeweller in Petersfield from one of his Santander accounts. TW told NW that when he went out with the Claimant, she had asked him for a birthday present and that she had picked out a pair of earrings which he said cost £1,200, which he felt at the time was expensive.

57. In evidence, the Claimant said that her father wanted to buy her earrings as a birthday present. She said that the purchase of jewellery as a present was not unusual and that KB had also been given various items of jewellery as birthday gifts. She said that her father was well aware of the cost of the earrings. It is entirely possible that the Claimant's father

believed the earrings to be £1200 and was mistaken as to the actual cost. The account given by the Claimant during the hearing was consistent with that which she gave to her siblings on 4 March 2015. Whilst some may question whether it was morally right for the Claimant to except a gift of that value from her elderly father, the Tribunal accepts the account given by the Claimant and does not accept, on the evidence before it, that she "hoodwinked" her father into purchasing the earrings. In light of that finding, the Tribunal rejects the suggestion that the acceptance of this gift amounted to "unconscionable conduct" as alleged by the Respondent.

58. A further act of unconscionable conduct alleged by the Respondent relates to a diversion of in the region of £30,000 to the Claimant's children, on the authority of the Claimant, from accounts which had been intended to pay a salary to TW and EW. The amounts, whilst NW said that he discovered the diversions of salary in February 2015, were in fact amounts that had been transferred some years prior to that point, before EW had passed away. The Claimant's position is that she had her father's express consent to provide the sums to her children and pointed to the fact that remuneration certificates for 2011 and 2012 reflected that the sums that her father and mother were receiving were less than they were entitled to and that they both signed certificates to acknowledge they were correct. The Claimant suggested that had there been a problem at that point, namely that sums were disappearing from their accounts without their consent, then the matter would have been raised as an issue at the time. Once again, the Tribunal found it difficult to conclude, on the evidence, that the transfers were anything other than legitimate and done with TW and EW's consent, as alleged by the Claimant. In the circumstances, the Tribunal does not find that this represented "*unconscionable conduct*" as alleged by the Respondent.

59. On 4 April 2016, the Claimant emailed her siblings [1708] regarding TW's role in the trusts which held the shares that EW and TW had intended to benefit the Claimant. There were similar trusts for other siblings and are the ones referred to at paragraph 27 above. The Claimant said that she was concerned that TW no longer had the capacity to act as a trustee and that she wanted to dissolve them. The Tribunal concluded that the Claimant was clearly concerned about powers that might be vested through a lasting power of attorney and that the Claimant was keen to seize control of shares which she believed belonged to her in any event. Indeed, it was not disputed that such trusts referred to had been set up to benefit the siblings.

60. There then followed a meeting on 28 April 2016 at which IW, KB, NW and the Claimant attended. This meeting was arranged following the Claimant's email to her siblings. A structure for the discussion was emailed by KB to her siblings on 22 April 2016 [1769]. The Claimant confirmed at that meeting that she wanted control of the shares in the trust in the

company of which she was a trustee and that if TW neither resigned as a trustee or wound up her trusts then she intended to take him to court, saying that he didn't have the mental capacity to continue as a trustee.

61. The Tribunal does not doubt that talking about their father's capacity would have been difficult and sensitive to all concerned. However, the Tribunal accepts that the Claimant (and indeed her sister) were in a very different situation to IW and NW, both of whom were in control of the majority of their shares in the company, in contrast to the Claimant, the majority of whose shares were held in trust. It was this distinction, in the Tribunal's view, which left the Claimant having to explore all of her options, including challenging any decision by her father on the grounds of lack of capacity. The Tribunal is mindful of the fact that by that stage, TW was very elderly and there had been a general discussion by the siblings about TW undergoing certain medical tests. The Tribunal was of the view that whilst NW referred to the Claimant in evidence as blackmailing his siblings with the distress that it would cause their father to do what she wanted, NW did not at the time suggest that the Claimant was blackmailing anybody.

62. Once again, it was alleged by the Respondent that the Claimant's conduct in the meeting at which she mentioned her father's capacity and wanting to wind up the trusts, was an act of unconscionable conduct and the real reason (in combination with other acts of unconscionable conduct) for the deterioration in the relationship between the Claimant and NW and KB. The Tribunal considered carefully the extent to which NW was at the time appalled and disgusted, as he suggests, with the Claimant's conduct, notably around the use of her parent’s money. The Tribunal considered, in particular, an email from NW to the Claimant and KB dated 7 March 2016 which was a proposal to make KB a director. In that email he states, "*luckily we have not had any major disputes to date, and we have all been made aware of what is going on*". He later states "*while we cannot anticipate any future disputes we could attempt to cater for certain situations*". The inference the Tribunal draws from this email is that at the time it was written nothing had occurred of such significance so as to damage the personal and family relationship between the siblings. The Tribunal concluded that had such damage already occurred, NW would not have written as he did or made the above statements in this email. The Tribunal also recalls NW saying on a number of occasions the distinction he drew between family and work matters. The Tribunal accepted that there was such a distinction and that whilst it was difficult to divorce family from business at times, most if not all of the incidents which the Respondent contends is the alternative basis for the dismissal, namely some other substantial reason, fell into the category of "family disputes" and did not influence NW in terms of how he dealt with or considered the Claimant as a business partner.

63. It is worth noting at this point that the Tribunal felt that at times that NW's

evidence was not credible in terms of truly reflecting how he felt about the Claimant at the time. For example, in his evidence he said as follows "*obviously, all my family knew about Kirsty stealing from my parents, as did Kate's family. On several occasions they said to me that if she could steal from her parents, she could be stealing money from the company as well, and that an investigation into the accounts was in order*". The Tribunal could find no written evidence in the form of documents where NW accuses the Claimant of stealing in the way that he describes in his evidence to the Tribunal. Had he felt then that her behaviour demonstrated that she could quite easily have been stealing from the company, the Tribunal concludes that NW would have taken appropriate steps to deny her access to the company's finances or the various loan accounts or taken formal action much earlier than he did.

64. On 7 March 2016, NW wrote to KB and the Claimant (the same email referred to at paragraph 62 above [1653]) proposing to make KB a non-working director of the Respondent. The Claimant responded to NW suggesting, in terms, that it was not good timing to appoint her in view of everything that was happening at that point. In any event she was appointed from 20 June 2016.

65. Following on from the discussion about the trusts and KB's appointment to the board, which the Claimant disagreed with the timing of, the Claimant wrote to KB and NW stating that it was time for her to start the process of withdrawing from the Respondent as an employee [1803], a board director and a shareholder. NW responded the next day, on 7 June 2016, stating that the circumstances of IW's exit 10 years previously were very different and that an exit by the Claimant would have a significant impact on all of their immediate families. He also suggested that as he was older and not as cash rich as he had been 10 years previously, dealing with an exit would not be as straightforward. He suggested that the first stage would be for him, KB and the Claimant to sit down with RSM (their accountants) to see if they could "*come up with some sort of deal that they could all live with*".

66. On 26 August 2016, a meeting took place with Chris Hurren of RSM accountants, with the Claimant, NW and KB. The purpose of the meeting was to review the accounts for 2015/16 but the opportunity was taken to raise the matter of the Claimant's proposed exit with them. However, discussions broke down when the Claimant made clear that she sought an exit on similar terms to those agreed with IW, in response to which NW made clear that the Claimants position was not comparable. There was also an issue about the value of the Claimant's shares as NW would only consider placing a value on those shares in the Claimant's name and not the ones held in trust [1891].

67. At the meeting on 26 August 2016, the Claimant suggested that she would have concerns about the auditors being able to sign off the Respondent

"*as a going concern*". NW wrote to the Claimant by email (copied to KB) on 20 September 2016 asking what she meant by that comment. The Claimant responded by email to KB and NW on 21 September 2019 [1917] alluding to possible litigation if she was unable to resolve the dispute between her and the company; she suggested that if she was aware of pending litigation then she was under a duty to raise it. In addition to that clarification, the Claimant also took the opportunity to state her belief that she had been, and continued to be, discriminated against on the grounds of her gender, referring to her earnings compared to NW and other male members of the family.

68. NW and KB instructed Goodyear Black and Herrington ("GBH") Solicitors who responded to the Claimant's 21 September 2016 email by letter dated 4 October 2019. In essence, that letter denied the claims made by the Claimant and said that NW and KB were prepared to negotiate with regards the Claimant's exit of the business and the purchase of her shares. The Claimant instructed her own solicitors, Charles Russell Speechlys, who sent a holding reply to GBH dated 12 October 2016.

69. The Respondent has alleged in this hearing, albeit not pleaded as such in the Response form, that the Claimant's conduct at the RSM meeting referred to above was an act of unconscionable conduct, notably the Claimant's comment about whether the Respondent was a "*going concern*". The Tribunal found it difficult to see how this was an unconscionable act. The Tribunal is not satisfied that the Claimant was seeking to blackmail the Respondent; she was simply raising a point which she considered it her duty to do, in circumstances where she considered that the dispute between her and her family/company could result in litigation.

70. Also, on 12 October 2016 at 19.43 [1937] NW sent the Claimant an email which said as follows:

> ***Kirsty,***
>
> ***I would like to discuss with you and Kate, but not in the context of a formal board meeting, a proposal that with immediate effect, no personal expenses are met out of the company and disguised as expenses of carrying on the business of the company. Instead, we just receive our salaries and reimbursement of the expenses wholly properly and reasonably incurred in relation to the company's business. I would like to receive from you, a list of all your personal expenses/purchases that the company has met over the last three years. You did supply some information in your email of 5 July but I believe some items were missed out. We can then match up all these expenses with copies of P60s to see what actual earnings have been v what was agreed in salary and bonus. I am happy to disclose the situation as far as I'm concerned.***
>
> ***I would also like to discuss the position of all our loan accounts.***

Please let me know what dates you are available to meet to discuss.

We will need to meet at Effingham so as to have direct access to the accounts department.

Neil

71. The next day on 13 October 2016, the Claimant responded to NW's email [1938] beginning:

Dear Neil

Not a problem.

I assume as a matter of good order you will be providing the same information including payment by the business of your Amex and WLA etc.

It would also be good to understand the flow of funds v TW given the outstanding debt.

72. On 16 October 2016, the Claimant wrote to KB and NW by email which started as follows:

Dear Neil and Kate

It has struck me that as this is the third time in as many years as I have been asked (and I believed answered) questions regarding my remuneration package, payments made and sums received from the business, that there may well be a fundamental misunderstanding about what our packages are/were/what we believe them to be/have been, and what practices are and aren't acceptable within the business (notwithstanding the view HMRC would take).

I therefore consider it imperative for all parties that the principles are established prior to any meeting, particularly as Kate may not be aware of certain practices, and if a "level playing field" is to exist.

73. The same email then proceeded into the detail of what is referred to in her introduction. NW replies to the above email on 17 October 2016 setting out his response to some of the points raised and requesting a meeting with the Claimant.

74. On 19 October 2016, the Claimant's solicitors wrote to GBH by letter which the Claimant says is the first protected act for the purposes of her victimisation claim [2004]. In it, they make the following points:

    a. The Claimant had been subject to systematic bullying and discrimination.

    b. The Claimant's position had been undermined by reducing her level of involvement in strategic decision making (referred to in these

proceedings as the marginalisation complaints).

c. There was a pervasive culture in the business which was dismissive of the Claimant's contributions (also referred to as marginalisation complaints).

d. The Claimant's pay was disproportionately low compared to TW, NW and AW.

e. The Claimant had been unfairly prejudiced in her role as shareholder.

75. The letter goes on to state:

> ***Much of the behaviour highlighted above, undermines her position in the workplace and is dismissive of her contribution to the business. In the circumstances, our client is concerned that she has been (and continues to be) treated less favourably because of her sex. We trust that her concern will now be properly investigated. In the event our client is forced to pursue such claims through the Employment Tribunal, loss of earnings (and claim for injury to feelings) would be significant..***

76. NW forwarded the letter to Chris Hurren of RSM and the Respondent's solicitors, copying it also to Christine Goodyear at GBH [2019]. Clearly in error, NW also copied the Claimant into the same covering email, which contained the following:

> ***Good evening,***
>
> ***I am sure this is not the normal way of introducing you all to each other- but I presume that TW White & Sons will need input from each of you and so I thought I would highlight my thoughts.***
>
> ***Attached is a letter regarding Kirsty to GBH solicitors. The letter is self-explanatory and covers various issues, including, her role in the management of the company, exclusion from management, excessive remuneration and inadequate dividends, procedural irregularity relating to the 2007 de-merger, unfair prejudice and sex discrimination during her employment with TW White and Sons…….***
>
> ***…….It is now obvious that Kirsty has taken company funds without my knowledge - both direct and as a way of clearing her loan account at the end of each year. It is difficult for me to fully investigate this without involving some of our staff working in accounts. Our senior accounts manager did admit to me only last week that Kirsty can and does "hide stuff" by making sure the opening balance on certain accounts at the start of the year is zero - and if the closing balance at the end of the year is zero - then no one will worry. I have asked Kirsty several times to account for her loan account and asked if she has taken extra. Each time I have been met with a smokescreen. Recently on advice of others, Christine worded an email to Kirsty from me when I asked for a meeting about this. Kirsty has given a list of certain amounts that I have evidence to show that she is still not revealing everything. I do not know if we are***

talking about "tens" or "hundreds" of thousands of pounds - but Kirsty has taken money from the company without my or any other directors' knowledge. In her capacity as financial director this is a major concern.

Chris, I am unsure what to do about the accounts. Do we go for some sort of forensic audit - I need advice? It is obviously in Kirsty's interest to have a company net worth as high as possible if that is the starting point of her negotiations. I would hate to find some sort of blackhole later. I know she owes the company close to £60,000-by her own admission-but I do know it is more.

Obviously, we have to answer the allegations regarding her claims against the company-especially the sex discrimination and exclusion from management-and these should be in accordance with employment law. Henry, this is obviously your area of expertise and we no doubt have to get back very quickly on the discrimination-but how do we handle what she has done with the money? Should this be separated?

If Kirsty is going to question the de-merger and all that concerns that then it is going to take a great deal of her resources. Currently she is contacting some of my managers as if trying to build a case regarding the employment issues.

77. On 10 November 2016, GBH provided a substantive response to the letter from the Claimant's solicitors dated 19 October 2016, denying the allegations [2047]. This was met with a response from the Claimant's solicitors reverting on five discrete points raised [2054].

78. On 30 March 2017, NW and KB met with KH at Roffe Swayne with a view to discussing the Claimant and asking her to prepare a report into certain affairs of the Respondent but with the focus seemingly on the Claimant. In an email from Ms Hart to NW and KB the next day confirming her instruction [2109], she confirmed that she had been asked to investigate and report on the following areas over the period from 1 May 2012 to date:

    a. Salary extracted from the company by the Claimant in comparison to sums agreed by NW.

    b. Amounts extracted by the Claimant through directors' loan account but not repaid (including amounts extracted through director's loan accounts of her family members).

    c. Sums paid by the Respondent in respect of personal expenditure accounted for through other accounts (e.g. sundries, temporary labour).

    d. Expenses claimed by the Claimant other than telephone and petrol.

79. On 7 April 2017 at 08.26 [2114], the Claimant sent the following email to NW, which she alleges was a second protected act:

> ***Neil***
>
> ***In conversation with Elise yesterday, I was informed that you have awarded both Elise and Louise with significant pay rises, and in the case of Louise, a company car, all effective as of 01/05/2007.***
>
> ***Not only did you not consult me prior to making these awards, you instructed Elise to inform Louise of the award, and have failed to inform me of either.***
>
> ***The fact that I wasn't even aware of these awards has not only caused me great embarrassment, it has undermined my position with the team I manage and makes controlling the department for which I am rightly held accountable for their performance fraught with difficulty.***
>
> ***In previous years, the decision on pay rises for the accounts department has always either been passed to me to make, within a budget, or has been agreed between us in advance.***
>
> ***Your decision to make these awards without my involvement is indefensible, and yet another example of the way in which you continue to seek to exclude me from the management of the business.***
>
> ***I would add that I note that you have instructed GBH to act on employment issues. This represents a profligate misuse of company funds, given that there are arrangements in place within the business where the cost of dealing with such matters is already covered within those arrangements.***

80. On 7 April 2017 at 11.46 (just over three hours after the above email from the Claimant to NW) NW wrote to Kate Hart confirming the instruction to handle the investigation referred to at paragraph 78.

81. On 7 April 2017 at 11.53 NW wrote to the Claimant asking her to meet with him and KB on 10 or 11 April 2017. On 10 April 2017 at 09.06 the Claimant wrote to the Claimant asking why he wanted to meet at such short notice and NW replied at 18.14 on the same day stating that the meeting was to advise the Claimant about the investigation into the "*Company's financial affairs which, as Directors of the Company, Kate and I consider should take place in the best interest of all shareholders*". A number of further emails were exchanged in an attempt to arrange a meeting [2115, 2119, 2125].

82. On 11 April 2017 the Claimant was hand delivered a letter placing her on immediate suspension pending an investigation into matters at paragraph 78(a)-(d) above. The letter said that the investigation would also include an analysis into the same matters for NW, KB and their families [2128]. The Claimant's email account was also suspended from 10.57 that morning. The Claimant responded to the suspension by writing to NW and KB seeking clarification on the scope of the investigation and seeking assurances that it was sufficiently wide and, importantly, would cover the activities of all members of the family, including her parents. She also

questioned why the investigation only covered the period from 1 May 2012 when arguably it should go back to 2007 [2140].

83. On 27 April 2017 the Claimant wrote to Kate Hart [2148] querying the scope of, and seeking further information about, the investigation, alleging that it was too narrow and did not appear to anticipate that the transactions of other members of the family were due to be investigated in the same way as hers was. She therefore complained that the focus of the investigation appeared to be too narrow and predominantly about her.

84. On 29 April 2017, the Claimant's son, TD, was unfortunately involved in a car accident. On 2 May 2017 NW wrote to the Claimant saying that he was suspending the investigation into the Claimant in the circumstances so that she could concentrate on looking after TD [2166].

85. On 31 August 2017 NW wrote to the Claimant inviting her to attend a disciplinary hearing on 19 September 2017 to answer nine allegations of misconduct [2310]. The letter stated that the investigation conducted by Kate Hart had not been completed and no report was available. NW explained his reasons as follows:

> ***…The reason why the investigation by Roffe Swayne was not completed is because following your suspension and my having oversight of the accounting function, enquiries of the accounts department staff have revealed examples where you appear to have instructed them to record and deal with certain matters in such a manner as to benefit yourself rather than keep the company's records accurately and honestly. It was not therefore felt necessary to continue with the Roffe Swayne investigation…***

86. The allegations against the Claimant can be summarized as follows:

    a. In January 2016 two amounts of £803.48, and one amount of £803.49, were "reallocated" to three different sites with the description "Parts Department Stock Adjustment" believed to relate to the purchase of a Suzuki motorbike, paid for by the company, for TD.

    b. In October 2013, the Claimant claimed £2000 in expenses, justifying the claim as having paid a Peter Tuckey £2000 directly for painting and decorating services carried out at the Respondent's Byfleet After Sales centre. It is alleged that no such painting and decorating services were carried out by Mr Tuckey and that Mr Tuckey was asked to produce a fictitious invoice.

    c. In April 2015, an invoice was submitted by a company called P&R Hurst for £12,000 plus VAT for works carried out at the Respondent's Effingham office. The Claimant is alleged to have

offset £10,000 of the £12,000 as her benefit but recorded the remaining £2000 against "GP Admin Temporary Labour"

d. In April 2012, the Claimant claimed £5000 in expenses to offset a negative loan account just prior to the end of the financial year. The expenses were made up of Vodafone mobile costs together with fuel and entertaining.

e. In July 2013, the Claimant purchased £756.90 of computer parts associated with computer gaming and claimed this as a company expense.

f. In January 2015, the Claimant is alleged to have instructed ES to move £3000 from an accrual into TD's loan account in circumstances where it is alleged that the money in the accrual was not owing to the Claimant or TD.

g. It is alleged that the Claimant arranged for the cost of outgoings on two timeshares to be settled by the company when they were not legitimate business expenses. She then arranged for some of these costs to be debited and then re-credited to TW's loan account and then debited to the business.

h. In October 2013, an amount of £1675 was paid by payroll as a bonus to TD. When the bonus was paid to TD, £500 was placed in the Claimant's loan account in circumstances where it is alleged that none of these sums were owed to the Claimant or TD.

i. In January 2016 an invoice purportedly presented by P&R Hurst was paid for by the Respondent despite it being alleged that the company did no work for the Respondent justifying such a payment.

87. On 7 September 2017, the Claimant wrote to NW by email [2421] acknowledging receipt of the invite to the disciplinary hearing, stating that she would provide a response in due course but also raising a concern that the Roffe Swayne investigation had not been allowed to continue. She requested that before NW went any further that he instructed Roffe Swayne to investigate all of the allegations set out in the disciplinary invite in addition to those matters that had originally been anticipated would form part of the investigation to be carried out by them. In addition, the Claimant raised concerns about his motives for taking action against her and that it would not be appropriate for him to conduct the disciplinary hearing as he would not be able to be impartial. The Claimant indicated that she would have comments in response to the witness statements that he had provided and asked that ES be available at the meeting to answer questions. Finally, the Claimant complained that she would not be allowed to attend with her chosen companion, Darrel James.

88. In her 7 September 2017 email, the Claimant referred to having been refused access to various documents which she would need to view in order to provide a full response. In these circumstances, the Claimant sought a postponement of the disciplinary hearing.

89. On 8 September 2017 the Claimant wrote to NW and KB giving examples of transactions engaged in by others in the family, including examples of tax evasions, salary diversions and offsets, payments of non-allowable expenses, undeclared benefits, movements of funds through loan accounts, and other payments falling into the same broad category as those alleged against her as part of the disciplinary proceedings and referred to as "misconduct".

90. On 15 September 2017, the Claimant again wrote to NW [2523] complaining about the disciplinary process. NW had by this time set out his response to the Claimant's email on 7 September 2017. The Claimant suggested that her father chair the disciplinary hearing, or alternatively someone appointed externally. She also stated that if NW was unwilling to allow Roffe Swayne to carry out their investigation then she would want to appoint her own expert. The Claimant complained that she still required access to a significant amount of documentation, and she repeated her request to be accompanied by Darrel James at the disciplinary hearing.

91. On 20 September 2017 NW emailed the Claimant [2528] responding to the Claimant's email on 15 September 2017. NW denied that the process was unfair. He did, however, agree to a postponement of the disciplinary hearing to 25 September 2017**.**

92. On 22 September 2017, the Claimant emailed NW seeking a further postponement of the disciplinary hearing, claiming that she still had not received all of the relevant documents required to defend herself and because she would need time to instruct her own expert. This request was refused by email from NW on 22 September 2017 [2531]. NW said that he proposed to proceed with the disciplinary hearing as scheduled.

93. The Claimant chose not to attend the disciplinary hearing on 25 September 2017 and by email dated 27 September 2017 [2538], NW confirmed that the disciplinary hearing had proceeded in her absence and that a decision had been taken to dismiss her with immediate effect. An additional point made in the outcome letter, which the Tribunal concludes was an important point relied on by the Respondent to justify the dismissal, but which was not mentioned in the disciplinary invite, was that the transactions were hidden by the Claimant. NW referred to his own conduct in the outcome letter, accepting that he had participated in "off-setting" arrangements, but sought to distinguish his own situation by saying that such arrangements were not hidden from the board.

94. On 7 October 2017, the Claimant lodged an appeal against her dismissal and a grievance [2548]. There then followed a sequence of correspondence between the Claimant and IW during the course of which the Claimant sent IW documents pertinent to her appeal.

95. On 19 October 2017 IW held a meeting with the Claimant to discuss the way forward with her appeal and grievance. The Claimant stated that she wished to be reinstated [2675].

96. On 14 November 2017, the Claimant submitted written submissions in support of her appeal [2792].

97. The appeal hearing was heard by IW in two sessions: the first on 20 November 2017 and the second on 1 February 2018. However, on 17 April 2018 IW wrote to the Claimant confirming that neither her appeal or grievance had been upheld [3155].

Relevant legal principles

Unfair dismissal

98. The right not to be unfairly dismissed is set out in s.94 Employment Rights Act 1996 ("ERA"). The test for determining the fairness of a dismissal is set out in sections 98(1)-(4) ERA which states the following: -

> ***(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(3) In subsection (2)(a)—***

> ***(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and***
>
> ***(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—***
>
> ***(a) depends on whether in 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, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case.***

99. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for that belief; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

100. The employer bears the burden of proving the reason for dismissal whereas the burden of proving that the dismissal was fair or unfair is neutral.

101. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in **Gilham and ors v Kent County Council (No.2) 1985 ICR 233** "*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness*".

102. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

103. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

104. The Tribunal is mindful of not falling into a substitution mindset. The Court of Appeal in **London Ambulance NHS Trust v Small [2009] IRLR 563** warned that when determining the issue of liability, the Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

Adjustments to compensation

105. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

106. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (**Polkey v A E Dayton Services Limited [1988] ICR 142**.

107. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

108. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……***

109. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. It said that the

Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Direct sex discrimination

110. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

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

111. Once less favourable treatment has been established, the focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* The Respondent's motive is irrelevant, and the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

112. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

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

113. There is a two-stage test to proving discrimination. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason, they dismissed the Claimant was not because of, in this case, sex. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given

the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

114. When looking at whether the burden shifts, the test is whether the Tribunal "could decide", not whether it is "possible to decide". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

115. Notwithstanding the process set out above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is a prima facie case is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

Victimisation

116. Section 27 of EQA provides as follows:

> ***(1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***(a) B does a protected act, or***
>
> ***(b) A believes that B has done, or may do, a protected act.***
>
> ***(2) Each of the following is a protected act—***
>
> ***(a) bringing proceedings under this Act;***
>
> ***(b) giving evidence or information in connection with proceedings under this Act;***
>
> ***(c) doing any other thing for the purposes of or in connection with this Act;***
>
> ***(d) making an allegation (whether or not express) that A or another person has contravened this Act.***

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

117. The test to be applied here is threefold:

    a. Did the Claimant do a protected act?
    b. Did the Respondent subject the Claimant to a detriment?
    c. If so, was the Claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

118. Here the most important decision to be made by the Tribunal is the "reason why" the Respondent dismissed the Claimant. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the dismissal is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

119. A person claiming victimisation need not show that the detriment meted out was *solely* by reason of the protected act. As Lord Nicholls indicated in **Nagarajan v London Regional Transport 1999 ICR 877, HL**, if protected acts have a '*significant influence*' on the employer's decision making, discrimination will be made out. Nagarajan was considered by the Court of Appeal in **Igen Ltd & ors v Wong and other cases 2005 ICR 931, CA,** a sex discrimination case. In that case Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.' The crucial issue for the Tribunal to determine is the reason for the treatment — i.e. what motivated the employer to act as it did? But it is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor.

120. Whilst the same burden of proof applies in such cases, namely that the Claimant must prove sufficient facts from which the Tribunal could conclude, in the absence of hearing from the Respondent, that the Claimant has suffered an act of discrimination, it is also perfectly acceptable to go straight to the "reason why" because that is the central question that the Tribunal needs to answer.

Submissions by the parties

121. The parties had prepared detailed written submissions that were supplemented by oral submissions which the Tribunal considered carefully in reaching its conclusions below.

Analysis, conclusions and further associated findings of fact

Victimisation

122. The Tribunal decided that it made sense to consider the victimisation claim first and, in doing so, reach conclusions on the reasons for the Claimant's dismissal, as this would also be relevant to the unfair dismissal claim.

123. As a first step, the Tribunal considered whether each of the communications from the Claimant, namely the letter from the Claimant's solicitor dated 19 October 2016 and the Claimant's email to NW dated 7 April 2017) were protected acts within the meaning of the EQA. The Claimant's case was that they fell squarely within s.27(2)(d) of the EQA in that they alleged that the Respondent had discriminated against the Claimant thereby contravening the EQA.

124. With regards the letter of 19 October 2016 the Tribunal concluded that there could be little doubt that this was a protected act; it expressly referred to the Claimant being less favourably treated because of her sex and referred to breaches of discrimination law. The position regarding the 7 April 2017 is a little more nuanced. By itself, and ignoring any other communication, the the Tribunal concluded that it could not be a protected act. However, the Tribunal considered that it would defeat the purpose of the protection given by s.27 EQA, as well as ignoring common sense, not to consider the second email in context: that context, of course, being the first protected act and the Claimant's express complaints of discrimination. The Tribunal concluded that by sending the 7 April 2017 email, the Claimant was clearly referring back to the complaints she had already made, through her Solicitors, in the 19 October 2016 letter. There is a sentence in the email which the Claimant highlighted bold and which supports that conclusion, which said as follows:

> ***….Your decision to make these awards without my involvement is indefensible, and yet another example of the way in which you continue to seek to exclude me from the management of the business.***

125. The Tribunal concluded that the second email had to be considered in the round. The Tribunal finds that it ignited a reaction in NW because of the letter sent in October 2016. For all these reasons, the Tribunal concludes that the email of 7 April 2017 was also a protected act.

126. The next question which the Tribunal considered was whether the Respondent suspended and subsequently dismissed the Claimant because of the protected act. In reaching a conclusion on this point the Tribunal asked itself "what was the real reason for the Claimant's suspension and dismissal?"

127. The Tribunal considered carefully the chronology of events leading to suspension and dismissal. The Tribunal agreed with the Claimant that it was necessary to look at the wider chronology going back to the meeting on 7 May 2013 and the correspondence which followed it. The Tribunal concluded that NW was angry and irritated at the suggestion that the Claimant valued her worth more than NW did, and that her pay was disproportionately low compared to his. He felt that his value to the business was far more than the Claimant's. The Tribunal concluded that the Claimant had hit a raw nerve when raising the subject of pay and attempting to value her contribution to the business as more equal to his. The Tribunal notes that on 24 May 2013 when the Claimant emailed NW about bonuses and commented in relation to AW, "*I hope he appreciates that his final package was well over £90,000*", NW responded tersely in an email, stating that such a comment was "an irrelevance". The Tribunal concluded that NW disliked the suggestion in the Claimant's email that he too was being overpaid for what he was doing.

128. The issue of the Claimant's pay compared to NW was again mentioned on 21 September 2016 and then again expressly referred to at length in the letter by the Claimant's solicitor on 19 October 2016. On both occasions the Claimant linked her low pay (compared to NW) to her gender.

129. The Tribunal found the email NW sent to his lawyers on 24 October 2016 [2019] to be revealing of NW's thinking and indicative of his primary concerns, in particular, the Claimant's complaints of sex discrimination, including salary and marginalization, which the Tribunal concluded were at the forefront of his mind. The email was also an indicator of the approach that NW would later take to deal with the Claimant.

130. The Tribunal noted NW's comment "*it is **now** [Tribunal's emphasis] that Kirsty has taken funds from the company without my direct knowledge*" yet the facts upon which such allegations were based had been known to NW for some time; NW appeared to be suggesting that he had made such discoveries shortly before writing the letter but the Tribunal finds that this was not the case. NW then asked how to separate dealing with the allegations of discrimination from the complaints against the Claimant about "*what she has done with the money*"

131. When one looks at the whole chronology and above findings of fact the clear conclusion reached by the Tribunal was that both protected acts played a significant part in the decision to suspend and dismiss the Claimant. In reaching this decision, the Tribunal also had regard to the following factors which supported the view reached by the Tribunal as to NW's state of mind and motivation when seeking to suspend and dismiss the Claimant:

    a. The unfair process applied to the Claimant leading to her being

unfairly dismissed (see below).

b. The fact that the Respondent sought to elevate "family matters" into acts of unconscionable conduct purely for the purpose of defending these proceedings.

c. Related to (b) above, the Tribunal finds that NW sought to make serious allegations against the Claimant during these proceedings, at various points labelling her a thief, when such accusations were not made at the time and the Claimant was not disciplined at the time for them, thereby leaving the Tribunal to doubt NW's credibility and whether he genuinely believed what he was saying, rather than being forced to say them during these proceedings to defend the claims brought by the Claimant.

132. The Tribunal concluded that the email on 7 April 2017 reignited matters raised in the first protected act resulting in KH formally being instructed, three hours later, to conduct an investigation primarily into the Claimant's activities, the Claimant being, in effect, summoned to a meeting with NW and KB, and then being suspended on 11 April 2017 (a suspension the Tribunal concluded would have happened earlier, had the Claimant attended the meeting with NW and KB). The Tribunal concluded that the reason why the Claimant was dismissed was also because NW did not like the fact that the Claimant was seeking an exit from the business on the same terms as IW and he considered her greedy for doing so. However, the Tribunal finds that whilst such factors no doubt played their part in NW's decisions to treat the Claimant as he did, the complaints of discrimination played a significant part in his decisions and the claim of victimisation is therefore well founded and succeeds.

Unfair Dismissal

133. Given the Tribunal's conclusions above, it did not accept that the reasons put forward by the Respondent during these proceedings or at the time, were the real reasons for dismissal. Neither did it believe that the acts of unconscionable conduct led to a breakdown in the relationship or a breach of mutual trust and confidence. The Tribunal concluded that the real reasons for the dismissal were those at paragraphs 131 and 132 above. On that basis alone, the Tribunal is not satisfied that the first stage of the test at s.98(1) ERA (reason for dismissal) has been proved by the Respondent which means that the dismissal is unfair.

134. However, even if the Respondent had discharged the burden at s.98(1) ERA, the Tribunal concluded that the dismissal was procedurally and substantively unfair for reasons set out in the following paragraphs.

135. There was a complete failure on the part of the Respondent to investigate

the allegations fairly and impartially which fell significantly outside the range of reasonable responses open to an employer. This was a case where there were allegations against the Respondent which would rightly be treated as misconduct in most businesses except that there were many practices in the Respondent which were accepted and adopted by NW, as well as other family members. NW had chosen therefore to discipline the Claimant for matters which had not previously been considered as misconduct and which the Tribunal finds NW and other members of the family had been guilty of. It was a point made by the Respondent during the proceedings that the crucial difference between NW and the Claimant was that he did not hide his activities whereas he did not know about the Claimant's activities. The Tribunal did not consider this argument carried much weight given that by the nature of the Claimant's role she would inevitably be privy to much of what was going on. The Tribunal was not satisfied that NW had obtained board approval to what he was doing, and it concluded that even the Claimant did not know about certain of NW's transactions at the time. The Tribunal concluded that a fair investigation, and one which a reasonable employer would have adopted, would have been one, as the Claimant requested, which looked at the transactions of all members of the family because without that, it was difficult to place what the Claimant did in context or assess the seriousness of what she was alleged to have done.

136. To do what was originally planned, which was to ask Roffe Swayne to conduct an investigation, would not only have corrected the unfairness referred to at paragraph 135 above, but it would also have allowed more objectivity and impartiality to the process. As it was, NW was responsible for investigating the misconduct and conducting the disciplinary hearing. On the point of NW conducting the disciplinary hearing, the Tribunal was struck by how NW could not see the problem with this approach, in circumstances where it was being alleged that NW had done exactly what the Claimant was being alleged to have done and was not being disciplined for it. The Tribunal concluded the decision to appoint NW to conduct the investigation and disciplinary hearing fell significantly outside the scope of what a reasonable employer would have done. The Tribunal considered the size and resources of the Respondent, together with the fact that it is a family business. That said, the Tribunal considered that there were options open to the Respondent to avoid the unfairness that was created.

137. The Tribunal was not satisfied that the Claimant received all of the documents and papers that she requested and she found herself being forced to defend allegations for which appropriate documents had not been disclosed to her.

138. The Tribunal accepts that the Respondent changed the focus of the allegations between the period when she was informed of the allegations

and invited to the disciplinary, to one which was less about the transactions themselves but more about the suggestion that the Claimant was guilty of hiding transactions. Indeed, the Respondent's position changed even further during the hearing, when NW gave evidence that his problem with the offsetting alleged as part of the disciplinary allegations, something which the Tribunal finds was common practice within the company, was that the level of offsets exceeded the specified limits, namely the level of bonuses which had been allocated. The Tribunal was surprised by this comment because that position appeared nowhere in the pleadings and was certainly not a point that was put to the Claimant during the disciplinary or appeal hearings.

139. The Tribunal considered whether the appeal hearing corrected any unfairness found at the disciplinary stage of proceedings and found that it did not. It was not a rehearing and did not correct a significant defect which was the Respondent's failure to conduct an impartial and fair investigation into the activities of all members of the family to assess whether what the Claimant was saying was correct and to assess the seriousness of the allegations and whether they warranted dismissal (or indeed any form of disciplinary action) in the circumstances. The Tribunal finds that IW was too close to matters to look at the dismissal afresh and reach a fair decision and that, once again, these actions fell outside the range of reasonable responses open to them.

140. For the above reasons the Tribunal concludes that the claim of unfair dismissal is well founded and succeeds.

Sex Discrimination

141. The basis for the the Claimant's direct discrimination claim relied on comparing her salary and bonus with NW's. She claimed that both were disproportionately low compared to what a Finance Director should be paid and said that it was because of her gender. In effect, she said that a male member of the same family employed to do her job would have been paid a higher amount and the gap between the salary and bonus of NW and the hypothetical comparator would have been narrower or smaller than that which existed between NW and the Claimant.

142. The Tribunal started by looking at the gap between the Claimant's salary and earnings and NW's and concluded that the gap was in fact narrower than suggested by the Claimant. This is because the gap identified by the Claimant assumed that the Claimant was contracted to work a four-day week. The Tribunal could find no documentary evidence confirming any change to the Claimant's contracted days from three to four days. The Tribunal considered the pieces of evidence which when put together established that such an agreement was reached, but it could not be satisfied of this on the balance of probabilities. The Tribunal accepts that

as senior people in the business, and as very commonly happens, that both of them were in fact working more hours for the business than they were contracted to do. However, the Tribunal does not find that any change to the Claimant’s contractual or working arrangements resulted from this discussion apart from each of them being given additional pay.

143. Having made the above finding, the gap between NW and the Claimant’s pay is narrower than alleged, with the Claimant earning, in broad terms from the financial year 10/11 onwards, on average 62.5% of NW’s salary. It is a similar story when one comes to bonuses.

144. The Tribunal was shown articles which gave a picture of the average differential in pay between Finance Directors and Managing Directors between 2014 and 2018. The differential ranged from 89% in 2014 to 61% in 2018. The Tribunal did not understand the reason why the differential should change from year to year and the authors of the research were not available at the hearing to answer questions. Whilst the Tribunal accepted the Claimant’s submissions that expert evidence was not always necessary in such situations in order for the Tribunal to make particular findings, the Tribunal found it difficult to place much weight on the research provided in the bundle, without being able to delve further into the findings. In any event, the Tribunal noted that 62.5% did fall at the bottom end of the range provided albeit that the Claimant would dispute this calculation because it is based on the Claimant working four days a week.

145. The Tribunal then went on to consider whether the position would have been any different had a male member of the family been performing the role of Finance Director and it concluded that the position would not have been any different. The Tribunal’s assessment of NW is that he placed considerable value on his own worth because he had been with the business longer than the Claimant and had helped establish it at the start. He also considered that his background, having worked for other companies, gave him experience that was superior to the Claimant’s. Importantly, the Tribunal concluded that NW was a person who considered anyone who brought business and revenue into the business had more worth than other “backroom” staff like those in finance. Finally, the Tribunal concluded that NW had in his mind a value to his own contribution to the business as Managing Director which far exceeded that of the Claimant’s contribution. The Tribunal concluded that these reasons were far more likely to explain the differential in pay than the Claimant’s gender and that a male member of the family doing the Claimant’s job would have been treated in the same way.

146. The Tribunal gave careful consideration to NW’s (and other male members of the family, such as TW) attitudes towards women and their place in the workplace. In particular the Tribunal considered the fact that TW had chosen to call the company “& Sons”, that more shares had been placed

on trust for KB and the Claimant, and that NW, IW and TW had held more shares in the company. However, the Tribunal were not persuaded that such matters meant that NW's motives were driven by gender. The Tribunal considered that the Respondent had provided sufficient evidence to enable it to reach the above conclusions, namely that there were other reasons which explained a differential in pay and bonuses.

147. The Tribunal considered each of the acts of marginalisation alleged by the Claimant. The Tribunal finds that in relation to many of the matters complained about by the Claimant, the Claimant was kept in the loop in terms of what was happening. Whether that constituted consultation or was the type of consultation that the Claimant expected to receive in her role as FD is a matter of debate. However, the Tribunal concluded that this was a company that did not operate like many other businesses. There is no evidence that board meetings were held as one might expect, or certainly at the frequency that one might expect, and of course such meetings would have provided opportunities for the type of consultation that the Claimant expected or wanted. Importantly, the Tribunal finds that NW had a firm view of the decisions that he felt fell firmly within his responsibility as MD, which gave him powers to make the decisions he did. The Tribunal accepts that NW did not believe he did anything wrong in this regard. The Tribunal considered that the claims of marginalisation were not particularly strong; the Tribunal certainly did not feel that NW's behaviour in this regard was driven by gender or that a male member of the family performing the role of Finance Director would have been treated any differently. On those matters where the Claimant was not consulted, the Tribunal finds that it was a judgment call on the part of NW whether he inform or consult the Claimant in his role of Managing Director. In any event, and once again, the Tribunal does not find that such decisions were taken because of the Claimant's gender.

148. For the above reasons, none of the claims of direct sex discrimination are well founded and are therefore dismissed.

Polkey and contribution

149. The Tribunal considered whether there should be any reduction to the compensation on account of Polkey or contributory fault. In light of our findings above, the Tribunal concluded that there should be no reduction. The extent of the unfairness of the dismissal leaves it impossible for the Tribunal to speculate as to what might have been the outcome had the Respondent acted fairly. The Tribunal finds that the Claimant did not do anything which the company had found unacceptable prior to the Claimant's protected act and bringing of these proceedings. In the circumstances of this case, the Tribunal does not find that the Claimant's conduct was blameworthy or culpable such that would justify a finding that the Claimant contributed to her dismissal.

Remedy Hearing

150. The case will be listed at a future date to consider remedy in relation to those of the above claims that have been successful.

....

Employment Judge Hyams-Parish
19 February 2020

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.