EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms Viviana Jimenez	**v**	**Brite Green Limited (1)** **Darren Chadwick (2)**

Heard at: Reading **On:** 14 to 17 October 2019, 18 October 2019 (chambers), 21 January 2020 (chambers)

Before: Employment Judge Hawksworth
Mr JF Cameron
Mrs F Betts

Appearances
For Ms Jimenez: Mr T Lau (counsel)
For the Respondent: Mr M Williams (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's complaint of unfair dismissal against the first respondent is well founded and succeeds. The claimant is awarded:

Basic Award:	£762.00
Compensatory Award:	£1,474.76
Total unfair dismissal award	£2,236.76

2. The claimant's complaint of unauthorised deduction from wages against the first respondent is well founded and succeeds. The claimant is awarded £4,987.46 in arrears of pay.

3. The complaints of victimisation, direct sex and race discrimination, and harassment against the first and second respondent fail and are dismissed.

4. The total award to the claimant is £7,224.22.

REASONS

Claim

1. The claimant Ms Jimenez was employed by the first respondent as a senior sustainability consultant from 19 January 2015 until her dismissal with effect from 26 January 2018.

2. By a claim form presented on 9 May 2018, following a period of early conciliation from 30 January 2018 to 15 March 2018, Ms Jimenez brought complaints against the first respondent of unfair dismissal, unauthorised deduction from wages, victimisation, direct sex and race discrimination, harassment, and unpaid holiday pay. The complaint of unpaid holiday pay is no longer being pursued.

3. At a preliminary hearing on 29 November 2018, I allowed an application by Ms Jimenez to join Mr Darren Chadwick as the second respondent. He is the founder and managing director of the first respondent. The complaints against him are victimisation, direct sex and race discrimination, and harassment under the Equality Act 2010. Mr Darren Chadwick is referred to in this judgment and reasons as Mr Chadwick (or at some points for clarity, as Mr Darren Chadwick). His father, the company secretary of the first respondent, is referred to as Mr Colin Chadwick.

Hearing and Evidence

4. The hearing to determine liability and remedy was heard on 14 to 17 October 2019, with the tribunal meeting in chambers on 18 October 2019 and 21 January 2020.

5. A bundle was sent to the tribunal on 11 October 2019. The bundle was prepared by the respondents. It was made up of 14 lever arch files containing 4688 pages and two further lever arch files (called Appendix 7 parts 1 and 2). In an email sent to the parties on 11 October 2019, I directed the parties to agree and bring to the first day of the hearing a list of essential reading, and to consider whether there was scope to agree a 'core' bundle of those documents which would be more frequently referred to during the hearing.

6. A list of essential pre-reading was attached to the claimant's opening skeleton argument. The documents and pre-reading were discussed at the start of the hearing. The parties explained that a large part of the bundle (over 2000 pages) comprised appendices to a report prepared for the respondent which it was not necessary for us to read in full. We told the parties that we would not read the whole bundle; we would only read those documents which we were asked to read as pre-reading or which were referred to in evidence.

7. Also at the start of the hearing, Ms Jimenez produced an additional bundle of documents which had been disclosed but which were missing from the

bundle prepared by the respondents. This was paginated from 4689 to 4880. There was some overlap.

8. We took the morning of 14 October 2019 for reading. We read the witness statements and the documents which the parties had asked us to read by way of pre-reading.

9. We started hearing witness evidence after the lunch break on 14 October 2019. On 14 and 15 October 2019 we heard the evidence of Ms Jimenez and Dr Phillip Butler (who attended the disciplinary appeal hearing with Ms Jimenez).

10. We also read a witness statement of Mr Rufus Ulyet who attended the disciplinary meeting with Ms Jimenez. The respondent did not challenge his evidence.

11. On 15, 16 and 17 October 2019 we heard evidence from the respondents' witnesses. We heard evidence from Mr Darren Chadwick (the second respondent) and four independent human resources consultants: Mr Robert Ingram, Ms Charlotte Broughton, Mr Robert Downing and Mrs Debra Cadman.

The Issues

12. The bundle received by the tribunal on 11 October 2019 did not contain an agreed list of issues or a chronology, although, at a preliminary hearing on 29 November 2018, there had been an order for these to be agreed. In the letter to the parties of 11 October 2019, Employment Judge Hawksworth directed that the parties should agree a list of issues to bring to the first day of the hearing.

13. At the hearing, the parties informed the tribunal that they had not been able to agree a chronology or final list of issues. A draft list of issues and a Scott Schedule had been prepared and these were discussed with the tribunal on the first day of the hearing. The parties agreed to produce a final agreed list of issues with cross-references to Ms Jimenez's particulars of claim, her further particulars of 21 December 2018 and the Scott Schedule.

14. A final agreed list of issues was produced by the parties and some points were clarified in discussions with the tribunal on 16 October 2019. The list of issues which was agreed following those discussions records the legal basis on which the claimant's complaints are put. It is set out below (retaining the numbers from the list). We have included the relevant date for each allegation, these dates were taken from the cross references to the Scott Schedule.

Unfair dismissal

1. *The first disciplinary hearing on 15 June 2017 was procedurally unfair and without any basis.*
2. *The claimant's appeal to the first disciplinary hearing on 28 July 2017 was procedurally unfair and her grievance she raised at that meeting was not properly considered.*
3. *The outcome on 6 November 2017 of a written grievance lodged by the claimant on 8 October 2017 was procedurally unfair.*
4. *The second disciplinary hearing on 18 December 2017 was procedurally unfair and without any basis.*
5. *The claimant's appeal to the second disciplinary hearing was procedurally unfair and the outcome on 28 January 2018 was without any basis.*

Unauthorised deduction

6. *The second respondent suspended the claimant from work on 3 October 2017. The second respondent has unlawfully deducted wages in the amount of £8971.98 from the claimant.*

Victimisation: the claimant relies on a verbal grievance made on 28 July 2017 as a protected act

7. *The second respondent covertly monitored the claimant's computer from 31 July 2017 to 3 October 2017 and read her personal communications following the claimant's grievance.*
8. *On 5 October 2017 the second respondent contacted a professional contact of the claimant's with false information after reading her personal emails.*

Direct discrimination because of sex and/or race

9. *During the period June to October 2017, the second respondent began strictly enforcing the claimant's working hours of 9am to 6:30pm. He did not do the same with the claimant's male colleague Matthew Drane ('MD').*
10. *During the period June to October 2017, the second respondent closely monitored the claimant's lunch hour. The second respondent never did the same with MD.*
11. *During the period June to October 2017, the second respondent would ignore the claimant by not responding to the claimant's 'Good Morning'. He did not behave in the same way with MD.*
12. *During the period June to October 2017, the second respondent treated MD differently by asking how his weekends were and saying little if anything to the claimant.*
13. *During the period June to October 2017, the second respondent requested 'project meetings' with the claimant where he criticised her. He did not do the same with MD.*
14. *On 5 July 2017 the second respondent restricted the claimant's ability to schedule doctor's appointments. A similar restriction was not imposed MD.*

15. *At a meeting with the claimant on 8 August 2017, the second respondent made discriminatory comments to her by saying she had a 'mañana attitude' and could not understand English. The second respondent also used offensive language to berate the claimant. He did not speak in this way to MD.*
16. *On 21 September 2017, the second respondent deliberately failed or refused to respond to the claimant's emails about her work. He did not behave in this way to MD.*

Harassment related to sex and/or race

17. *From 8 May 2017 until the claimant left employment at the first respondent, the second respondent and the claimant barely spoke. The second respondent only spoke to the claimant to criticise her work. The second respondent created a hostile environment.*
18. *During the period June to October 2017, the second respondent removed the claimant's benefit being able to work from home on Tuesdays.*
19. *During the period June to October 2017, the second respondent undermined the claimant in the presence of MD, who she line managed.*
20. *During the period June to October 2017, the second respondent began to call MD instead of the claimant to discuss daily work. Previously the second respondent had called the claimant (as she was MD's line manager).*
21. *On 3 July 2017 the second respondent and the claimant drove to visit the client. The second respondent did not speak to the claimant.*
22. *In August 2017, the second respondent deliberately failed to respond to the claimant's request for an employer reference for the renewal of her flat.*

15. The claimant's representative confirmed that there is no complaint for unpaid holiday and that there is no complaint of discriminatory dismissal.

Findings of fact

16. Ms Jimenez began working for the first respondent, Brite Green Ltd, on 19 January 2015, as a senior sustainability consultant.

17. The first respondent is a consultancy company which provides companies with advisory and project management services relating to sustainability strategy. The second respondent Mr Chadwick is the founder and managing director. In 2017 the first respondent had two employees: Ms Jimenez and one other. Ms Jimenez is a national of the USA and describes herself as Latin American. The other employee was Matthew Drane, a British male. He was a senior analyst, a more junior role than Ms Jimenez.

18. When Ms Jimenez was first employed by Brite Green Ltd she had a right to work in the UK by virtue of a spousal visa. During her employment by

the first respondent, Ms Jimenez's spousal visa was revoked. Mr Chadwick then successfully applied for a Tier 2 licence from the Home Office to enable Brite Green Ltd to sponsor Ms Jimenez to work in the UK under a Tier 2 visa.

19. On 22 September 2016 Ms Jimenez had an end of year performance review with Mr Chadwick for the year 2015/2016. For the area of presentation of project work, Mr Chadwick assessed Ms Jimenez's performance as 'needs development' and commented 'Viviana's work is often not client ready and requires significant review to meet the presentation standards expected. This is a key area to improve'. Ms Jimenez was given a development objective to 'Deliver client ready work'. (pages 119 to 121).

The LAA project

20. On 12 January 2017 the first respondent acquired a major new client, London Luton Airport (LLA). Ms Jimenez had substantial involvement in winning this client. The first project for LLA was the delivery of a sustainability strategy, and Ms Jimenez was appointed by Mr Chadwick to lead the project. The scope of work involved was agreed with the client. Ms Jimenez developed a project plan which set out a timeline of work on the project (page 4761). The project plan included a number of reports to be produced for the client, including reports on Benchmarking and Gap Analysis and Commercial Drivers which were due on 19 May 2017.

21. Ms Jimenez said that in a meeting with Mr Chadwick in March 2017 she raised concerns about whether the number of billable hours that had been agreed with LLA gave sufficient time to produce all of the work which had been agreed. She said that Mr Chadwick told her that, to address the concern she had raised, she should not produce all of the reports which were due on 19 May 2017. She said that she was told that she should only produce the benchmarking report, and not the gap analysis or commercial drivers reports. There was no note of this meeting.

22. Mr Chadwick said that Ms Jimenez was never given any instruction not to complete the full scope of work required by 19 May 2017.

23. On this disputed point of fact, we accept the evidence of Mr Chadwick and find that there was no instruction to Ms Jimenez to reduce the number of reports due on 19 May 2017. We have made this finding because Mr Chadwick's evidence is consistent with the documents, in particular the project plan which was not amended to reflect any reduction in the reports due on 19 May 2017 or to change the dates on which any of these reports were due. Further, there was no evidence of correspondence with the client about any changes to the scope of work. We would have expected the client to have been told if there were to be changes to the number or scope of reports which had been agreed and which the client was expecting to receive. Further, Ms Jimenez later accepted that she may have misunderstood what she was told in March (page 350).

The Spirent report

24. On 11 April 2017 Mr Chadwick sent Ms Jimenez an email about the final proof version of a 28 page sustainability report for Brite Green Ltd's largest client, Spirent (page 165). Mr Chadwick asked Ms Jimenez to 'review it with a fine tooth comb and check everything'. Ms Jimenez had written the text for this report, the text had then been put into a final format by a designer, ready to be sent to the client for it to provide to its shareholders.

25. Ms Jimenez sent her comments to Mr Chadwick the following day. She made four comments, two of which were questions to Mr Chadwick, one was flagging up a missing hyperlink and one which commented that a section of text was not clear. There was an additional note about whether the spelling should be British English or American English.

26. Mr Chadwick, who was on annual leave, felt that Ms Jimenez's review of the report was not sufficiently thorough, and that she had failed to identify some significant shortcomings. He prepared a list of 25 points which had to be addressed before the report could be sent to the client, including typographical errors and sections copied in the wrong order (pages 198 to 200).

27. On 18 April 2017 Mr Chadwick sent an email to Ms Jimenez in which he said 'I was really disappointed by the level of review you completed…I expected much more from you on this.' (page 268)

The LAA project stage 1 deadline

28. In May 2017 the deadline for the client reports on the LAA project was missed. The background to this was as follows.

29. Ms Jimenez was on annual leave in Colombia from 13 April 2017 to 2 May 2017. In response to a request by Ms Jimenez, Mr Chadwick agreed to Ms Jimenez working remotely from Colombia from 2 to 5 May 2017 to allow her to spend longer with her family.

30. On 10 May 2017 Ms Jimenez and Mr Chadwick met to review progress on the LAA project. Mr Chadwick was concerned that Ms Jimenez was significantly behind schedule. Ms Jimenez's evidence was that the scope of the work was changed again at this meeting, in that, after saying previously that the gap analysis and commercial drivers reports would not have to be produced by 19 May, Mr Chadwick now said that they should be. We have found that Mr Chadwick had not told Ms Jimenez not to produce these reports and therefore that there was no change in the scope of the work which Ms Jimenez had to produce. At the meeting on 10 May, Ms Jimenez agreed that these reports were important and after the meeting, she began working 14-16 hour days to complete the work.

31. Mr Chadwick was concerned that Ms Jimenez would not be able to complete the reports satisfactorily by the 19 May deadline. He felt that as this was the first major work for the client, it could have a significant impact on the business's relationship with the client. Mr Chadwick had other client commitments and was due to be out of the office for 9 days. He would not be able to provide assistance with the work. He decided to appoint Nadine Exter, an experienced associate consultant, to provide guidance and assist Ms Jimenez to complete the project on time. On 11 May 2017 Mr Chadwick sent an email to Ms Jimenez and Ms Exter, providing a detailed breakdown of work for them both (page 273.1). The email specifically said that Mr Chadwick wanted Ms Exter to review and comment on the documents, then work through them with Ms Jimenez and outline what was needed to get them 'client ready'.

32. Between 11 May 2017 and 19 May 2017 there were a number of emails exchanged between Ms Jimenez, Ms Exter and Mr Chadwick about the project.

33. Ms Jimenez emailed Ms Exter about progress on 11 and 12 May 2017. Ms Exter was reading through the drafts and she was due to have a telephone call with Ms Jimenez on Monday 15 May 2017 (pages 273.3 and 273.4).

34. On 12 May 2017 Ms Jimenez updated Mr Chadwick on progress (page 3922). He asked whether the word version was available to view. Ms Jimenez uploaded a version of one of the reports on 14 May 2017, saying that this was not the final version and she was still working on it (page 276).

35. On 15 May 2017 Ms Jimenez and Ms Exter discussed the reports.

36. On 16 May 2017 Mr Chadwick asked Ms Jimenez whether there was 'anything meaningful to share'; she replied that she was still working on the stakeholder analysis (page 275). At 23.02 that evening Ms Jimenez sent Mr Chadwick an email saying 'Here is the stakeholder analysis report. I am partway done with the commercial drivers and will send it tomorrow' (page 278).

37. On 17 May 2017, with the deadline to get the documents to the client approaching on 19 May 2017, Ms Exter emailed Ms Jimenez saying 'I hope writing is going well, do let me know how I can help'. Ms Jimenez replied at 13.35 to say that she would 'send stuff over when it is available for … review' (page 276). At 14.28 on 17 May and 13.48 on 18 May Ms Jimenez sent the latest versions of the drafts to Mr Chadwick (pages 3924 to 3925), although she knew that he was out of the office with another client and would have very little time to review or work on the reports.

38. On the morning of the deadline, Friday 19 May 2017, Ms Exter emailed Ms Jimenez saying, 'Do let me know what my turn-around needs to be for commenting, I'm assuming the reports still need to go to the client today?' Ms Jimenez replied to Ms Exter at 17.41, apologising for 'all the delays

and confusion' and saying 'I do not think you need to worry about turnaround today or the weekend' because Mr Chadwick was working on the report (page 324). Ms Exter sent a reply saying that she had not seen the new versions of any of the reports, and checking that she was not required to review or comment on anything. Ms Jimenez replied to say that Mr Chadwick was working on the documents and that Ms Exter did not need to review anything further (page 4796).

39. Ms Jimenez sent the final draft section of the report to Mr Chadwick at 17.28 on 19 May, two minutes before the deadline to send the work to the client. Further work was needed on the reports. They were not sent to LAA on 19 May and the deadline which had been agreed with the client was missed.

40. Mr Chadwick and Ms Exter worked on the reports over the weekend (page 3928). The final reports were sent to the client by Mr Chadwick.

41. On 22 May 2017 Mr Chadwick and Ms Jimenez had an informal meeting to discuss what had happened, and Mr Chadwick sent an email to Ms Jimenez recording the discussion. The tone of the email was direct, but it set out clear and reasonable expectations for future work. Mr Chadwick said the process and the final LAA document were not at all satisfactory and he did not want this to happen again. He set out five key points for improvement.

42. Ms Jimenez replied later the same day. She said she had noted the comments, and that feedback earlier in the process would have been helpful. There was a subsequent exchange of emails between Ms Jimenez and Mr Chadwick; Ms Jimenez said that she understood Mr Chadwick's points, and apologised for the delays (pages 347 to 352).

<u>The LAA summary report deadline</u>

43. Later on 22 May 2017 Mr Chadwick and Ms Jimenez had a conference call with LAA. It was agreed that Ms Jimenez would prepare a summary report to be sent to the client by 23 May 2017.

44. Ms Jimenez sent a draft of the summary report to Mr Chadwick by 14.00 on 23 May. At 16.08 Mr Chadwick returned the report with comments and requesting some changes. He said he wanted to have a final review of the summary report before it was sent to the client (pages 3936 to 3941).

45. At 17.27 Ms Jimenez emailed Mr Chadwick to say that she would update the document and send it to him for final review. She may have to step out at 6pm, but she would send the final version to him that night if she was not done by then. At 20.33 Mr Chadwick replied to say that this was not OK, as they had said they would get the summary report to the client that day, and he was surprised that, the day after their discussion about the importance of delivering work on time, Ms Jimenez had not made this her

priority (page 3935). Ms Jimenez went to say that she had to leave for a doctor's appointment. She had not told him about this earlier in the day.

46. Ms Jimenez sent the amended summary report to Mr Chadwick at around 20.50 that evening.

47. Mr Chadwick met with Ms Jimenez on 24 May 2017 to discuss the missed deadline. Ms Jimenez did not see that there was an issue with the work being completed late. Mr Chadwick said that there would have to be a further meeting about this, and a letter would follow.

48. Ms Jimenez's evidence was that she thought that delivering the summary report to the client at any time before midnight on 23 May 2017 would count as getting the report to the client on time. We agree with Mr Chadwick that the client is more likely to have understood the deadline as meaning by close of business on that day, ie by 17.30 on 23 May 2017. In making this finding, we note that Ms Jimenez had suggested to Mr Chadwick when she sent the first draft of the summary report that it should be sent to the client by 17.00 if possible.

First disciplinary hearing

49. On 5 June 2017 Ms Jimenez was sent a letter requesting her to attend a formal hearing to review her performance in line with the company's disciplinary and capability procedure (page 380).

50. The company disciplinary and capability procedure was set out in the company handbook (pages 4713 to 4715).

51. The letter said that Ms Jimenez's performance had fallen below the required standard in respect of the Spirent report, the LAA stage 1 project reports and the LAA summary report. In her witness statement, Ms Jimenez said that the first two allegations of poor performance had not been raised by Mr Chadwick before at any point. However, we have found that Mr Chadwick's concerns over the Spirent report had been raised with Ms Jimenez in writing, and his concerns over the LAA stage 1 reports had been raised at a meeting and confirmed in writing. We find that Mr Chadwick's concerns about Ms Jimenez's performance were reasonable and were based on reasonable grounds.

52. The hearing took place on 14 June 2017. The respondents allowed a request by Ms Jimenez to be accompanied by Mr Rufus Ulyet, a retired former business owner/manager. Ms Jimenez submitted a number of documents for consideration at the hearing.

53. The hearing lasted two and half hours. It was conducted by Mr Darren Chadwick. Mr Chadwick's father, Mr Colin Chadwick was also in attendance. Mr Colin Chadwick is the company secretary of the first respondent.

54. Mr Darren Chadwick said in his evidence that Mr Colin Chadwick was only present at the meeting as a note-taker. However, the note of the hearing records Mr Colin Chadwick playing a substantial part at the hearing, asking questions and making suggestions (pages 657 to 660). The note also says that Mr Colin Chadwick would play a part in the decision making:

> "**Hearing close**
> DC explained that he and CC had now to consider what had been discussed and to reach a determination in line with the Company Handbook."

55. Ms Jimenez said that during this hearing Mr Darren Chadwick and Mr Colin Chadwick were condescending to her and that some of the discussion was intrusive and harassing. We do not accept this. We find that the hearing was business like and matter of fact. We make this finding based on the account given in the course of the later grievance investigation by Mr Ulyet, Ms Jimenez's companion (page 558).

First disciplinary hearing outcome

56. On 26 June 2017 Ms Jimenez received a letter with the outcome of the disciplinary hearing. The letter was from Mr Darren Chadwick. It said that his decision was to issue a first and final written warning to remain on Ms Jimenez's file for 12 months. The letter set out what was expected of Ms Jimenez in respect of project planning, document planning and communication, to enable her to deliver satisfactory work in the future.

57. The company procedure permitted the use of a final written warning without a first written warning. It stated:

> "**Stage 2: Final written warning**. In case of further misconduct or failure to improve where there is an active first written warning or improvement note on your record, you will usually receive a final written warning. This may also be used without a first written warning or improvement notice for serious cases of misconduct or poor performance. The warning will usually remain active for 12 months."

Claimant's working hours/location and working environment

58. In the list of issues, Ms Jimenez said that on 3 July 2017 when she and Mr Chadwick travelled together by car to a client meeting, Mr Chadwick did not speak to her at all. Mr Chadwick said, and we accept, that on 3 July 2017 they travelled separately to a client meeting at UWE. In the grievance investigation when asked about this Ms Jimenez discussed the UWE meetings but did not mention another car journey (page 560). In her witness statement Ms Jimenez described this incident as happening on a different journey, to Luton Airport. Mr Chadwick did not agree that this had happened. We accept Mr Chadwick's evidence on this point. Ms Jimenez

was not clear about the incident and when it had happened, and had not referred to it when asked about it in the grievance.

59. Ms Jimenez's contract of employment, which was dated 12 January 2015 provided at clause 5.1 that her normal hours of work were 9am to 6.30pm Monday to Friday (page 102). In practice, these hours were not kept strictly, and also Ms Jimenez worked from home on Tuesdays and from time to time on other days.

60. On 4 July 2017 Mr Chadwick emailed Ms Jimenez to ask her to work her full contractual hours of 9am to 6.30pm in the office for the rest of the week and the following week, because he was not going to be in the office (page 385). Mr Chadwick made this request to ensure that, in his absence, Mr Drane, the first respondent's other employee, would be supported and supervised and would not be left in the office on his own, and also because he felt that issues with communication arising from Ms Jimenez working from home had contributed to her performance problems.

61. Ms Jimenez sent two emails in response (pages 385 and 388). The first said that she would work from 8 or 8.30 to 5 or 5.30 and eat lunch at her desk. Shortly afterwards, Ms Jimenez replied again to say that she had realised that her contract provided for working hours of 9am to 6.30pm with a one hour lunch break, but the first respondent had not strictly followed those hours. She asked for her hours to be changed to 8 to 5 with a 30 minute lunch break. She also said that she had a doctor's appointment for 11.00am the following week, and asked, 'Would you like me to cancel it?'.

62. Mr Chadwick replied saying:

> "I'd like you to keep the office hours I requested as set out in your contract. This is likely to be a permanent arrangement.
>
> I would also prefer as a rule that you arrange doctors appointments where possible outside of work time, although I appreciate that this is not always possible."

63. We find that Mr Chadwick did not prevent Ms Jimenez from attending doctors' appointments. It was reasonable to ask for doctors' appointments to be made outside of work time where possible, particularly in the context of Ms Jimenez notifying Mr Chadwick about an appointment at 11.00am, in the middle of the working day.

64. The lunch hour was not working time. Mr Chadwick did however keep an eye on the time his employees took for lunch and what they did during lunch. Ms Jimenez joined a gym near the office and was able to go to the gym in her lunch hour. When Mr Drane had driving lessons in his lunch hour, he discussed and agreed this with Mr Chadwick first.

65. Ms Jimenez says that during the period June to October 2017 Mr Chadwick ignored her by not responding when she said 'Good Morning', and not asking about her weekends. She said that he did not behave in the same way with Mr Drane and that he started to call Mr Drane to discuss work matters instead of her. She said that Mr Chadwick undermined her in front of Mr Drane.

66. We accept the evidence of Mr Chadwick that he may not have replied to Ms Jimenez's good morning because he wore headphones in the office, and that he apologised to Ms Jimenez for this.

67. On the balance of probabilities, we do not find that during the period June to October 2017 Mr Chadwick treated Ms Jimenez differently to Mr Drane by not asking about her weekends, that he said little if anything to Ms Jimenez or that he began calling Mr Drane instead of Ms Jimenez to discuss work. We do not find that Mr Chadwick and Ms Jimenez barely spoke from the period from 8 May 2017 until Ms Jimenez left employment or that Mr Chadwick undermined Ms Jimenez in front of Mr Drane.

Monitoring of activity on the claimant's laptop

68. On 25 July 2017 Mr Chadwick provided the claimant with a replacement laptop as her previous laptop had broken. The laptop was loaded with ActivTrak, productivity software which enables activity tracking. The software allowed the respondents to monitor all use of the laptop including websites visited, documents worked on, emails sent, and the times of each activity.

69. The respondents had not previously used software to conduct monitoring of computer activity by their employees. However, the first respondent's IT and communications systems policy in the company handbook at schedule 22 permitted such monitoring in clause 7 which provided:

> "7.1 Our systems enable us to monitor telephone, email, voicemail, internet and other communications. For business reasons, and in order to carry out legal obligations in our role as an employer, your use of our systems including the telephone and computer systems (including any personal use) may be continually monitored by automated software or otherwise.
>
> 7.2 We reserve the right to retrieve the contents of email messages or check internet usage (including pages visited and searches made) as reasonably necessary in the interests of the business, including for the following purposes (this list is not exhaustive):
>
> a) to monitor whether the use of the email system or the internet is legitimate and in accordance with this policy;
>
> b) to find lost messages or to retrieve messages lost due to computer failure;

c) to assist in the investigation of alleged wrongdoing; or

d) to comply with any legal obligation."

70. After Ms Jimenez was provided with a new laptop, Mr Chadwick began monitoring Ms Jimenez's use of the laptop, using the ActivTrak productivity software. This was very intrusive monitoring as it included all personal use as well as work use of the laptop, and monitoring of Ms Jimenez's personal and work email accounts. Mr Chadwick did not warn Ms Jimenez that the ActivTrak software was installed on the new laptop and that monitoring would take place.

71. There was a dispute between the parties as to the date on which tracking of activity on Ms Jimenez's laptop began. Mr Chadwick said that it began on 25 July 2017 when Ms Jimenez was provided with the new laptop. He also said that the same software was installed on the laptop of the other employee, Mr Drane, around 2-3 days later. Ms Jimenez said that monitoring of her laptop did not start until 31 July 2017, after the disciplinary appeal hearing on 28 July 2017.

72. On this disputed point of fact, we accept the evidence of Ms Jimenez and find that the monitoring of activity on her work laptop began on 31 July 2017. We have made this finding because Ms Jimenez's evidence is consistent with the documents, in particular the monitoring records which are lengthy and detailed. The activity tracking records with which we were provided start from 31 July 2017, not 25 July. Given the very wide scope of documentation which was included in the bundle, we have concluded that if activity tracking was being conducted from 25 July, there would have been documents to reflect this. We note also that the reports of Ms Broughton on Ms Jimenez's grievance appeal and of Mr Downing on the second disciplinary allegations both record that ActivTrak was installed from 31 July 2017 onwards (page 822 and 877).

73. We find that the reason Mr Chadwick started monitoring Ms Jimenez's work laptop was because concerns about her productivity had arisen at the same time as she was being supplied with a new work laptop and this prompted the decision to install the software on the laptop of both Ms Jimenez and Mr Drane and to start monitoring after that.

<u>First disciplinary appeal hearing</u>

74. Ms Jimenez appealed against the outcome of the first disciplinary hearing and the decision to issue her with a first and final written warning. Her appeal was set out in letters dated 1 and 28 July 2017 (pages 784 to 789).

75. The appeal hearing took place on 28 July 2017. Ms Jimenez was accompanied by Dr Phillip Butler, who was her partner at the time.

76. The appeal hearing lasted three and half hours, including a 20 minute break. It was chaired by Mr Colin Chadwick. Mr Darren Chadwick also attended. Mr Darren Chadwick said that he attended in the capacity of note-taker. However, the note of the hearing shows that both Mr Colin Chadwick and Mr Darren Chadwick asked questions and made comments throughout the hearing (pages 790 to 798). Given the involvement of both Mr Darren Chadwick and Mr Colin Chadwick at both stages of the process, the appeal cannot be regarded as having been heard by an independent person.

77. Towards the end of the appeal hearing, after a break, Ms Jimenez made an oral grievance. This was said by Ms Jimenez to be a protected act. We find that she said that the workplace had become hostile, the working relationship had broken down, and that she had a strong case for constructive dismissal. As an example, she said that Mr Chadwick had not said good morning to her. Mr Colin Chadwick said that as the meeting had run for over three and half hours, it was perhaps not the best time to start a new discussion. He suggested that Ms Jimenez should present her complaint and supporting evidence in the coming days and this would be considered carefully (pages 797 to 798).

78. In her statement, Ms Jimenez said that she raised an oral grievance about the hostile work environment and that she went on to give examples such as Mr Chadwick ignoring her, not responding to emails, monitoring her closely during her lunch hour, requesting project meetings. On the balance of probabilities, we do not accept that she gave these as further examples, as they would then have been likely to have been recorded in the minutes. Importantly, Ms Jimenez does not say in her statement that she made any reference to the Equality Act, to race or sex discrimination, or to harassment related to any protected characteristic. Also, Dr Butler, who attended the appeal hearing with Ms Jimenez does not say that she made any reference to the Equality Act, to discrimination or to any protected characteristic. He says Ms Jimenez said that there was an increasingly hostile work environment and that her mental and physical health were suffering from the work conditions.

79. Ms Jimenez did not make a written grievance in the days after the appeal hearing on 23 July 2017. She made a written grievance on 13 October 2017.

80. In his later grievance investigations, Mr Ingram said that the interviews about this meeting suggested that while the tone of the meeting was initially professional and cordial, Mr Darren Chadwick and Mr Colin Chadwick adopted a condescending tone towards Ms Jimenez as disagreements surfaced.

Meeting on 8 August 2017

81. On 8 August 2017 Mr Chadwick and Ms Jimenez met for a scheduled project progress meeting. Ms Jimenez recorded the meeting on her phone.

Mr Chadwick was not aware that the meeting was being recorded. A transcript of the whole meeting was in the bundle (pages 3993 to 4077).

82. This was a long meeting of around three hours. The working relationship between Mr Chadwick and Ms Jimenez was inevitably more difficult following the disciplinary process and this was made more difficult by the small size of the business. For the most part the discussion was conducted in a polite and reasonable manner by both participants, however towards the end of the meeting Mr Chadwick used offensive language, referring to 'the scale of fuck up from not doing your job properly' and having to be 'up to 2am covering your arse' (page 4061).

83. Ms Jimenez complains about what was said by Mr Chadwick at two other points in this meeting.

84. First, during a discussion about the importance of proof-reading client documents, Mr Chadwick said that he was trying to get under the skin and find out what the issue was. Ms Jimenez said that there needed to be enough time to proof read. Mr Chadwick replied:

> "Time is issue and that's it, that's fine. If time's an issue there's no language problems or there's no comprehension problems…"

85. Ms Jimenez felt this question was related to her race or ethnic origin and that it was inappropriate given that English is her first language. Mr Chadwick said, and we accept, that he wanted to understand whether there were any factors impacting on proof-reading, and he gave the example of a previous colleague who had struggled with proof-reading because of dyslexia.

86. Later, there was a discussion about the delay in providing the LAA summary report. The following exchange took place (page 4049):

> DC … you didn't come to me with any solutions other than..
> VJ No, my solution was …
> DC Mañana, it'll happen
> VJ Did I say mañana?
> DC No you didn't but it, I'll do it later.
> VJ No, I said I'll do it when I get home.

87. Mr Chadwick said that his use of the word mañana was not related to Ms Jimenez's race and he was referring to the tone of her email on 23 May 2017 which suggested she didn't care about the deadline. He said that with hindsight, he would have chosen a word with a less problematic interpretation.

<u>First disciplinary appeal hearing outcome</u>

88. On 11 August 2017 Mr Colin Chadwick wrote to Ms Jimenez with the outcome of the appeal hearing. The decision was to uphold the decision

of Mr Darren Chadwick and retain the first and final written warning on Ms Jimenez's record. (page 493).

89. We find that the decision to give a final warning rather than a first warning might be regarded as harsh, but it was within Brite Green's procedure and not manifestly inappropriate. There were grounds to criticise the process, in particular the appeal was not heard by someone independent. However, issuing a final warning in these circumstances was far from being clearly unreasonable. The warning was issued in good faith and there were prima facie grounds for it. There was nothing to suggest that the warning was issued for an oblique motive.

90. In her witness statement and the list of issues, Ms Jimenez said that during September 2017 Mr Chadwick deliberately failed or refused to respond to her emails. She realised on 20 September 2017 that he had not responded to any work-related email from her for a period of three weeks. We were not taken to any of Ms Jimenez's emails to which she said there was no reply. On the balance of probabilities, we do not find that this incident occurred as alleged.

Request for employer reference

91. In late July 2017 Ms Jimenez gave Mr Chadwick's details to her letting agency as they needed an employer reference for the renewal of her tenancy of her flat.

92. There was communication between Ms Jimenez and the letting agency about the reference during the period 26 July 2017 and 5 August 2017 (pages 469 to 484). The process does not appear to have been completely clear as Ms Jimenez had to check with the agent on 26 July 2017 and 4 August 2017 whether she needed to contact Mr Chadwick herself, and whether she needed to do anything. The agent confirmed on 28 July 2017 that everything had been received, but then said on 3 August 2017 that the reference was still outstanding. Ms Jimenez gave the agent Mr Chadwick's mobile number on 5 August 2017.

93. Mr Chadwick said that he did not become aware of Ms Jimenez's request until he received a phone call. He said that when it was brought to his attention he responded to the letting agency on the same day. We accept his evidence on this as it is consistent with the confusion about the process between Ms Jimenez and the agency about who should be contacting Mr Chadwick, and the lack of clarity on the part of the letting agent as to whether Mr Chadwick's reference had been provided or not.

Meeting on 3 October 2017

94. On 3 October 2017 Mr Chadwick and Ms Jimenez had a meeting. Mr Chadwick described this as an end of year review, Ms Jimenez said it was a project planning meeting; nothing turns on the different description. Ms Jimenez recorded the meeting on her phone; Mr Chadwick was not aware

that the meeting was being recorded. A transcript of the whole meeting was in the bundle (pages 4078 to 4097).

95. By the time of this meeting, Mr Chadwick had obtained activity tracking information about Ms Jimenez's laptop use from the ActivTrak software. The ActivTrak system produced raw data including screenshots and tracking records (listing the user's laptop activities and the time spent on each activity) and also management information summarising laptop use. The system divided laptop use into 'productive', 'unproductive' and 'unspecified' or undefined.

96. From the data he had, Mr Chadwick was concerned about some activity which had been recorded and which he believed showed that Ms Jimenez was doing work which was not work for the first respondent. The screenshots recorded by ActivTrak showed that Ms Jimenez had been doing some work on a draft chapter of a book and that she spent time on the draft book chapter during work time on 5 days during a period of 12 working days (pages 4814 to 4822)

97. Mr Chadwick was also concerned about personal use of the laptop during work time, as recorded by the ActivTrak system. He felt, and we accept, that the records showed that Ms Jimenez had spent extensive time on the internet and social media during work time. It was much more than incidental use. For example, the ActivTrak data for 3 August 2017 (Appendix 7) showed that, during a 2 hour period from 09.10 to 11.10 (working hours), Ms Jimenez conducted job searches, looked at job application pages and her CV, logged into her Airbnb account and had a conversation with someone, accessed personal email accounts (around 20 times), and accessed Facebook (around 15 times). We accept that this was all very likely to have been personal use and unrelated to Brite Green's work. There is a similar pattern on other days.

98. Mr Chadwick produced a summary document for the period 31 July 2017 to 3 October 2017, setting out Ms Jimenez's hours of productive, unproductive and unclassified work for each day according to ActivTrak, and comparing this to the number of hours Ms Jimenez had recorded on her timesheets and which had been billed to clients (page 1169). The documents showed that Ms Jimenez was spending considerable amounts of time on personal use of the internet and social media during working hours. Mr Chadwick's analysis suggested that her personal usage increased when he was out of the office. The data for Ms Jimenez showed significant periods of unproductive or unclassified time, even during August and September 2017 when Mr Chadwick had reduced Ms Jimenez's workload at her request because she said she was overloaded.

99. Mr Chadwick also obtained ActivTrak data for Mr Drane. This did not show any personal use during work hours.

100. Mr Chadwick was also concerned that Ms Jimenez had not met her targets for the year. These had been set at her review in September 2016

(page 3727). For example, Ms Jimenez had only achieved £22,000 of new revenue and this was from one project, against a target of £50,000 from three projects. She had not developed a business plan, attended any conferences or produced any white papers as set out in her business development target. Mr Drane had met all of his targets for the year.

101. At the meeting on 3 October, after an initial discussion about current work, Mr Chadwick raised the issue about the draft book chapter. At first, he did not say expressly what he was concerned about and he did not say that he had obtained monitoring data about Ms Jimenez's activities on the laptop. He asked Ms Jimenez in general terms whether she had been doing work that was not Brite Green work, and what it was all about.

102. Ms Jimenez's response was to ask what specifically Mr Chadwick was talking about. We find this response was understandable in the light of the very general way the question was put to her. She may simply not have known what he was referring to. She may also have been shocked at learning that her computer activity was being monitored. In the circumstances, we do not find that her response was evasive (as the respondents' representative suggested it was). We also find that, given the information Mr Chadwick had obtained from ActivTrak about the number of days Ms Jimenez had been working on the draft book chapter during work time, it was reasonable for him to be concerned about this and to raise it with Ms Jimenez.

103. Later in their discussion, Ms Jimenez confirmed that the work on the draft book chapter was for a friend, Dr Wilkinson. Ms Jimenez accepted that she had spent time on the chapter while at work (at Brite Green) during work hours. She said she had worked at home and at weekends and nights for Brite Green, and that it was 'a bit silly to think that somebody is doing 100% only … work at work, because …you look at Facebook', adding 'I don't really look at Facebook very much' (page 4084).

104. Ms Jimenez said that she was not being paid for the work on the draft book chapter and that she had turned down an offer to be paid for the work. Mr Chadwick said that he may need to speak to Dr Wilkinson because he didn't believe that she was not being paid (pages 4095 and 4096). Ms Jimenez said the draft book chapter was 'nothing related to anything to do with Brite Green at all' and that she was allowed to get paid for other work she did. Mr Chadwick said that he recommended that Ms Jimenez read her employment contract (page 4096) and told her that her contract said she could not work for other people without express permission (page 4086).

105. Clause 4.2 of Ms Jimenez's contract of employment (page 101) provided:

> "You shall not work for anyone else while you are employed by the Company unless with express written permission from the Managing Director."

106. During the meeting, Mr Chadwick also told Ms Jimenez that he was monitoring her computer. He raised his concerns about the time that she had put in her timesheets (page 4087) and that her productivity was 'astonishingly low' (page 4087). Ms Jimenez said that throughout the time she had been with Brite Green:

> "I have had periods when I am super productive 100% Brite Green and other periods when you know I am reading about other stuff and combining it more because I think that is what normal human beings do, I have not been disrespectful to you in absolutely any way."

107. Mr Chadwick replied saying that he thought it was disrespectful to spend the amount of time that she had on things which were not work related, while telling him that she was working flat out (page 4092).

108. In his witness statement, Mr Chadwick said that this meeting concluded with Ms Jimenez agreeing that she would take annual leave; we find, looking at the transcript of the meeting, that is not accurate. In fact Mr Chadwick told Ms Jimenez that there would be a formal meeting to discuss the issues he had raised and that in the meantime she should take paid leave, leave her work laptop in the office (with passwords) and return her key and access card (page 4088). We find that the words used by Mr Chadwick amounted to a suspension. Ms Jimenez's contract of employment at clause 10.3 and 10.4 allowed suspension with pay for the purposes of investigating any allegation of misconduct.

109. Ms Jimenez did not return to work at Brite Green after this date.

Notification of second disciplinary hearing

110. On 4 October 2017 Ms Jimenez was sent a letter (page 502.1) inviting her to a formal disciplinary meeting on 10 October 2017 to address instances of misconduct namely:

- Conducting work for third parties during work time;
- Low productivity
- Misreporting time on timesheets

111. On the same day, Ms Jimenez was sent an automatic email from a document sharing programme called SugarSync. It said that Brite Green had shared a folder with her called 'Evidence documents (shared)'. There was a large volume of documents shared with Ms Jimenez, around 2000 pages. It included the raw data from the ActivTrak system. Ms Jimenez emailed Brite Green on 6 October to ask for a password. An email response the same day informed her that she needed to create an account and password (page 508).

112. On 5 October 2017 Mr Chadwick emailed Dr Wilkinson asking a number of questions about the scope of work Ms Jimenez had undertaken for her on

the draft book chapter, and the contractual arrangements. It was sent to Dr Wilkinson's home email (page 507). We accept Mr Chadwick's evidence that he obtained Dr Wilkinson's home email address from her work website, because this was later confirmed by an independent human resources consultant, Mr Ingram, in the course of his investigation (page 598).

113. In her response, Dr Wilkinson said she was very surprised to receive Mr Chadwick's email and said she thought his behaviour was intrusive (page 505). Dr Wilkinson confirmed that Ms Jimenez was assisting with her chapter as 'a personal favour' (page 506). Mr Chadwick concluded, and we accept, that the time Ms Jimenez spent on the draft chapter was personal work, not work for Brite Green.

114. We find that Mr Chadwick corresponded with Dr Wilkinson because he wanted to obtain information about the other work Ms Jimenez had been carrying out, not because of the complaint Ms Jimenez made on 28 July 2017.

Ms Jimenez's grievance

115. On 9 October 2017 Ms Jimenez was certified unfit to work by her doctor, and unfit to attend the disciplinary hearing on 10 October 2017 (page 522 and 523). There was no change in the arrangements which had been put in place following the meeting on 3 October 2017: Ms Jimenez's laptop, office keys and access card were not returned to her. We find that she remained suspended during this time and up to her dismissal. She was unfit for work but was suspended, not on sick leave.

116. Ms Jimenez was not paid her full pay while suspended. In the period 3 October 2017 to 26 January 2018 Ms Jimenez's full pay before tax would have been £13,435, and her full pay after tax would have been £10,073. Her actual pay (some basic and holiday pay, contractual sick pay and statutory sick pay) totalled £5,993 before tax, and £5085.54 after tax (pages 4189 to 4190). There has therefore been a net deduction from her wages of £4,987.46.

117. On 12 October 2017, Ms Jimenez's solicitors emailed Mr Chadwick to say that they were instructed by her (page 523) and on 13 October 2017 they submitted a written grievance on her behalf (page 530). The document, dated 9 October 2017, was 10 pages long (page 512 to 521). In her grievance, Ms Jimenez complained that she had been harassed since May 2017 and that the workplace environment had become increasingly hostile. She said that she had raised the issue with Mr Darren Chadwick previously, and with Mr Colin Chadwick on 28 July 2017, but that it had not been properly addressed. She said that the hostile environment and constant harassment had impacted her physically and mentally.

118. Ms Jimenez's complains of harassment generally, and does not say that harassment was on grounds of sex or race. In relation to the meeting on 8

August 2017, Ms Jimenez said that the use of the word 'mañana' and the reference to problems understanding the English language were discriminatory.

119. The respondents appointed Mr Robert Ingram, an independent human resources professional, to consider Ms Jimenez's grievance (page 536). Mr Ingram conducted telephone, video or face to face interviews with Mr Darren Chadwick, Ms Jimenez, Mr Drane, Ms Exter, Mr Colin Chadwick, Dr Butler and Mr Ulyet (page 545). Mr Ingram kept a 55 page note of the interviews structured by reference to the points raised in the grievance letter (page 545 to 599).

120. Mr Ingram set out his summary report and conclusions in a document dated 2 November 2017 (page 600 to 602). He did not consider those aspects of the grievance which were felt to revisit the first disciplinary process, or those which were the subject of the second disciplinary process which was still outstanding. His report included a marked up copy of Ms Jimenez's grievance which was colour coded to show those elements of her complaints where were 'in scope' of the grievance, those which were not considered because they revisited the first disciplinary and those which were not considered because they concerned the second disciplinary.

121. Mr Ingram concluded that Mr Chadwick's high standards and direct style were felt to be harsh and patronising on some occasions. He recommended some formal people management coaching for Mr Chadwick. However, his overall assessment was that Mr Chadwick had not demonstrated a degree or frequency of behaviour which would be regarded as representing harassment or being hostile (page 601). He concluded that Ms Jimenez's oral grievance had been dealt with in line with the respondents' procedure, and the appropriate steps had been taken to deal with the written grievance of 13 October 2017.

122. In relation to the first disciplinary process, Ms Jimenez complained that the same people who were present at the first hearing were also present at the appeal hearing (Mr Darren Chadwick and Mr Colin Chadwick). This complaint was marked as being in scope in the grievance (page 4887). Mr Ingram concluded that first disciplinary hearing and appeal were properly constituted, given the small size of the business and its limited administrative resources (page 602).

123. In a letter dated 6 November 2017, Mr Chadwick relied on the conclusions of Mr Ingram and decided not to uphold the grievance (page 603).

124. Ms Jimenez appealed against the decision in a letter of 13 November 2017 (page 799). She said that there had been a failure to address her grievance in its entirety, that the conclusions were based on different incidents to those raised by her in her grievance and that the conclusions were insufficient and/or uninformed. Ms Jimenez sent an updated version of her appeal letter on 20 November 2017 (page 808) in which she also

complained that information acquired during the interviews had been left out of the report.

125. The respondents appointed an independent human resources consultant, Charlotte Broughton, to consider Ms Jimenez's grievance appeal. She interviewed Ms Jimenez, Mr Chadwick and Mr Ingram and reviewed the documents (page 815). Ms Broughton wrote to Mr Chadwick on 30 November 2017 confirming her findings. She reviewed the points raised by Ms Jimenez and considered whether Mr Ingram had adopted a meaningful and overall fair process. Broadly, she concluded that he had.

126. On 4 December 2017 Mr Chadwick wrote to Ms Jimenez to say that her appeal was not upheld. A copy of Ms Broughton's report was included. (page 827).

Second disciplinary hearing and investigation report

127. Also on 4 December 2017 Mr Chadwick wrote to Ms Jimenez about the second disciplinary hearing which had initially been scheduled to take place on 10 October 2017 but which had been postponed pending the grievance process (page 862). An additional instance of misconduct had been added since the letter of 4 October 2017 and a further explanation of whether each was said to amount to misconduct was also included. The allegations as set out in the letter of 4 December 2017 were:

- Conducting work for third parties during work time (misconduct);
- Low productivity and failure to meet performance objectives for the year to 30 September 2017 (capability and potentially misconduct, given apparent time spent on unauthorised matters during work time);
- Breaches of the company's IT and communications policy (misconduct) including clause 6.2;
- Misreporting time on timesheets – misconduct.

128. In relation to the fourth allegation, the letter did not give details of which days it was alleged that the claimant had misreported her time.

129. The letter of 4 December 2017 said that the outcome of the hearing may include summary dismissal.

130. The IT and communications policy (schedule 22 of the company handbook) provided at clauses 6.1 and 6.2:

> "6. Personal use of our systems
>
> 6.1 We permit the incidental use of our systems to send personal email, browse the internet and make personal telephone calls subject to certain conditions. Personal use is a privilege not a right. It must not be overused or abused. We may withdraw permission for it at any time or restrict access at our discretion.

6.2 Personal use must meet the following conditions:

(a) it must be minimal and take place outside normal working hours (that is, during your lunch break, and before or after work);
(b) personal emails should be labelled 'personal' in the subject header;
(c) it must not affect your work or interfere with the business;
(d) it must not commit us to any marginal costs;
(e) it must comply with our policies including the Equal Opportunities Policy, Anti-harassment and Bullying Policy, Data Protection Policy and Disciplinary Procedure."

131. Clause 8.1 provided that excessive personal use of the email system or inappropriate internet use would be dealt with under the disciplinary procedure.

132. Mr Chadwick appointed Mr Robert Downing, another independent human resources consultant, to conduct the second disciplinary hearing (page 613).

133. Ms Jimenez met with Mr Downing on 18 December 2017 (page 608). Her chosen companion was not available and so she attended on her own. The meeting lasted from 15.05 to 16.20. A transcript of the meeting was in the bundle at pages 4138 to 4162. During the meeting Mr Downing gave Ms Jimenez three screenshots which were part of the evidence but which had not been provided to her previously.

134. In relation to the allegations about low productivity and time reporting, Ms Jimenez said (and we accept that this is correct) that the ActivTrak productivity data did not include time spent in person with clients or with colleagues (page 4145). She also questioned whether online research would be classified as productive. She asked for more information about how productivity had been analysed (page 4152).

135. Ms Jimenez had also prepared a written response to the allegations dated 18 December 2017 in which she said that she needed more information to allow her to respond fully (page 865 to 867). In her meeting with Mr Downing, Ms Jimenez said that she wanted to make it clear that she had not given a full response because of the information she felt was outstanding. She asked Mr Downing to clarify next steps and whether he would now write a report. She said that she did not think she had presented everything that she needed. Mr Downing replied:

> "… I will give you the opportunity to respond, no I will endeavour to get a response to each of the questions you have asked me today and then you will have an opportunity to then provide a written

> statement back if you want to hold a further meeting then that is fine, but sometimes people prefer to put something in writing…in some ways it allows you time to reflect and put a considered statement together which is useful." (page 4160)

136. Ms Jimenez therefore left the meeting on 18 December 2017 with the understanding that she would receive a response to the questions she had asked, and that she would then be given the opportunity to have a further meeting if she wished, or to put forward a written statement.

137. On 20 December 2017, after the meeting with Ms Jimenez, Mr Downing spoke to Mr Chadwick. Mr Chadwick told him that Ms Jimenez had already been provided with copies of all the evidence (either in the SugarSync shared files, or at the meeting itself). Mr Downing asked Mr Chadwick questions about each of the allegations. This procedure was adopted because Ms Jimenez had asked that Mr Chadwick not attend the hearing.

138. In this discussion, Mr Chadwick provided further analysis of the ActivTrak data. In response to a question about the allegation of low productivity, he took 17 August 2017 as an example, summarised time spent and then compared the ActivTrak record for the day with time recorded by Ms Jimenez in her time sheets. This information was recorded by Mr Downing in a 'questions and answers' document (pages 954 to 969); the information Mr Chadwick gave was largely accepted by Mr Downing.

139. Having spoken to Mr Chadwick, Mr Downing decided that Ms Jimenez had been provided with all relevant information to allow her to fully participate in the disciplinary meeting and that he could complete his report without further input from the claimant. He did not provide Ms Jimenez with a copy of the questions and answer document recording his discussion with Mr Chadwick on 20 December 2017 or give her the opportunity to respond to what Mr Chadwick had said, including his analysis of the ActivTrak data.

140. On 21 December 2017 Mr Downing sent an email to the claimant via her solicitor in which he said:

> "I consider that you have been provided with all of the information to be relied upon and had sufficient time to prepare for our meeting."

141. Mr Downing said he had considered the various questions put by Ms Jimenez in her document of 18 December 2017 within his outcome report, and that the report had now been sent to Brite Green (page 829).

142. Mr Downing's report dated 21 December 2017 was sent to Mr Chadwick. It was 11 pages long and had 23 appendices which spanned pages 868 to 3673 of the bundle, plus two unpaginated lever arch files containing the ActivTrak computer monitoring reports.

143. Mr Downing concluded that there was evidence to substantiate all four allegations against Ms Jimenez and that there was also evidence of further

misconduct in relation to claims for sick leave and pay on two days when Ms Jimenez had been well enough to attend meetings (14 August and 20 September 2017).

144. Mr Downing also concluded that Brite Green should consider whether Ms Jimenez's actions breached the implied term of trust and confidence. He recommended that Brite Green should consider whether the matter was to be considered as misconduct or gross misconduct, and what, if any, sanction should be applied (page 878).

Second disciplinary outcome - dismissal

145. On 27 December 2017 Mr Chadwick wrote to Ms Jimenez via her solicitor (page 3674 to 3676). He decided that Ms Jimenez should be dismissed with notice, her employment was to terminate on 26 January 2018.

146. In the letter Mr Chadwick attached a copy of Mr Downing's report. He referred to the 'question and answer' document recording his discussion with Mr Downing and his analysis of the ActivTrak data; Ms Jimenez had not had an opportunity to comment on this document.

147. Mr Chadwick said that he accepted Mr Downing's conclusions that the allegations of misconduct were upheld and that the breaches amounted to gross misconduct individually and certainly in aggregate. He concluded that Ms Jimenez had decided that she could ignore instructions and her contractual terms during August and September 2017, and that this insubordination created a breach of trust and confidence. Mr Chadwick noted the previous warning which Ms Jimenez had on file.

148. Mr Chadwick considered what disciplinary sanction should be applied. He considered whether a sanction short of dismissal would be appropriate, and concluded that it would not. He decided to dismiss Ms Jimenez with notice expiring on 26 January 2018.

149. At the time of her dismissal, Ms Jimenez was aged 37. Her net weekly pay was £605.38 and she was entitled to a pension contribution of £7.00 per week.

Second disciplinary appeal

150. Ms Jimenez appealed her dismissal in a letter dated 3 January 2018 (page 833). The grounds for her appeal were:

- Failure to carry out the investigation properly;
- Failure to supply complete evidence of the claims;
- Ignoring the failure to supply complete evidence;
- Failure to carry out the disciplinary process properly.

151. Mr Chadwick engaged Mrs Cadman, another independent human resources consultant to investigate the appeal on behalf of Brite Green

(page 847). Ms Jimenez attended a meeting with Mrs Cadman on 19 January 2018. Mrs Cadman also interviewed Mr Downing on 23 January 2018.

152. Mrs Cadman's report was dated 26 January 2018 (page 852.1 to 852.11). She considered each of the four grounds of appeal and concluded that none of the grounds of appeal were upheld. She commented that there had been a misunderstanding around next steps after Ms Jimenez's meeting with Mr Downing.

The law

Unfair dismissal

153. A reason that relates to the conduct of the employee is a potentially fair reason for dismissal pursuant to Section 98(2)(b) of the Employment Rights Act 1996.

154. In misconduct unfair dismissal cases the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. That is not a matter for the tribunal to consider. Instead the tribunal has to consider fairness in the circumstances by reference to guidance set out in British Home Stores v Burchell. This requires consideration of the following issues:

- whether, at the time of dismissal, the employer believed the employee to be guilty of misconduct;
- whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

155. The tribunal must also consider whether dismissal is a fair sanction to impose in the circumstances, namely whether dismissal was within the range of reasonable responses open to the employer. In doing so, the tribunal must not substitute its own view of the appropriate penalty for that of the employer.

156. Previous warnings may be taken into account in considering the fairness of a dismissal, even when the previous warnings related to different kinds of conduct from that for which the employee was dismissed. However, where a final warning was clearly unreasonable, and where that final warning contributes to a later dismissal, the dismissal may be unfair (Cooperative Retail Services Ltd v Lucas EAT145/93). As a general rule, the tribunal does not need to assess whether a final warning was reasonably given, but it is entitled to satisfy itself that the warning was issued in good faith and that there were prima facie grounds for it. In particular, if there is anything to suggest that the warning was issued for an

oblique motive or if it was manifestly inappropriate, that might be a factor to be taken into account in determining the fairness of a later dismissal in which the warning relied on by the employer.

Unfair dismissal remedy

157. Where an employee does not seek re-instatement or re-engagement, the financial remedy is made up of a basic award and a compensatory award.

158. In respect of the basic award, section 122(2) of the Employment Rights Act provides:

> *"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."*

159. There is no causation test in section 122(2), however the tribunal must consider the employee's conduct before the dismissal and the extent to which that conduct makes it just and equitable to reduce the basic award (British Gas Trading Ltd v Price EAT0326/15).

160. In respect of the compensatory award, section 123(6) of the Employment Rights Act provides:

> *"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."*

161. The decision as to whether there has been conduct of this nature is for the tribunal, on the basis of the evidence it has heard. This is different from the decision to dismiss which is a decision for the employer.

162. For conduct to be the basis for a finding of contributory fault under section 123(6) ERA, it must have the characteristic of culpability or blameworthiness. The tribunal must make its own assessment of whether the employee is culpable or blameworthy, by considering what the employee did or failed to do, not rely on the employer's assessment of the employee's actions. However, deductions can only be made in respect of actions by the employee that took place prior to the dismissal and of which the employer had knowledge when the decision to dismiss was taken. The employee's conduct must be shown to have actually caused or contributed to the employer's decision to dismiss. The conduct of the employer is not a relevant factor for consideration on this issue.

163. In Steen v ASP Packaging Ltd 2014 ICR56, EAT, the EAT held that it is for the tribunal to:

- identify the conduct which is said to give rise to possible contributory fault
- decide whether that conduct is culpable or blameworthy, and
- decide whether it is just and equitable to reduce the amount of the basic award to any extent.

Unauthorised deduction from wages

164. Under section 13 of the Employment Rights Act 1996, a worker has the right not to suffer unauthorised deduction from their wages unless the deduction is required or authorised by a statutory provision or a relevant provision of the employee's contract or there has been written agreement or consent by the employee.

165. 'Relevant provision' is defined in section 13(2) and includes a provision of the contract comprised:

> *"in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question."*

Direct discrimination because of sex and/or race

166. Sex and race are protected characteristics under section 6 of the Equality Act 2010. Race includes nationality and ethnic or national origins.

167. Section 13 of the Equality Act provides:

> *"(1) 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."*

Harassment related to sex and/or race

168. Under section 26 of the Equality Act, a person (A) harasses another (B) if

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

169. In deciding whether conduct has the effect referred to, the tribunal must take into account:

> *'a) the perception of B;*
> *b) the other circumstances of the case;*

c) whether it is reasonable for the conduct to have that effect.'

Victimisation

170. Under section 27 of the Equality Act:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because

(a) B does a protected act…"

171. A protected act is defined in section 27(2) and includes:

"(d) making an allegation (whether or not express) that A or another person has contravened this Act."

Burden of proof

172. Sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."

173. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.

174. In *Igen v Wong* [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. The court's guidance is not a substitute for the statutory language and that the statute must be the starting point.

175. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)

176. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case

and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

177. The tribunal must adopt a holistic rather than fragmentary approach. This means looking not only at the detail of the various individual acts but also stepping back and looking at matters in the round.

Time limit in discrimination complaints

178. The time limit for bringing a complaint of discrimination is set out in section 123 of the Equality Act. A complaint may not be brought after the end of:

> "(a) the period of three months starting with the date of the act to which the complaint relates,
> (b) such other period as the employment tribunal thinks just and equitable".

179. When calculating the end date of the period of three months, time spent in a period of early conciliation is not counted (section 140B of the Equality Act 2010).

180. When considering whether to hear a complaint which is out of time, all relevant factors must be taken into account, and relevance will depend on the facts of the individual case. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that the tribunal may have regard to the factors in section 33 of the Limitation Act 1980. Two factors which are almost always relevant are i) the length of and reasons for the delay, and ii) whether the delay has prejudiced the respondent.

181. Employment tribunals have a wide discretion to extend time under the 'just and equitable' test, but 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA. The onus is on the claimant to persuade the tribunal that it is just and equitable. This does not mean that exceptional circumstances are required; the test is whether an extension of time is just and equitable

Conclusions

182. We have applied these legal principles to our findings of fact as set out above, in order to decide the issues for determination.

Unfair dismissal

183. We have concluded that Ms Jimenez was dismissed for misconduct. This is a reason related to conduct and a potentially fair reason for dismissal.

184. We have next considered whether, at the time of dismissal, the employer believed the employee to be guilty of misconduct. We conclude that at the time of the dismissal, Mr Darren Chadwick, the decision maker, believed Ms Jimenez to be guilty of four allegations of misconduct as set out in the dismissal letter of 27 December 2017.

185. Further, we have concluded that, at the time of dismissal, Mr Chadwick had reasonable grounds for believing that the employee was guilty of four allegations of misconduct, for the following reasons.

186. First, there were reasonable grounds for believing that Ms Jimenez had spent time on activities for third parties during work time, namely the draft book chapter for Dr Wilkinson. Mr Chadwick had seen the timed and dated screenshots from ActivTrak. Ms Jimenez had said in the meeting of 3 October 2017 that she had done this during work time and that it was nothing related to Brite Green at all. Ms Jimenez had said that she had refused an offer of payment for the work and Dr Wilkinson described it as a 'personal favour'. On that basis, it was reasonable for Mr Chadwick to believe that this was not being done for Brite Green and that it had been conducted in work time. Mr Downing had concluded after an investigation that this amounted to misconduct.

187. Second, there were reasonable grounds for Mr Chadwick to believe that Ms Jimenez had breached of the company's IT and communications policy, clause 6.2 in particular. The ActivTrak screenshots and activity tracking showed that Ms Jimenez's use of Brite Green's laptop for personal reasons was extensive and was frequently during work hours. In this respect, the data 'spoke for itself'. Further, Ms Jimenez had accepted in the meeting with Mr Chadwick that there were times when she was not working on Brite Green work 100% of the time. Mr Downing had concluded after his investigation that this amounted to misconduct.

188. The second and fourth allegations relate to low productivity and misreporting in time sheets. Our conclusion on these allegations is that, on the basis of the information Mr Chadwick had, it was reasonable for him to form the belief that Ms Jimenez's productivity was low and that she had over-recorded time on her timesheets. That is what the summary document Mr Chadwick produced from the ActivTrak data showed, on the face of it. Mr Downing agreed that these allegations were proven and amounted to misconduct.

189. We next considered whether, at the time that Mr Chadwick formed a belief in Ms Jimenez's misconduct on the four grounds, the investigation adopted by Brite Green was, in the circumstances, within the range of reasonable responses.

190. We have concluded that in respect of the second and fourth allegations, the investigation carried out by Mr Downing and Brite Green did not fall within the range of reasonable responses which a reasonable employer

would have adopted. Mr Chadwick appointed Mr Downing to carry out the investigation, and accepted Mr Downing's conclusions and recommendations. Both Mr Downing and Brite Green relied very heavily on the ActivTrak data and analysis based on that data. Unlike the allegation relating to personal use, where the data 'spoke for itself', there was a significant element of interpretation required by the ActivTrak system to produce data on Ms Jimenez's productivity. The system had to classify activity into categories of productive, unproductive or unspecified. Further, the data could only record time on the laptop, not work which was conducted 'in person' or on paper.

191. Mr Downing did not investigate the accuracy of the productivity summaries provided by the ActivTrak system. Ms Jimenez raised with him the point that the system did not recognise work carried out 'in person' such as in meetings or with colleagues. She also asked (in the written statement she gave to Mr Downing on 18 December 2017 and in the meeting) for details of the discrepancies and for an opportunity to access documents to prepare her defence. Mr Downing initially said he would get more information and allow Ms Jimenez an opportunity to provide a further response, but having spoken to Mr Chadwick he went ahead with his report without allowing Ms Jimenez a further opportunity.

192. We have concluded that there were a number of aspects of the allegations of low productivity and misreporting in respect of which the response of a reasonable employer would have been to have investigated more fully. The response of a reasonable employer would have included telling Ms Jimenez the dates on which it was said that she had misreported on her timesheets. The unparticularised allegation was difficult for Ms Jimenez to respond to, especially given the large volume of raw data she had been provided with from ActivTrak (around 2000 pages).

193. On the question of the reliability of the system's classification of activities as productive or unproductive, a reasonable employer would have explored with Ms Jimenez whether the classification of productivity in the raw data was accurate, again by reference to specific dates. A reasonable employer would have provided Ms Jimenez with access to documents such as her work diary to allow her to check whether she had been doing client work 'in person' on the days in question.

194. We conclude that it was not within the range of reasonable responses for Ms Jimenez to have been told by Mr Downing that she would have an opportunity to provide more information, and for this to have been withdrawn. It was also not within the range of reasonable responses to have failed to give Ms Jimenez the opportunity to comment on Mr Chadwick's analysis of the activity data and productivity which he gave Mr Downing in his discussion with him on 20 December 2017. Given the points raised by Ms Jimenez and her requests for further information, it was not within the range of reasonable responses to assume that there was an impact on productivity and reporting of time. A reasonable response would have been to adopt a procedure (as was initially proposed

by Mr Downing) whereby Ms Jimenez was given an opportunity to provide her explanation on these points.

195. We have concluded that the investigatory procedure which was adopted fell outside the range of reasonable responses.

196. This was not remedied by the appeal, as no further investigation was carried out as part of the appeal. Mrs Cadman noted the misunderstanding about next steps, but did not suggest that any further investigation was required.

197. When considering the fairness of the dismissal, we have also considered points 1-5 in the list of issues. We have concluded that the allegations at points 1 and 2 about procedural unfairness in the first disciplinary procedure are not relevant. We conclude that in reaching his decision to dismiss it was within the range of reasonable responses to note the first and final warning which Ms Jimenez had on file and to take that into account when deciding to dismiss. We have found that the previous warning was harsh, but within Brite Green's procedure and not manifestly inappropriate or unreasonable. The warning was issued in good faith and there were prima facie grounds for it. We did not find as Ms Jimenez's counsel suggested, that the first disciplinary procedure was the start of a process intended to control, bully and dismiss the claimant. There was nothing to suggest that the warning was issued for an oblique motive.

198. We do not consider the grievance procedure to have been procedurally unfair, or to be relevant to the fairness of the dismissal as suggested at point 3 of the list of issues.

199. Points 4 and 5 in the list of issues relate to the fairness of the second disciplinary procedure which we have considered in detail above. In light of our conclusion that the investigatory procedure which was adopted fell outside the range of reasonable responses, we conclude that the dismissal was unfair.

200. The claimant's complaint of unfair dismissal therefore succeeds.

201. We have gone on to consider whether Brite Green could have dismissed Ms Jimenez fairly if a proper investigation had been carried out. We conclude that given the extent of time spent on the internet/social media during work hours, and the time spent on the draft book chapter, Brite Green could have dismissed Ms Jimenez fairly on the basis of the first and third allegations even if the second and fourth allegations had been not proven after an investigation which fell within the range of reasonable responses.

202. We also conclude that, it is inevitable, whatever the outcome of an investigation within the range of reasonable responses, that Ms Jimenez would have been dismissed in any event, in the light of the damage to the working relationship and trust and confidence which had arisen as a result

of the other allegations. We conclude that the additional investigation required would have taken 4 weeks.

Time limit

203. The three month time limit for presenting a complaint of unfair dismissal in relation to an effective date of termination on 26 January 2018 would end on 25 April 2018. Ms Jimenez notified Acas for early conciliation on 30 January 2018 and the early conciliation certificate was issued 6 weeks later on 15 March 2018. This extends the deadline for presenting the complaint to 6 June 2018. Ms Jimenez presented her claim form on 9 May 2018, and the unfair dismissal complaint was therefore in time.

Contributory conduct

204. We have next considered section 122(2) and 123(6) of the Employment Rights Act, that is whether it is just and equitable to reduce the compensation awarded to the claimant because of her conduct.

205. The conduct which gives rise to possible contributory fault is the conduct of Ms Jimenez as set out in the four allegations of misconduct. In the light of our conclusions that the investigation fell outside the range of reasonable responses in respect of the productivity and misreporting issues, we have considered the first and third of those allegations, namely time spent on the draft book chapter in work time, and use of the internet/social media in breach of the IT policy.

206. We have concluded that these two aspects of Ms Jimenez's conduct, which took place before her dismissal and which the employer was aware of, were culpable and blameworthy. In respect of the book chapter, Ms Jimenez told Mr Chadwick that the work was nothing to do with her employer, but she had spent time on it during working hours on 5 days during a period of 12 working days. In respect of the internet/social media use during work time, we have found that extensive time during work hours was spent on this. Extensive personal use of Brite Green's laptop in work time was a clear breach of the IT policy.

207. Ms Jimenez's dismissal was caused or contributed to by this conduct, as it formed the basis of two of the four allegations of misconduct which were the employer's reasons for the dismissal.

208. We have concluded that it would be just and equitable having regard to those findings and conclusions to reduce the compensatory award under section 123(6) of the Employment Rights Act by 50%.

209. We also find that this conduct is such that it would be just and equitable to reduce the basic award under section 122(2) of the Employment Rights Act by 50%.

Unfair dismissal remedy

210. The claimant had three years' service. Her net weekly pay was £605.38. The statutory cap on a week's pay applies. At the date of the claimant's termination of employment, this was £508. The claimant's basic award before any reduction is £508 x 3 = £1,524.00.

211. We have concluded that a 50% reduction should be made under section 122(2). The basic award after reduction is £762.

212. We have found that the claimant could have been fairly dismissed after further investigation which would have taken 4 weeks and that dismissal at that point was inevitable. The claimant's net weekly pay was £605.38 plus pension loss of £7.00 per week. Four weeks' loss of pay and pension was £2,449.52. Loss of statutory rights claimed is £500, giving a total before reduction of £2,949.52.

213. We have concluded that a 50% reduction should be made under section 123(6). The compensatory award after reduction is £1,474.76.

214. This gives a total award in the unfair dismissal complaint of £2,236.76.

Unauthorised deductions

215. We have found that Ms Jimenez was suspended on 3 October 2017 and that she remained suspended after 9 October 2017 when unfit for work. Her suspension was not lifted; she was suspended until her employment ended on 26 January 2018.

216. During the period of her suspension Ms Jimenez did not receive full pay. We have found that there was a net deduction from her wages of £4,987.46.

217. Deductions were made in October 2017, November 2017, December 2017 and January 2018. This amounts to a series of unauthorised deductions which lasted until 26 January 2018. The three month time limit for presenting a claim in relation to a series of deductions ending on 26 January 2018 would end on 25 April 2018. Ms Jimenez notified Acas for early conciliation on 30 January 2018 and the early conciliation certificate was issued 6 weeks later on 15 March 2018. This extends the deadline for presenting the claim to 6 June 2018. Ms Jimenez presented her claim form on 9 May 2018 and this was in time in respect of the unauthorised deduction complaint.

218. Ms Jimenez is entitled to be paid £4,987.46 by Brite Green in respect of this series of deductions.

Victimisation

219. Ms Jimenez said that an oral grievance she made at the first disciplinary appeal hearing on 28 July 2017 was a protected act.

220. We have found that at the appeal hearing on 28 July 2017 Ms Jimenez said that the workplace had become hostile, the working relationship had broken down, and that she had a strong case for constructive dismissal. We have not found that she made an allegation (whether or not express) of a contravention of the Equality Act. A reference to a hostile workplace without any reference to a protected characteristic is not an allegation of a contravention of the Equality Act. There was no suggestion that Ms Jimenez had brought proceedings, given evidence or information or done anything else in connection with proceedings under the Equality Act such that her oral grievance would be a protected act.

221. We conclude that Ms Jimenez did not make a protected act on 28 July 2017.

222. In case we are wrong about that, we have also gone on to consider whether the detriments relied on by Ms Jimenez were because of the oral grievance she made on 28 July 2017. We have concluded that they were not.

223. The first alleged detriment (point 7 in the list of issues) was the covert monitoring of Ms Jimenez's computer. Although we have found that Mr Chadwick started monitoring Ms Jimenez's work laptop on 31 July 2017, three days after the disciplinary appeal, we have found that this was because of concerns about Ms Jimenez's productivity arose at the same time that she was being issued with a new laptop. We conclude that it was in no sense because of the oral grievance.

224. The second alleged detriment (point 8) is Mr Chadwick contacting Dr Wilkinson on 5 October 2017. While it might have been advisable for Mr Chadwick to have dealt with this differently, we have found that Mr Chadwick corresponded with Dr Wilkinson because he wanted to obtain information about the other work Ms Jimenez had been carrying out, and again, that it was in no sense because of the oral grievance Ms Jimenez made on 28 July 2017.

225. For these reasons, we have concluded that Ms Jimenez's complaint of victimisation does not succeed.

<u>Direct discrimination</u>

226. Ms Jimenez complains of eight acts of direct discrimination which are said to be less favourable treatment because of sex and/or race. These are points 9 to 16 of the list of issues. As to whether each of these acts happened, our findings of fact were as follows.

    9. *During the period June to October 2017, the second respondent began strictly enforcing the claimant's working hours of 9am to 6:30pm. He did not do the same with the claimant's male colleague Mr Drane.*

227. We have found that on 4 July 2017 Mr Chadwick did ask Ms Jimenez to work her full contractual hours of 9am to 6.30pm in the office for the rest of that week and the following week and that he said that this would be a permanent arrangement.

10. During the period June to October 2017, the second respondent closely monitored the claimant's lunch hour. The second respondent never did the same with Mr Drane.

228. We have found that Ms Jimenez joined a gym near the office and was able to go to the gym in her lunch hour. The lunch hour was not working time. Mr Drane had driving lessons in his lunch hour, he had discussed and agreed this with Mr Chadwick. We do not find that Mr Chadwick monitored Ms Jimenez's lunch hours more closely than Mr Drane's.

11. During the period June to October 2017, the second respondent would ignore the claimant by not responding to the claimant's 'Good Morning'. He did not behave in the same way with MD.

229. We have found that Mr Chadwick wore headphones in the office, and that he apologised to Ms Jimenez for not replying to her.

12. During the period June to October 2017, the second respondent treated MD differently by asking how his weekends were and saying little if anything to the claimant.

230. We have not found that Mr Chadwick treated Mr Drane differently by asking how his weekends were and saying little if anything to Ms Jimenez.

13. During the period June to October 2017, the second respondent requested 'project meetings' with the claimant where he criticised her. He did not do the same with MD.

231. We have found that Mr Chadwick had project meetings with Ms Jimenez on 8 August 2017 and 3 October 2017 and that he raised performance concerns with her at these meetings.

14. On 5 July 2017 the second respondent restricted the claimant's ability to schedule doctor's appointments. A similar restriction was not imposed MD.

232. We have found that Mr Chadwick did not prevent or restrict Ms Jimenez's arrangements for attending doctors' appointments, rather he asked her to arrange them outside work time where possible.

15. At a meeting with the claimant on 8 August 2017, the second respondent made discriminatory comments to her by saying she had a 'mañana attitude' and could not understand English. The second respondent also used offensive language to berate the claimant. He did not speak in this way to MD.

233. We have found that at the meeting on 8 August 2017, Mr Chadwick described Ms Jimenez's solution to a delay with client work as "Mañana, it'll happen" that he said "If time's an issue there's no language problems or there's no comprehension problems" and that towards the end of the meeting Mr Chadwick used offensive language, referring to 'the scale of fuck up from not doing your job properly' and having to be 'up to 2am covering your arse'.

    16. On 21 September 2017, the second respondent deliberately failed or refused to respond to the claimant's emails about her work. He did not behave in this way to MD.

234. We did not find that there was any deliberate failure or refusal to respond to the claimant's emails during September 2017.

235. In summary, we have found that the incidents referred to at points 9, 11, 13, 14 and 15 did take place. We next considered whether, in respect of those incidents, there is evidence from which we could conclude that any less favourable treatment was because of Ms Jimenez's sex and/or race. If there is, the burden of proof on these complaints will shift to the respondent.

236. We have concluded that there is no evidence from which we could conclude that these are acts of sex discrimination. Ms Jimenez compares her treatment with that afforded to Mr Drane who is male. Something more than a difference in treatment and a difference in sex is required. There is nothing more from which we could make a finding of sex discrimination. On the direct sex discrimination complaint, we find that the burden of proof does not shift to the respondents. The complaint of direct sex discrimination therefore fails.

237. In respect of the complaints of direct discrimination because of race, we have concluded that there is evidence from which we could conclude that these are acts of race discrimination. Ms Jimenez describes herself as Latin American. Race for the purposes of the Equality Act includes ethnic origin. Mr Chadwick's use of the word 'mañana' to refer to putting something off to the next day may be connected with Ms Jimenez's ethnic origin; it might indicate an assumption or prejudiced view about the work ethic of someone of Latin American background. We have therefore concluded that in respect of the complaints of direct race discrimination, the burden of proof shifts to the respondents. This means the respondent must provide cogent evidence of a non-discriminatory reason for the treatment. We need to be satisfied in respect of each of the incidents at points 9, 11, 13, 14 and 15 of the list of issues that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

238. Our conclusions are as follows:

238.1. Point 9: In relation to the request that Ms Jimenez should work her contractual hours in the office, we are satisfied that this was in no sense whatsoever because of Ms Jimenez's race. We accept the evidence of Mr Chadwick that he made this request to ensure that Mr Drane would be supported and supervised and would not be left in the office on his own, and also because he felt that issues with communication arising from Ms Jimenez working from home had contributed to issues with her performance. We have found that the respondents' concerns about Ms Jimenez's performance at this time were reasonable and based on reasonable grounds.

238.2. Point 11: In relation to Mr Chadwick not replying to Ms Jimenez saying good morning, we are satisfied that this was in no sense whatsoever on the grounds of Ms Jimenez's race. We accept the evidence of Mr Chadwick that he wore headphones, and that he apologised for this.

238.3. Point 13: In relation to the project meetings which Mr Chadwick held with Ms Jimenez, we accept that these meetings were for Mr Chadwick to seek an update on Ms Jimenez's work in the light of the previous underperformance concerns, including issues with deadlines. We have found that those concerns were genuine and that there were grounds for them. We conclude that the project meetings were in no sense whatsoever because of Ms Jimenez's race;

238.4. Point 14: We have found that Mr Chadwick did not restrict Ms Jimenez from attending doctors' appointments, rather he asked her to arrange them outside work time where possible. To the extent that this amounted to restriction on Ms Jimenez's ability to schedule appointments during working hours, we accept that this request was made by Mr Chadwick in response to Ms Jimenez notifying him of a doctor's appointment in the middle of the working day, and was not in any sense because of her race;

238.5. Point 15(1): Point 15 contains three allegations that comments made at the meeting on 8 August 2017 amounted to direct discrimination on grounds of race. In relation to the use of the word 'mañana' we do not accept the evidence of Mr Chadwick that this was just a reference to her attitude as it came across in an email. We conclude that it was a comment which was related to her race or ethnic origin and which would not have been made in this context to an employee who was not Latin American. It was less favourable treatment because it had negative connotations about the work ethic of someone of Latin American background.

238.6. Point 15(2): We accept that the reference to language and comprehension issues was not related to Ms Jimenez's race or ethnic origin. We accept that it was a question put in the context of a discussion about proof-reading issues, and that Mr Chadwick was trying to find out whether there was any reason why Ms Jimenez might have had problems with this. We accept

that there are many reasons why there may be language or comprehension problems, including dyslexia or other disability.

238.7. Point 15(3): We accept that the offensive language used by Mr Chadwick towards the end of the meeting was not related to Ms Jimenez's race or ethnic origin.

239. We have therefore concluded that the use of the word mañana by Mr Chadwick in the meeting on 8 August 2017 was less favourable treatment because of Ms Jimenez's race or ethnic origin. We return below to the question of whether this complaint was made within the time limit.

240. In respect of the other allegations of direct race discrimination, the complaints do not succeed.

Harassment

241. Ms Jimenez complains of eight acts of harassment which are said to be related to sex and/or race. These are points 17 to 22 of the list of issues. As to whether each of these acts happened, our findings of fact were as follows.

17. From 8 May 2017 until the claimant left employment at the first respondent, the second respondent and the claimant barely spoke. The second respondent only spoke to the claimant to criticise her work. The second respondent created a hostile environment.

242. We have not found that Mr Chadwick barely spoke to Ms Jimenez during the period from 8 May 2017 to when she left her employment on 26 January 2018.

18. During the period June to October 2017, the second respondent removed the claimant's benefit being able to work from home on Tuesdays.

243. We have found that on 4 July 2017 Mr Chadwick did ask Ms Jimenez to work her full contractual hours of 9am to 6.30pm in the office for the rest of that week and the following week and that he said that this would be a permanent arrangement.

19. During the period June to October 2017, the second respondent undermined the claimant in the presence of Mr Drane, who she line managed.

244. We have not found that Mr Chadwick undermined Ms Jimenez in the presence of Mr Drane.

20. During the period June to October 2017, the second respondent began to call MD instead of the claimant to discuss daily work. Previously the second respondent had called the claimant (as she was MD's line manager).

245. We have not found that Mr Chadwick called Mr Drane instead of Ms Jimenez to discuss daily work.

21. On 3 July 2017 the second respondent and the claimant drove to visit a client. The second respondent did not speak to the claimant.

246. We have not found that this incident took place.

22. In August 2017, the second respondent deliberately failed to respond to the claimant's request for an employer reference for the renewal of her flat.

247. We have not found that Mr Chadwick deliberately failed to respond to Ms Jimenez's request for an employer reference for the renewal of her tenancy. We have found that once he became aware of the request, he provided the reference on the same day.

248. In summary, we have found that only the incident at point 18 did take place as alleged. For the reasons set out above in relation to direct discrimination, we conclude that the burden of proof shifts to the respondents to show that this incident was not harassment related to race (but that the burden does not shift in relation to harassment related to sex, because there is nothing from which we could conclude that any harassment was related to sex).

249. In relation to point 18, the request that Ms Jimenez should work in the office and not from home, we are satisfied that this was in no sense whatsoever because of Ms Jimenez's race. We accept the evidence of Mr Chadwick that he made this request to ensure that Mr Drane would be supported and supervised and would not be left in the office on his own, and also because he felt that issues with communication arising from Ms Jimenez working from home had contributed to issues with her performance. We conclude that the respondents have provided cogent evidence that the request was for management and performance reasons and these were not related to race.

250. Having considered each of the acts complained of individually, we stepped back and considered the treatment of Ms Jimenez by the respondents in the round, particularly bearing in mind our finding on the comment at point 15 of the list of issues. We decided that, considered as a whole, other than that comment, we could not properly and fairly conclude that any of the incidents that we have found occurred were because of or related to Ms Jimenez's race or sex.

<u>Summary of conclusions on discrimination claims</u>

251. In summary, we find that Mr Chadwick's use of the word mañana to Ms Jimenez during the meeting on 8 August 2017 was less favourable treatment because of her Latin American origin. We do not find that any of

the other incidents amounted to victimisation, direct sex or race discrimination, or harassment.

Time limit

252. We have considered whether the claim in relation to the comment on 8 August 2017 was submitted in time. As it was the only act that we have found to be discrimination, it was not part of a series of acts. The three month period expired on 7 November 2017. Ms Jimenez notified Acas for early conciliation on 30 January 2018, after the expiry of the time limit. There is no extension of time in respect of an early conciliation period which starts after the time limit has already expired, because the early conciliation period does not then fall within the three month period in order to 'not be counted'. Ms Jimenez presented her ET1 on 9 May 2018. The complaint has been presented out of time.

253. We have considered whether it is just and equitable to allow this complaint out of time.

254. We bear in mind that the meeting at which the comment was made was recorded, so the cogency of the evidence was not significantly affected by the delay and the respondents have not suffered any prejudice in this regard.

255. However, even taking this into account, we have concluded that it is not just and equitable to extend time, for the following reasons.

    255.1. The deadline expired on 7 November 2017 and the claim was presented on 9 May 2018. The length of the delay is six months, which is a very significant delay in respect of a complaint where the time limit is three months.
    255.2. Ms Jimenez knew of the comment at the time it was made, this was not a case in which she discovered discriminatory treatment after it occurred.
    255.3. Ms Jimenez had been taking advice from a solicitor since before 28 July 2017 (she says in her witness statement she took advice on the disciplinary appeal which was held on that date). She was formally represented by solicitors from at least 12 October 2017 (they wrote to the respondents on that date).
    255.4. Ms Jimenez made a formal grievance on 13 October 2017 which included a complaint that this comment was discriminatory. The grievance and appeal were concluded on 4 December 2017, but Ms Jimenez did not present her claim until 5 months after that. The notification to Acas for early conciliation was not made until almost 3 months after the expiry of the time limit in respect of this complaint.
    255.5. Ms Jimenez did not give us any explanation for the delay in presenting the claim.

256. For these reasons, the complaints of victimisation, direct sex and race discrimination, and harassment against the first and second respondent fail and are dismissed.

Summary of award to claimant

257. In respect of the successful complaints of unfair dismissal and unauthorised deduction from wages, the claimant is awarded:

Unfair dismissal		
Basic Award:	£762.00	
Compensatory Award:	£1,474.76	
Total unfair dismissal award		£2,236.76
Unauthorised deduction from wages		£4,987.46
Total award to the claimant		£7,224.22

258. The employment judge apologises to the parties for the delay in sending this reserved judgment to the parties. The judgment took longer in part because of the amount of documentation and the number of issues involved.

Employment Judge Hawksworth
Dated: 22 January 2020

Judgment and Reasons
03 February 2020
Sent to the parties on: .....

.....
For the Tribunal Office

Public access to employment tribunal decisions:
All 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.