Case numbers: 2200540/2019V
2200546/2019V

EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANTS		**RESPONDENTS**
MR C BAYFIELD **MR C JENNER**	**V**	**WUNDERMAN THOMPSON (UK) LIMITED (1)** **MR L PEON (2)** **MS E HOYLE (3)**

HELD AT: LONDON CENTRAL ON: 8-12, 15-19 & 22-26 FEBRUARY 2021

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS S CAMPBELL
MS L JONES

REPRESENTATION:
For the claimant: Mr N Roberts (Counsel)
For the respondents: Mr R Leiper QC (Counsel)

JUDGMENT

The claims of both claimants against the 1st respondent - dismissal:

1. The claims of direct sex discrimination succeed.
2. The claims of direct age discrimination fail and are dismissed.
3. The claims of direct sexual orientation discrimination fail and are dismissed.
4. The claims of direct race discrimination fail and are dismissed.
5. The claims of victimisation succeed.
6. The claims of harassment fail and are dismissed.
7. The claims of automatic unfair dismissal on grounds of making protected disclosures fail and are dismissed.
8. The claims of unfair dismissal succeed.

The claims of both claimants against the 1st respondent – detriment during employment:

9. The claims of direct sex discrimination succeed in part.
10. The claims of direct age discrimination fail and are dismissed.
11. The claims of direct sexual orientation discrimination fail and are dismissed.
12. The claims of direct race discrimination fail and are dismissed.
13. The claims of victimisation succeed in part.
14. The claims of harassment succeed in part.
15. The claims that the claimants made protected disclosures and were subject to detriment fail and are dismissed.

The claims of both claimants against the 2nd respondent:

16. All claims fail and are dismissed.

The claims of both claimants against the 3rd respondent:

17. All claims fail and are dismissed.

REASONS

1. On 18 and 21 May 2018 the claimants complained about a presentation given by two of the 1st respondent's employees, one of whom was the 2nd respondent. They say that their complaints amount to an Equality Act 2010 (EqA 2010) protected act and an Employment Rights Act 1996 (ERA 1996) public interest disclosure; that thereafter they were subjected to unlawful detriments, discrimination on grounds of their race, age, sex and sexuality, they were harassed and victimised, that their dismissals thereafter were automatically unfair, discriminatory, amounted to victimisation, and harassment.

2. The respondents deny all allegations, saying that the claimants were fairly selected for redundancy for foreseeable reasons following a fair procedure in an ongoing redundancy process, which was required because of loss of business and revenue.

The Issues

Public interest disclosure / protected acts

3. The Claimants contend that the following were protected disclosures alternatively protected acts:

    a. Mr Bayfield:
        i. Email to Ms Bruges on 18 May 2018
        ii. Oral disclosures to Mr Peon & Ms Hoyle on 21 May 2018, in which he alleges that he complained about the discriminatory nature of the comment in the Presentation
    b. Mr Jenner:
        i. Email to Mr Peon & Ms Hoyle on 21 May 2018
        ii. Oral disclosures to Mr Peon & Ms Hoyle on 21 May 2018, in which he alleges that he complained about the discriminatory nature of the comment in the Presentation

    c. Did the alleged protected disclosures involve the disclosure of information?

    d. If so, was the disclosure of information in the public interest?

    e. If so, did the disclosure of information tend to show (in each Claimant's reasonable belief) that JWT had failed, was failing or was likely to fair to comply with any legal obligation to which it was subject (by showing an intention to discriminate against employees on the basis of protected characteristics)?

    f. Did the communications amount to a protected act: were the Claimants doing something in connection with the Equality Act 2010?

Reason for dismissal

4. What was the reason for the Claimants' dismissal?

    a. The Respondent contends that the Claimants were dismissed by reason of redundancy (alternatively, for some other substantial reason) (ERA s98(1)(b), (2)(c)).

    b. The Claimants contend that the reason or principal reason for their dismissal was that they had made a protected disclosure (contrary to ERA s 103A).

c. Alternatively, the Claimants contend that, by dismissing them, JWT harassed them - this was unwanted conduct related to their sex and/or race and/or sexual orientation and/or age (contrary to EqA s 40(1)(a) read with ss 4 & 26).

d. Alternatively, the Claimants contend that, by dismissing them, JWT directly discriminated against them on grounds of their sex and/or race and/or sexual orientation and/or age (contrary to EqA s 39(2)(c) read with ss 4 & 13).

e. Alternatively, the Claimants contend that, by dismissing them, JWT victimised them (contrary to EqA s 39(4)(c) read with s 27).

Unfair dismissal

5. If the Claimants were dismissed by reason of redundancy (or for some other substantial reason) was their dismissal fair or unfair in all the circumstances (by reference to ERA s 98(4)). The Respondent contends that it was fair; the Claimants contend that it was unfair, raising the following issues:

a. Did the Respondent consider or properly consider alternatives to making redundancies, such as calling for voluntary redundancies or reduced hours or terminating the engagements of freelances?

b. Did the Respondent adopt redundancy selection criteria that were inappropriately subjective?

c. As to the pool:

i. Did the Respondent inappropriately include freelance Creative Directors (Mike Watson & Chermine Assadian) in the Creative Directors' pool?
ii. Did the Respondent inappropriately exclude Jacqui Stecher from the Creative Directors' pool?

d. Did the Respondent fairly and properly score the Claimants in the redundancy process?

i. Did the people who conducted the scoring have the knowledge of the Claimants' work to fairly assess them against the criteria?
ii. Were the comments made by those people in purported justification for the scores true?
iii. Was the scoring exercise genuine?

e. Did the Respondent make any or sufficient attempts to redeploy the Claimants?

f. Did the Respondent consider and determine the Claimants' appeals against dismissal in a fair and proper manner?

Harassment

6. Did the Respondents harass the Claimants by engaging in unwanted conduct that was related to the Claimants' sex and/or race and/or sexual orientation and/or age, with the purpose or effect of:
    a. Violating the Claimants' dignity, or

    b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimants,
    (contrary to EqA s 40(1)(a) read with s 26(1)).

    c. For these purposes, as against the First Respondent the Claimants rely upon the following:

        i. The matters set out under issue 5 above;
        ii. Their dismissals (see Issue 4(c) above);
        iii. They allege that they were angrily accused (in the course of meeting on 21 May 2018) by the Third Respondent of being against equal opportunities and diversity;
        iv. JWT's failure to provide the Claimants with copies of witness statements/interview notes, emails, documentation and information supplied by Celia Berk (Chief Employee Experience Officer), who was investigating their grievances;
        v. JWT's failure to provide the Claimants with a copy of the Taylor report prior to Tony Taylor (European Regional Director) issuing his grievance decision letter;
        vi. JWT's refusal to grant an extension of time in which to issue an appeal against the grievance decision;
        vii. Fixing a date for a further redundancy consultation period during the period in which a grievance appeal was to be issued;
        viii. Failing to invite the Claimants to a grievance meeting with Mr Taylor to discuss and explain their grievances before Mr Taylor determined those grievances;
        ix. Failing to carry out a fair and proper investigation, consideration and determination of the Claimants' grievances;
        x. Failing to carry out a fair and proper investigation, consideration and determination of the Claimants' appeals against the grievance decision;
        xi. Holding the Claimants to their notice periods.

    d. For these purposes, as against the Second Respondent the Claimants rely upon the following:

        i. The matters set out under issue 5 above;
        ii. Their dismissals.

    e. For these purposes, as against the Third Respondent the Claimants rely upon the matters set out in sub-paragraphs 6(c)(iii) to 6(c)(vii) above.

Direct discrimination

7. In the alternative to Issue 6, were the Claimants treated less favourably because of their sex and/or race and/or sexual orientation and/or age (contrary to EqA s 39(2)(c) & (d) read with s 13(1))?

    a. The Claimants rely upon the same matters as against the same Respondents as under Issue 6 as less favourable treatment.

    b. For these purposes, the Claimants rely upon hypothetical comparators.

Victimisation

8. In the further alternative to Issues 6 and 7, were the Claimants subjected to detriments by reason of having done a protected act (see Issue 3) (contrary to EqA s 39(4)(d) read with s 27(1))?

    a. As detriments, the Claimants rely upon the same matters against the same Respondents as under Issue 6

Protected disclosure detriments

9. In the further alternative to Issues 6, 7 and 8, were the Claimants subject to detriments on the ground that they had made a protected disclosure (see Issues 1-4) (contrary to ERA s 47B(1))?

    a. As detriments, the Claimants rely upon the same matters against the same Respondents as under Issue 6 (save that their dismissals are not relied upon).

Jurisdiction

10. To the extent that the Claimants' claims may be well-founded, does the Tribunal have jurisdiction to consider them?

    a. In relation to the claims against each Respondent under the EqA, under EqA s 123(1), (3)?

    b. In relation to the claims against each Respondent for protected act detriments, under ERA s 48(3)?

The respondents say

Mr Bayfield: all claims prior to 5 June 2018 (1st respondent) and 22 September 2018 (2nd & 3rd respondents) are out of time
Mr Jenner: all claims prior to 27 May 2018 (1st respondent) and 22 September 2018 (2nd & 3rd respondents) are out of time.

The Law

11. Equality Act 2010

s.4 The protected characteristics

The following characteristics are protected characteristics [relevant to this claim] —

- age
- race
- sex
- sexual orientation

s.5 Age

(1) In relation to the protected characteristic of age-

a. a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group

b. a reference to persons who share a protected characteristic is a reference to persons of the same age group.

(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

s.9 Race

(1) Race includes—
a. …
b. nationality;
c. ethnic or national origins.

(2) In relation to the protected characteristic of race—
a. a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
b. a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

s.11 Sex

In relation to the protected characteristic of sex—

a. a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
b. a reference to persons who share a protected characteristic is a reference to persons of the same sex.

s.12 Sexual orientation

(1) Sexual orientation means a person's sexual orientation towards-

a. persons of the same sex,
b. persons of the opposite sex, or
c. persons of either sex.

(2) In relation to the protected characteristic of sexual orientation—

a. a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;
b. a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation.

s.13 Direct discrimination

(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.

s.23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

s. 24 Irrelevance of alleged discriminator's characteristics

(1) For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic.
(2) For the purpose of establishing a contravention of this Act by virtue of section 14(1), it does not matter—

a. whether A has one of the protected characteristics in the combination;
b. whether A has both.

s.26 Harassment

(1) A person (A) harasses another (B) if—

a. A engages in unwanted conduct related to a relevant protected characteristic, and
b. the conduct has the purpose or effect of—

i. violating B's dignity, or
ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(2) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

i. the perception of B;
ii. the other circumstances of the case;
iii. whether it is reasonable for the conduct to have that effect.

s.27 Victimisation

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

a. B does a protected act, or
b. A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

a. …
b. doing any other thing for the purposes of or in connection with this Act;
c. making an allegation (whether or not express) that A or another person has contravened this Act.

s.136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

12. <u>Employment Rights Act 1996 – Pt.IVA Protected Disclosures & Pt.V Detriment</u>

s.43A Meaning of “protected disclosure”.

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

s.43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

a. that a criminal offence has been committed, is being committed or is likely to be committed,
b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
c. that a miscarriage of justice has occurred, is occurring or is likely to occur
d. …
e. …
f. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory

(3) …

(4) …

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

s.43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –
a. to his employer
b. …

s.47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done

a. by another worker of W's employer in the course of that other worker's employment, or

b. …

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

a. from doing that thing, or

b. from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

a. the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

b. it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

13. Employment Rights Act 1996 – Pt X Dismissal

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and

b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

a. …
b. …
c. is that the employee was redundant…

(3) ….
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
b. shall be determined in accordance with equity and the substantial merits of the issue

s.103A Protected disclosure.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Relevant case law

14. We read the cases referenced in the parties closing submissions which were included in a joint authorities bundle of over 500 pages. We also had regard to the following case law.

15. Direct Discrimination

a. Have the claimants been treated less favourably than a comparator would have been treated on the ground of a protected characteristic? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the protected characteristic. Importantly, it is not possible to infer discrimination merely because the employer has acted unreasonably. (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainants and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator does not have that protected characteristic (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimants were treated as they were (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142).*

d. *Chondol v Liverpool CC UKEAT/0298/08* - *"*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*"*

e. Law Society v Bhal[2003] IRLR 640 - the fundamental question is why the discriminatory acted as he did. Were the claimants (in this case) treated the way they were because of their age, their sex, their sexual orientation, their race? It is enough that a protected characteristic had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [the protected characteristic]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL.* "What, out of the whole complex of facts … is the effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

f. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

   i. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

   ii. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

   iii. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted

the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

iv. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of protected characteristic of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

v. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

vi. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

vii. As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

g. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

16. Harassment

a. Harassment involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating,

hostile, degrading, humiliating or offensive atmosphere for the complainant or violating the complainant's dignity.

b. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

c. *Richmond Pharmacology v Dhaliwal [2009] IRLR 336:* 'harassment' is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him/her; (c) on the prohibited grounds. It would normally be a 'healthy discipline' for tribunals to address each factor separately and ensure that factual findings are made on each of them. It must be reasonable that the conduct had the proscribed effect. While there is a subjective element ('… having regard to … *the perception of that other person* …') there is no harassment if there is an unreasonable proneness to take offence. "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

d. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the

employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

e. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

f. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

g. Prohibited grounds: it may be necessary to consider the employer's mental processes to determine whether the conduct was on the prohibited grounds. *Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] EqLR 142*: when considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it is relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation, at the second stage, once the burden of proof has passed.

h. The conduct must be 'related to' a relevant protected characteristic. *Brumfitt v Ministry of Defence [2005] IRLR 4, EAT* (a decision under the old wording, on grounds of, in the SDA 1975) the need for comparative disadvantage defeated a claim which was made by a woman who complained of offensive language delivered to her as a member of a mixed-sex audience. There was no doubt that she had been exposed to language that she found offensive, but she had not been exposed to this because she was a woman.

i. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

j. No justification for harassment is possible and no comparator is needed; that said, conduct shall be regarded as having the required effect only if, having regard to all the circumstances, including in particular the perception of the victim, it should reasonably be considered as having that effect. In other words, the fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

k. *Pemberton v Inwood [2018] EWCA Civ 564*, *[2018] IRLR 542* ''In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

l. *Whitley v Thompson EAT/1167/97:* (i) A characteristic of harassment is that it undermines the victim's dignity at work and constitutes a detriment on the grounds of sex; lack of intent is not a defence. (ii) The words or conduct must be unwelcome to the victim and it is for her to decide what is acceptable or offensive. The question is not what (objectively) the tribunal would or would not find offensive. (iii) The tribunal should not carve up a course of conduct into individual incidents and measure the detriment from each; once unwelcome sexual interest has been displayed, the victim may be bothered by further incidents which, in a different context, would appear unobjectionable. (iv) In deciding whether something is unwelcome, there can be difficult factual questions for a tribunal; some conduct (e.g. sexual touching) may be so clearly unwanted that the woman does not have to object to it expressly in advance. At the other end of the scale is conduct which normally a person would be unduly sensitive to object to, but because it is for the individual to set the parameters, the question becomes whether that individual has made it clear that she finds that conduct unacceptable. Provided that that objection would be clear to a reasonable person, any repetition will generally constitute harassment."

m. *Timothy James Consulting Ltd v Wilton [2015] IRLR 368, EAT* - held that a constructive dismissal could not constitute an act of harassment as a matter of law. Cf: *Urso v Department for Work and Pensions [2017] IRLR 304, EAT*, - held that a direct dismissal was distinguishable from a constructive dismissal, which could be an affront to the employee's

dignity and, as a matter of statutory interpretation, could qualify as something done 'in relation to employment.

n. *Driskel v Peninsula Business Services Ltd[2000] IRLR 151*, which concerned the approach to be taken by employment tribunals, in determining whether alleged harassment constituted discrimination on grounds of sex. In *Driskel* the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

o. *UNITE the Union v Nailard [2018] EWCA Civ 1203*, *[2018] IRLR 730*. The Court of Appeal said that the ET had gone too far in arguing that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex 'because of the background of harassment related to sex'. While the union could be vicariously liable for acts of discrimination by its employees, there would need to be a finding that the employees in question were themselves guilty of discrimination.

p. *'Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported)*. The claimant had Asperger's syndrome which was accepted as a disability. When dismissed for underperformance, she brought proceedings for disability discrimination, complaining (amongst other things) of harassment based on comments by two managers in discussions about her work. The first manager had drawn a distinction between commenting on her tenacity (related to her condition) and rudeness/abruptness (which he attributed to her character not her disability). The second manager had drawn a distinction between commenting on her communication problem and her intelligence/ability to understand a spreadsheet. The employment tribunal held these comments did not amount to harassment because that had not been the intent of the managers, who were not, in effect, aiming them at her condition. The EAT held that this was the wrong approach; the matter had to be reconsidered to see if the overall effect was unwanted conduct related to her disability.

q. *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*, a case in which a woman of British Asian origin complained that a remark by a psychiatrist that a young man in his clinic 'should join ISIS, that'll sort him out' was not found to be related to race. The ET had accepted it was racial harassment because of a 'perception that ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular in such areas as Pakistan, Afghanistan and Iran'. However, setting aside this finding the EAT held that an ET needs to 'articulate distinctly, and with sufficient clarity, what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged'. Here, there was no evidence to justify the

finding that ISIS was related to Asian or South Asian people and it was not a matter of which judicial notice could properly be taken.

17. Victimisation

a. *Aziz v Trinity Street Taxis Ltd [1988] IRLR 204*, (under the RRA 1976 'by refence to' wording as opposed to the EqA 'in connection with'): A wide interpretation is allowed – in this case making a tape recording of conversations. An act could properly be said to be done 'by reference to the Act' if it was done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act.

b. *National Probation Service for England and Wales (Cumbria Area) v Kirby [2006] IRLR 508*: a manager interviewed as a witness in a complaint of race discrimination said she had not seen any issues of race. Held - the giving of information in connection with a complaint of race discrimination raised in internal grievance procedures was the doing of something by reference to the Act in relation to another person.

c. *Waters v Metropolitan Police Comr [1997] IRLR 589* – CA 'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in [SDA 4(1)(d)]. All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of [s 6(2)(b) SDA].'

d. *Durrani v London Borough of Ealing UKEAT/0454/2012* – "I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies."

e. Chalmers v Airpoint Ltd *UKEATS/0031/19* – an email stating "I do not find you approachable of late. Your manner is aggressive and unhelpful… my work is mostly ignored and I have been excluded from both the Christmas night out and the hardware refresh … both of which may be discriminatory": EAT held that in determining that this was not a protected act, it was open for the Tribunal to conclude that the reference to "may" and the absence of "sex" plus other facts such as the claimant's HR knowledge, a finding which was plainly open to the Tribunal.

f. Reason for the treatment: The detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the existence of the protected act, and the 'detriment' have been established, in examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to show that the doing of the protected act was the legal cause of the

victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy*) *[2012] EWCA Civ 1578:* 'the real reason, the core reason, for the treatment must be identified'

g. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

h. Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such - *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

i. The burden of proof: *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act…'

j. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

18. Public Interest Disclosure

a. *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT* it is not sufficient that the claimant has simply made *allegations* about the wrongdoer: "… the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information."

b. *Smith v London Metropolitan University [2011] IRLR 884, EAT:* the raising of grievances about the claimant's workload is not a 'disclosure'.

c. *Western Union Payment Services UK Ltd v Anastasiou* UKEAT/0135/13*:* - applying *Cavendish* distinction between information on the one hand and the making of an allegation or statement of position on the other: 'the distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information, and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact-sensitive.'

d. *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, [2018] IRLR 846. Per Cavandish, what it decided was that whatever is claimed to be a protected disclosure must contain *"sufficient factual content and specificity"* to qualify under the ERA 1996 s 43B(1). The position is that in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (*Cavendish*), a disclosure may contain sufficient information even if it also includes allegations. Moreover, the very term 'information' must grammatically be construed within the overall phraseology which continues 'which tends to show …'. Ultimately, this will be a question of fact for the ET, which must take into account the context and background.

e. *Darnton v University of Surrey* [2003] IRLR 133, *EAT*. The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

f. *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979, [2017] IRLR 837, *[2017] ICR 731*: In a case of mixed interests (personal contractual and public), it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation. ''The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion … In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case…" The CA adopted as a "useful tool" the following submission: (a) the numbers

in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest. Additionally, 3 points of guidance: (1) the very term 'public interest' is deliberately not defined by Parliament, leaving it to be applied by tribunals; (2) the mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing - 'the necessary belief is simply that the disclosure was in the public interest' and 'the particular reasons why the worker believes it be so are not of the essence'. (3) the necessary reasonable belief in that public interest may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure (though as an evidential matter, the longer any temporal gap, the more difficult it may be to show the reasonable belief).

g. *Parsons v Airplus International Ltd UKEAT/0111/17 (13 October 2017, unreported)*the EAT pointed out that the determination that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest does *not* prevent a tribunal from finding on the facts that it was actually only one of them. Thus, where the claimant made a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a disciplinary dispute with the employer which eventually led to her dismissal for other reasons, the tribunal was held entitled to rule that they were made *only* in her own self-interest and so her claim of whistleblowing dismissal was rejected. The judgment of the EAT makes two subsidiary points of interest in a case such as this: (1) the fact that in these circumstances a claimant *could* have believed in a public interest element is not relevant; and (2) a case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination.

h. *Bolton School v Evans [2006] IRLR 500, EAT* : ''It is true that the claimant did not in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise *to a potential legal liability.*' (emphasis added)'

i. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT*, Judge Serota said that, outside that category, 'the source of the obligation should be identified and capable of certification by reference for example to statute or regulation'.

j. *Arjomand-Sissan v East Sussex Healthcare NHS TrustUKEAT/0122/17 (17 April 2019, unreported)* where Soole J held that it depends on the stage of the complaint/action that is involved.

k. *Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06 (3 May 2006, unreported)* "As to any of the alleged failures, the burden of the proof is upon the Claimant to establish upon the balance of probabilities any of the following: (a) there was in fact and as a matter of law, a legal obligation (or other relevant obligation) on the employer (or other relevant person) in each of the circumstances relied on. (b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

l. *Babula v Waltham Forest College [2007] EWCA Civ 174*, *[2007] IRLR 346*, "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

m. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT* "a. Each disclosure should be separately identified by reference to date and content. b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified. c. The basis upon which each disclosure is said to be protected and qualifying should be addressed. d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not

be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures. e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, … whether it was made in the public interest. f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act. g. The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

n. *Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73*, *[2020] IRLR 374*. "In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. *There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. The employer stated that *all* the claimant surgeon's allegations against the hospital had been dismissed by the relevant professional bodies, whereas in fact some had not been. The Court of Appeal held that this sort of half-truth is capable of qualifying as a detriment; but the motivation of the employer was to defend the hospital and had not been because of the whistleblowing: "In short, the Trust's objective was, so far as possible, to nullify the adverse, potentially damaging and, in part at least, misleading information which the appellant had chosen to put in the public domain. This both explained the need to send the letters and the form in which they were cast. The Trust was concerned with damage limitation; in so far as the appellant was adversely affected as a consequence, it was not because he was in the direct line of fire.

o. T*imis v Osipov [2018] EWCA Civ 2321*: "(1) It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal. (2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply."

p. *Harrow London Borough v Knight[2003] IRLR 140, EAT: The* act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial

19. Whistleblowing dismissal

a. *Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT*, where a tribunal had found automatically unfair dismissal under s 103A because it was satisfied that the whistleblowing had been 'on the Respondent's mind' when dismissing, the EAT held that it had applied the wrong test (i.e. the s 47B test) and allowed the employer's appeal.

b. *El-Megrisi v Azad University (IR) in Oxford UKEAT/0448/08* - held that where an employee alleges that she has been dismissed because she made multiple public interest disclosures, s 103A does not require a tribunal to consider each such disclosure separately and in isolation, as their cumulative impact can constitute the principal reason for the dismissal. This is so even where (as in *El-Megrisi*) some of the disclosures have taken place more than three months before the claimant's dismissal. Where a tribunal finds that they operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal.

c. *Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401*: It is necessary in the context of section 103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. I accept that the first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if [counsel for the hospital] were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the

employer itself believed that the disclosures for which the claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all…. In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal."

d. *Royal Mail Group v Jhuti* [2019] UKSC 55, [2020] IRLR 129. "In the present case, however, the reason for the dismissal given in good faith by [the decision-maker] turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here … Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

20. Unfair dismissal – redundancy

a. *Capita Hartshead Ltd v Byard* [2012] IRLR 814: A pool of one, in which actuaries have personal clients, and her client list had decreased, dismissal was unfair because there were other actuaries doing similar work, there had been no criticisms of her ability and the risk of losing clients if their actuaries had to be rearranged was 'slight'. EAT held that (a) the tribunal does have the power and right to consider the *genuineness* requirement and (b) ruling against the employer's choice of pool may be difficult *but not impossible*. "Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that (a) "It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited* [1982] IRLR 83); (b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (*UKEAT/0691/04/TM*); (c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan* EAT/663/94); (d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the

reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that (e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

b. *Eaton Ltd v King [1995] IRLR 75*: it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. This approach was expressly endorsed by both Waite and Millett LJJ, in the Court of Appeal decision

c. *British Aerospace plc v Green [1995] IRLR 437* "Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge, namely a swift, informal disposition of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him.'

d. *Bascetta v Santander [2010] EWCA Civ 351*: "The tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the appeal tribunal in *Eaton Ltd v King* … that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessments on which the selection for redundancy was based."

e. *Pinewood Repro Ltd v Page [2011] ICR 508, EAT* – held that consideration of the assessment criteria where an employee is seeking clarification of his low score on one particular (rather subjective) criterion as part of the consultation exercise but was met by a brick wall from the employer; it was held that this did not contradict the basic approach against rescoring by the tribunal in *British Aerospace v Green* because if the employee was given the information, put his case to the employer and still failed to have the decision changed, that case would mean that it would be difficult to challenge his selection (provided the system itself was considered fair by the tribunal).

f. Mental Health Care (UK) Limited v Biluan: === (UKEAT/0248/12) – there will be a wide range of reasonable choices when determining the selection criteria, and the same for the methods of competence assessment to be used. A finding that either is outside of the range of reasonable responses, "is a strong finding" which should be accompanied with an acknowledgement of the limited role of the employment tribunal in determining such issues.

g. Consideration of alternative employment: *Aramark UK Ltd v Fernandes [2020] IRLR 861* – held that what the employer must seek to find is *actual* alternative employment, not just the *chance* of it.

Witnesses

21. We heard evidence from the claimants and the following witnesses on their behalf:
    a. Ms Fiona O'Brien, a former employee of the 1st respondent
    b. Mr Philip Risdale, a former employee of the 1st respondent
    c. Mr Jasper Shelbourne, a former employee of the 1st respondent

22. We heard evidence from the named respondents: Mr Lucas Peon, the Executive Creative Director of the 1st respondent and the claimants' line manager; Ms Emma Hoyle, the 1st respondent's UK and European HR Director. From the 1st respondent we heard from the following witnesses:
    a. Mr Toby Hoare, then CEO Europe of JWT Worldwide
    b. Mr James Whitehead, then CEO of the 1st respondent
    c. Mr Tony Taylor, then European Regional Director of the 1st respondent

23. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

24. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

Preliminary Issues

25. A preliminary issue was raised by the respondents, who in the documents and statements have redacted the names of clients. Mr Leiper's position is that the clients named "are irrelevant", that the respondents would "prefer not to identify clients, as this is not necessary." However the claimants' witness statements do use the name of clients as they "declined" to redact names. There is no formal application, but Mr Leiper argued that it is "disproportionate"; while he accepted that the statements will be in the public domain.

26. Mr Roberts argued that it is difficult to navigate witness statements without knowing what's been talked about, the respondents' redactions are unilateral; some clients have the same first letter so it's confusing. It is not realistic when giving oral evidence not mention the name of client. And in the context of the case, clients feature in the selection for redundancy; also the character of the clients is relevant - why some of the clients and their nature, and reputational factors means that the issues need to be dealt with in a particular way "and so the Tribunal needs to understand who the client is. So practically, and on grounds of fairness, the claimants do not agree to redact.

27. We concluded that in order to make sense of the evidence we would need to refer to client names. We did not consider that client names were irrelevant, as both the size and the business of some clients were relevant to issues within the case, including the rationale behind some of the scores given to the claimants at a redundancy assessment.

28. On the agreement of the parties, the name of the first respondent is amended to Wunderman Thompson (UK) Limited.

The Relevant Facts

29. The claimants were employed by the 1st respondent, the UK arm of a global advertising agency, as an advertising team from 4 January 2016 to the date of dismissal, 23 November 2018, on the purported ground of redundancy. Both had commenced employment as Senior Creatives and both achieved promotion to Creative Director in July 2017. On their promotion they received a pay rise of nearly 15% and in October 2017 they received a bonus of £5,000. This was, the Tribunal found, a bonus for their contribution to the 1st respondent in a year when few bonuses were awarded because of the 1st respondent's financial position. Prior to their employment starting both claimants had worked for the 1st respondent as a team on a freelance basis. Both claimants are heterosexual, male, middle aged, (at the date of their dismissals Mr Bayfield was aged 52 and Mr Jenner aged 50), and both describe their ethnic origins as white British.

30. Throughout their career the claimants have been involved in significant advertising campaigns, Mr Bayfield's role in a famous Blackcurrant Tango advert in the late 1990s being one example. Mr Bayfield's specialism in the team was Copywriter, Mr Jenner, Art Director. They had worked as a team for approximately 7 years at the date of their dismissal.

31. On their promotion an email was sent on 2 June 2017 to over 60 recipients stating *"Some exiting news for the department and the agency today. In recognition of all their hard work, on HSBC UK and Oxo amongst many others, it's with great pleasure we announce [the claimants] promotion to Creative Directors. They've taken the lead on HSBC UK and the work keeps getting better and better. They've worked on numerous pitches, constantly helping us out, but more than that, their attitude to creativity and pushing the work is a perfect example of what we are trying to build…"* (342). The bundle contains evidence of other pitches the claimants were requested to work on; one, to 8 recipients including the claimants, says *"… I know most of you have a full plate already but it's a good opportunity and we need the right teams on it…"* (346).

32. When pitching for new business it is often the case that an average of 4-5 and sometimes up to 10 agencies are also pitching for the same business; accordingly the prospects of winning any one pitch is not necessarily high. While Creative Directors, the claimants were placed on several pitches, some they did win, but as Mr Jenner put it, the *"substantial wins did not materialise".* We accepted Mr Jenner's evidence that *"up to 25 people can be involved in a pitch"*. It is the case that few pitches were won by the 1st respondent in 2017 and in

2018 up to the claimants' dismissal, that both years were poor financially for the 1st respondent, which lost clients and clients it retained spending less.

33. In 2017 the 1st respondent underwent a redundancy exercise (named 'Worzel 1'). In the event, several departments lost staff through, in the main, employees resigning who were not replaced. Staff in the Creative Department were consulted with, all at risk employees were informed they were at risk, there were meetings. All staff in the Creative Department, including the claimants, were scored in a redundancy process; the claimants, then still Senior Creatives, but acting up as Creative Directors on some projects (e.g. HSBC) scored the highest in a pool of 15, made up of 12 teams of 2 and 3 individuals. The redundancy scoring exercise was undertaken by Mr Peon, Ms Dani Bassiland and Ms Glega Minaidis. Each scored the claimants top; the claimants achieved a score of 47, the next highest score was 41 (254).

34. We saw plenty of evidence of how the claimants' work was regarded as both Senior Creatives and Creative Directors during this period, (330 – 339), with clients clearly happy with their work – one client saying *"…Everyone's been asking me whether it's our best yet … I'm certain it will"* (340); an internal email on which the claimants were recipients 2 and 3 (out of 49) references a client's feedback *"... great chemistry continues and they are loving the work.."*(344). We accepted that in the Worzel 1 redundancy exercise the claimants' general performance in role was assessed, that they were marked in this redundancy exercise on the basis that they were performing well acting up as Creative Directors; that if they had not been performing well in this role this would have significantly affected their scoring. In the event, no redundancies were made from the Creative Department at this time.

35. There was disputed evidence for the reasons why the claimants were taken off some client projects. The Tribunal accepted the claimants' evidence that they asked to be taken off HSBC, that there was no reflection on their work on this campaign, (we saw evidence in the bundle that their work was praised by management at HSBC). We also accepted that there was a significant team change on the Ribena account, that all of the senior team was removed; this we found was not a reflection on the claimants' work on this account which again had been praised.

36. There was evidence in the case about how often Mr Peon saw the claimants and the knowledge he had of their work. His evidence was that he worked on some projects on which the claimants also worked, that while he had few formal meetings with them during their employment, he had a good idea of the work they were doing, he also talked to other managers and staff about all creatives, including the claimants. We accepted that Mr Peon had an understanding of how the claimants undertook their work including working with other creatives and team members, and about their capabilities in the work they were doing.

37. Diarised catch-up meetings with Mr Peon and the claimants were often cancelled by his PA at short notice. Mr Peon's evidence was that this was because he was very busy. Often he was required to spend time on projects where he was most needed or where his input was most useful. The claimants' evidence was that

he often spent time with junior creatives, that he appeared to favour the juniors over them. The Tribunal accepted that Mr Peon scheduled his time where he was most needed, that this was often with the more junior creatives, that this was where his input was required. The Tribunal also accepted that this was in part because he did not see the need to spend time with the claimants unless he was involved in a project with them, because of their depth of experience and capability in role.

38. In October 2017 the 1st respondent's 2018 budget was produced; this referenced the need to make financial savings in 2018. There is reference to 2 Creative Directors being made redundant and there are figures within the budget setting out the total salary, notice and statutory redundancy pay for two creatives. Ms Hoyle's evidence was that she probably used these figures as an illustration of likely costs (922). In the event, the proposal for Creative Director redundancies was reduced to 1, and then a CD resigned in January 2018 meaning this proposal was not taken forward.

39. A significant issue arose at a catch-up meeting in November 2017, their first meeting with Mr Peon since their promotion. The accounts of the meeting differ. Mr Bayfield's note of the meeting was "… *The feedback is not great – he hasn't seen any output from us that has impressed, and we are seen as a traditional team – traditional in the sense that we prefer TV, print radio and other longstanding advertising media."* It refers to the claimants' *"defence",* that this is what their clients want – TV ads – and *"… it makes sense we are put on these projects. … What makes his comments sting a bit is that we have presented multiple campaigns to multiple clients that are far from traditional …"* (360-61). As Mr Bayfield put it in his evidence *"I have presented plenty of ideas in the digital world, and so not sure where they get the opinion that traditional or non-traditional, other than that my main clients wanted TV, radio, posters. So this is my workload. And so the assumption was that is all that I can do. In fact if you looked at my 20 years portfolio, this shows I was digital at the very beginning of digital."*

40. Mr Peon's account was that the claimants' written record was a misinterpretation of what he was saying. His witness statement refers to *"rumours"* he was aware of that they were not digitally focussed. We accepted Mr Peon's evidence of this meeting: *"I thought highly of them, and I felt my management style was accepted - to be informal and straightforward. And I said demonstrate your digital expertise though work and push for it, that they had not been put on pitches because of this perception … I was wanting them to be in demand. And I was straightforward - a conversation with any CD. And it looked like they were liking it. … I was trying to get them motivational, directional, positive, to get them to perform better and have more success."* He said that his view was that Mr Bayfield *"… had done one of the best commercials ever and I said I had huge expectations - they had this responsibility to do work like this."* Mr Peon accepted in his evidence that he said *"they are seen as a traditional team".* His view was that *"I left the meeting believing them, and thinking it was very positive, I thought it was a good meeting, … we were pushing for more digital work, to expand this and get rid of [the 1st respondent's] reputation of being a traditional advertising agency."* We accepted Mr Peon's evidence that his comments had been misinterpreted, that the

claimants were regarded positively by Mr Peon, that he was urging them to expand their digital output and to show that this perception they were a *"traditional team"* was not an accurate perception. The Tribunal also accepted the comment in Mr Bayfield's note that the claimants had, in the main, been given TV briefs, based on a perception that this was seen as their main strength.

41. The claimants were concerned enough by what had been discussed to take their concerns to HR. On 5 December Mr Jenner asked Ms Hoyle for *"a quick meeting"*, saying *"… we had a meeting with Lucas last week and we now feel quite concerned about our future here."* (400) Another of Mr Bayfield's notes references going to HR *"… especially if our chief is paving the way for us to depart… We are not being given any new briefs to work on…";* it references a meeting with Ms Hoyle *"… and we tell her the whole sorry story…"* (360-61).

42. The claimants had an appraisal meeting with Mr Peon on 6 December 2017, Mr Bayfield's note stating *"… and it goes pretty well. Throughout the session Lucas pushes on with his agenda to move away from traditional advertising and mentions numerous times that [the claimants] are seen as traditional. After the meeting ends … Lucas asks us to stay behind for few minutes. He's really pissed off that we went to Ms Hoyle and not him…. We're really honest with him … We really thought you were firing us… He felt we were having a frank chat about how we needed to get the best work out of our teams and he's seriously upset that this was misinterpreted…"* (402-3). The Tribunal accepted this as an accurate account of the appraisal meeting and conversation which followed. Mr Jenner's evidence was that *"in hindsight we may have overreacted .. we may have over thought it, read more into the situation than there was."* He agreed that there was a *"misunderstanding"* in their November meeting, that he *"felt a lot better coming out than going in"* the appraisal meeting.

43. The meaning of *"traditional"* took up a lot of time in evidence; for Mr Peon this was a term which meant the claimants' work, expertise and interests were in *"traditional advertising",* i.e. TV, print, radio; and not in new-form advertising such as digital, and social media. We accepted Mr Peon's view that the 1st respondent employs *"plenty of junior creatives doing traditional advertising, and wanting to do this".* Mr Peon's evidence was that there was an issue if a creative only wanted to do traditional advertising, or only had expertise in traditional advertising.

44. The claimants' view of the word traditional was that it was a euphemism, as put to Mr Peon, for *"old, outdated, out of touch"* and it referred to older creatives. Mr Jenner's evidence was that *"in the context of advertising, 'traditional' does refer to age. If you're "traditional", you've been around a long time, therefore an old creative. A young traditional is not called traditional."* We accepted that the use of the word "traditional" can be used as a pejorative term. To want to do traditional advertising is not an issue, as long as that creative also pushes for and is seen to have skills in digital /social media; but to be *seen* as only undertaking traditional advertising and only having skills in digital advertising strongly implies that you are out of touch and outdated.

45. We concluded that the remark "traditional" when directed by Mr Peon towards the claimants was not wholly neutral, that it was a remark which was also referencing the perception of the claimants as out of touch. We noted the use of this term in the Creative Equals presentation in which it was used in a pejorative sense, on which more below.

46. We accepted the claimants' contention, said by Mr Jenner in his evidence, that the perception within the agency, that the claimants were only interested in TV and more traditional advertising, was in part based on the briefs they had been given, that *"… no one seemed to look at our portfolio; the assumption that we only became Creative Directors at JWC; but in fact we were Creative Directors for a decade prior. … We were not told what the others had said, so we could not fill in any gaps."* We also accepted that the claimants were pushing digital work to clients, that had there been a proper appraisal of them, including obtaining comments from colleagues as was the 1st respondent's norm at this time, or a consultation process with them prior to their being selected for redundancy, their expertise in digital/social media advertising could have been highlighted by them.

47. The claimants provided examples of the digital media ideas they produced while employed by the 1st respondent. One example was a proposal for a soft drink being dispensed from a petrol pump, that this would be open to the public and hence become a social media led event; that the client *"… was very excited about it and were talking about going into production, it was being costed and we had an events company designing the petroleum station."* In the event this campaign was not taken forward. Mr Peon accepted in his evidence that this was a *"good idea, a good use of digital"* that other digital campaigns the claimants worked on were *"good"*; that in one appraisal document for a Senior Creative he added *"create more campaigns that are non-traditional – like Ribena", referencing the claimant's* work (420). Mr Peon accepted that the claimants produced *"… digital ideas they tried to sell".* Referencing 4 clients/pitches he said that they were *"… All digital ideas proposed, most not brought by client. … ideas they were working on and proposing."* He stated that they were *"not ideas which stand out as unique and different use of digital, from an agency which is highly immersed in digital technologies and platforms. They are ideas - comparable to 'standard' digital. All ideas are difficult and appreciated, but they did not stand out. … I'm not suggesting the ideas were bad ideas, but they were not stand out ideas, and they were not responding to clients problems and were not able to turn them into reality. In a competitive market - digital fluency needed content to be of 'Ribena' standard."* He accepted that the claimants had won awards for the previous year (2017); his view was that the 1st respondent was *"looking for bigger awards";* Mr Peon was not sure when it was put to him that no other Creative Directors had won awards that year.

48. It was after their appraisal meeting in December that Mr Peon sought feedback on the claimants' performance from others. The usual practice of the respondents is for the appraisee to provide names of staff from whom feedback is sought. On this occasion the claimants were not asked for names. Mr Peon only sought feedback from Ms Glega Minaidis and Mr Nick Tsolkas, Design Operations Director. Ms Minaidis produced a draft email which was never sent

to Mr Peon. This said that Mr Bayfield *"… is a brilliant writer and was originally brought in to work on bigger ideas and TV as his strong point, therefore there is a perspective that he is very traditional, this makes resourcing him as CDs difficult as all our clients are integrated and we need CDs with diverse skill sets."* It states that he needed to get out of his office, *"integrate with the department and build relationships … which will help enthuse teams to create proactive work for his clients …"*. Ms Minaidis email states that Mr Bayfield *"can also come across as lacking enthusiasm for our work."* On clients they would better fit with, she says *"I think more quirky clients … and I am tempted to say TV clients until they have proven they have a wider breadth of skill sets/knowledge."* Mr Tsolkas states that the claimants' work *"very well as a team"* but that Mr *Jenner "… I find a little indecisive which has the danger to over-elaborate a project/campaign … Could be a little more blunt and ruthless."* (412/3). No appraisal document was drawn up following the appraisal meeting and this feedback was not provided to the claimants at this time.

49. The claimants' evidence was that Ms Minaidis and Mr Tsolkas had little idea of their work. We accepted that Ms Minaidis had marked them in the 2017 redundancy exercise when she had scored them highly, that she had some knowledge of the claimants' work as she placed them onto pitches. The claimants acknowledged that they were placed mainly on TV work, and this perception that TV work was their strength was a view held by Ms Minaidis. We also accepted that she had less knowledge of the digital work they developed once they were working on a pitch.

50. On 8 December 2017 the claimants were amongst 5 primary recipients of an email from a major client thanking with positive feedback on a major campaign (409).

51. In early 2018, the claimants undertook the performance feedback for Senior Creatives on behalf of Mr Peon, consulting widely in doing so. They received complementary feedback, Ms Kate Bruges UK and Europe L&D Director emailing thanked them for their *"great job and I have had such positive feedback … He found it really motivating and helpful"* (423). We accepted that the fact the claimants were given this role was evidence that they were positively regarded at this stage by the SMT of the 1st respondent including Mr Peon and Mr Whitehead. We accepted also that the claimants mentored more junior staff; we noted for example an email to the claimants and several others who had volunteered to be mentors for junior creatives and designers (194).

52. One issue arose in that on one occasion the claimants refused to work on a pitch under the management of another Creative Director. The claimants accepted that they had refused to do so on one occasion, that they felt *"uncomfortable"* doing so because they considered they were more senior. Mr Jenner's evidence was that was not evidence that they *"rarely"* collaborated as there were several occasions when they worked under and reported into other Creative Directors on pitches but that on this occasion they were told they would effectively be the Senior Creatives, that *"it felt like a demotion".*

53. Into 2018 the respondent's financial position did not improve. On 14 March 2018 a SMT Update and Review meeting took place. This referred to the Worzel 2 redundancy exercise, which had "*evolved significantly due to further resignations…"* and that the planned 19 redundancies (it has been 28 in the October 2017 document) were reduced to *"8 x creatives in April".* The document included initials of those who were proposed for redundancy. The claimants were not included on this list, and none of those earmarked on this document (by way of their initials) were Creative Directors. The Tribunal found that the reference to named creatives was evidence that they had been selected for redundancy without a redundancy consultation exercise having been undertaken (453).

54. The respondents case is that the decision to make two Creative Directors redundant were made in January 2018, the aim being to reorganise and have two Deputy Executive Creative Directors sitting below Mr Peon. There is no document to this effect; if this was a proposal at this time, the Tribunal found that it was tentative, it had not been costed, and it was in any event superseded by the 14 March 2018 proposal which was for no Creative Directors to be made redundant.

55. On 18 March 2018 Mr Jenner provided at Mr Peon's request details of 7 colleagues who could provide feedback for his forthcoming appraisal (454). There is no evidence that these individuals were approached to provide feedback on Mr Jenner, Mr Peon could not recollect doing so, and we found that this did not happen. Mr Peon also sought feedback again from Mr Tsolkas, who forwarded his December email to him (456). In fact, their appraisals never took place.

56. The 1st respondent's Gender Pay Gap Report for 2017 was published in April 2018. It showed that the mean gender pay gap was 38.8% and its median gender pay gap 44.7%; the report describes these numbers as *"very disappointing and we are determined to improve them in the coming years. … There is an acute problem of female representation in creative – a majority of senior jobs in that department are held by men, not just at [the 1st respondent] but also in our industry."*

57. The report defined three *"key areas"* where initiatives were being put in place, including (1) talent acquisition and retention: aiming to continue to improve gender balance and diversity; to continue to broaden its recruitment pipelines to attract candidates from underrepresented groups; (2) progress and development for women saying: *"… [we] already invest in the growth of all our employees but we are going to invest more in developing, promoting and retaining our female talent".* One *"clear area of focus"* was to *"implement targeted development schemes to advance women to senior positions in line with addressing that imbalance"* e.g. women in creative department leadership roles is *"a key area of focus"*; (3) culture and behaviour: to *"create a truly inclusive talent meritocracy*; *including tracking progress to reducing our gender pay gap bi-annually on our website"*. The document states that the *"global management team are committed to significantly reducing the gender pay gap…"* (198-216).

58. The Tribunal accepted that these were all reasonable and proper steps to take as a result of what the 1st respondent correctly characterised as very disappointing gender pay gap figures.

59. A meeting took place in April 2018, attended by a significant number of the 1st respondent's employees, including Mr Risdale. He gave evidence that Mr Whitehead stated that that the aim would be to show an improvement in the gender pay gap *"within a quarter"* that the *"intent"* shown was *"we are going to make change and quickly"*, that there was a *"key point - there would be change and it would improve within a quarter".* We accepted his evidence: when it was put to him that he had mis-recollected the meeting, his response was there were *"several hundred people at the meeting – it would be interesting to see what they have to say about it."*

60. Ms Hoyle's evidence was that there was an *"expectation"* that there would be some improvement on the numbers *"every year",* but that the quarterly updates and bi-annual tracking was on the *"actions*" the business was taking rather than a reference to improvements *"…ambition on delivering on action plan would result in a change in the gender pay gap numbers. … the action plan would be reported on quarterly - to be in the corporate memory and to keep it alive; to update and be public about it. … The reason to keep reviewing this was building and improving the culture which would work in improving the numbers."* She said that there was no expectation that the results would improve within a quarter, but that within a year she would *"expect improved results, with quarterly reporting on the action plan".* We accepted this evidence, that the aim was to keep the gender pay gap as a live issue, to update and be public about it; we also accepted that there was significant pressure to improve these figures as the year went on with the aim to show actual change and progress on a quarterly basis with significant improvements by the date of the next report.

61. A Creative Director, Ms Jo Wallace, had been appointed in November 2017. On 16 May 2018 she along with Mr Peon presented to a "Creative Equals Conference"; the title of the presentation was *"Crisis: The Mother of All Change".* The presentation was jointly written by Mr Peon and Ms Wallace and was intended in part to show their personal journey in advertising. Ms Hoyle was in attendance, she had attended part of the rehearsal the day before. The 1st respondent's CEO James Whitehead also attended.

62. The presentation was, the Tribunal found, designed to be a strong response to the gender pay gap figures, to present a positive vision of diversity in practice within the agency, addressing the perception of its lack of diversity, also how the 1st respondent wanted to significantly improve its gender pay gap figures. This was, we found, is a perfectly legitimate response. Much of the presentation was uncontroversial, if also hard-hitting. For example, that the 1st respondent *"… over the years, had a reputation as a Knightsbridge boys club…";* the mean and median gender pay gap figures were *"… horrible. It's embarrassing";* also pointing out that the 1st respondent had been *"actively recruiting fresh female talent"* and that its aim was to ensure that this pipeline continued, that it was *"vital that we do what it takes to ensure these women remain in the business and rise*

to the top". The slides reference the industry-wide issue of gender pay, the need for change coming *"from all of us getting on the bus together".*

63. There was however significant controversy about the following slides and the verbal commentary underneath:

WHITE, BRITISH, PRIVILEGED, STRAIGHT, MEN
CREATING TRADITIONAL ABOVE THE LINE ADVERTISING

"One thing we all agree on is that the reputation JWR once earnt: as being full of "White, British, Privileged… etc…"

~~WHITE, BRITISH, PRIVILEGED, STRAIGHT, MEN~~
~~CREATING TRADITIONAL ABOVE THE LINE ADVERTISING~~

"… has to be obliterated."

A later slide repeated the above, the commentary saying "*Remember the earlier slide about JWT's lurking reputation. The boys club element is one factor amongst a whole lot of other parts that need addressing too…"*

64. This, and other agencies presentations at the conference gained industry press coverage. – one example is an article headline - *"Inside JWTs plan to address its 'terrible' gender pay gap & 'boys' club' reputation"* (466).

65. On 18 May 2018 Mr Bayfield sent an email to Ms Bruges, cc'ing Mr Jenner, stating: *I found out recently JWT did a talk off site where it vowed to obliterate white middle class straight people from its creative department. There are a lot of very worried people down here".* Ms Bruges responded later that day, saying *"Firstly can I reassure you…"* that the 1st respondent is committed to being a company where everyone is *"welcomed, valued, respected and heard"*. She stated that the quote was *"obliterating our reputation, not obliterating white males. This is a strong word to use but I believe it was used to try and communicate the dramatic shift in reputation needed… And it is true we do have work to do to have a more diverse workforce but that does not mean we do not value the wonderful talent…".* Ms Bruges forwarded this email to James Whitehead, saying *"… it suggests to be we do need to be careful about the language used at these events…"* (471-2).

66. Ms Bruges' email suggested Ms Hoyle should be the best point of contact and she was forwarded Mr Bayfield's email. Ms Hoyle forwarded it to Mr Peon on Sunday 20 May 2018 saying *"let's discuss this tomorrow"* (474).

67. Mr Jenner wrote an email on 21 May 2018 to Mr Peon and Ms Hoyle saying *"I just wanted to make you aware of the reaction within the creative department … everyone is talking about this particular part: JWT wants to obliterate an agency full of white, privileged British straight men… I'm sure you can imagine the way this has been perceived and I think this is something that needs clarification…"* (476). The next day, Ms Hoyle responded to a similar email from Mr Bayfield to

her and Mr Peon saying, *"This is a massive misunderstanding of what was said last week. Let's catch up. Are you both free now?"* (476).

68. There was disputed evidence on what occurred at the catch-up. Mr Bayfield's note of the meeting says that Ms Hoyle *"..seemed angry and immediately accused DJ of deliberately misunderstanding the content and wording"* of the presentation; that the presentation had been *"… about the agency's reputation not the reality";* that changing the reputation was separate from changing the personnel. The note states that Ms Hoyle *"… seemed incredulous that we were unsettled. She accused us of not seeing the bigger picture… We then had to defend our stance on diversity and inclusion… we have always believed that women and minorities should be given a fair chance."* There was an issue about hiring the best person, to which Ms Hoyle's response was, said Mr Bayfield, *"so you are saying the best person can't be black or a woman?"* The note says that Ms Hoyle *"became more and more argumentative. And repeatedly accused us of not being prepared to change our minds … speaking of reputation rather than reality … the meeting ended inconclusively and we were not convinced by their arguments and we felt they believed we were just being difficult and had deliberately misinterpreted [the presentation]"* (479-80).

69. Mr Peon's evidence in Tribunal that that Ms Hoyle did not get angry *"right away",* that she *"tried to explain there was a misunderstanding; she tries to explain this quote was not correct - they had left out eliminating the perception. Instantly their reaction was not wanting to agree. … It was a discussion - argument - between two parties. …. Angry is different, there was no screaming but we definitely had not reached a complete understanding on the discussion."* Ms Hoyle's subsequent recollection was that the conversation was *"horrible … Lucas was angry at this and defended himself…"*. Mr Peon's view in his evidence was that *"I do not recall being angry … it was an argument with an elevated tone of voice, both trying to win the argument."*

70. In her evidence Ms Hoyle accepted that she was *"horrified"* by the claimants position; that *"…I was saying something and they responded, 'you're saying this' which I was not."* She said that when Mr Jenner said *"'how can you obliterate the reputation without dismissing people' - I felt 'ok' I understand the conversation."* She said that *"tensions were running high. There was a shift in tone, this escalated…".* Ms Hoyle accepted in her evidence that it was a *"legitimate question*" – how do you obliterate the reputation without changing the personnel *"but I felt profoundly depressed that someone had said something like that".*

71. In a subsequent grievance interview Ms Hoyle stated that the *"conversation was horrible … the lowest point she's had"* since joining the respondent. *"She saw a nasty side to these two creatives which she hadn't seen before. [Mr Jenner] in particular was extremely passive aggressive and quoted incorrectly what was said at the conference … but repeated his version as fact. Lucas was angry with this and defended himself. [Mr Bayfield] said the problem would be that instead of hiring the best person, a woman or ethnically diverse person would be hired instead… [the claimants] were treading dangerously regarding a formal reason for dismissal with their comments …"* (568-9). In her evidence Ms Hoyle said

that the claimants' comments *"had made dismissal go through my mind, but I was not considering it".*

72. Later that afternoon Ms Hoyle drafted an email which she never sent, which stated that the issue was about changing reputation, *"…and not any comment on our employees… you kept talking to us about 'obliterating people'. We were disappointed that you had taken such a negative take on what should be an inclusive message".* The email referred to what she regarded as *"a disappointing and deeply depressing"* comment by Mr Bayfield, as his comment seemed to suggest that *"…hiring a woman or someone who wasn't white"* was *"mutually exclusive"* with hiring the best person, *"For me it was disappointing that at the end of the meeting you were still misrepresenting the article and our conversation…"* (477).

73. On 22 May 218 Mr Jenner wrote a follow up to Ms Bruge's email of 18 May, *"Many thanks for getting back to me … and thanks for the reassurance. Lucas and Kate spent quite a bit of time yesterday going round to various teams explaining what they meant in their talk and calming this down. I still thing that the reaction from the creative department suggests that the wording of the talk was ill advised and open to misinterpretation."* (481).

74. There is dispute as to when the decision was made to make 2 Creative Directors redundant, and when the claimants were selected for redundancy. The outcome of the subsequent grievance, in rejecting the claimants' allegations, states that the decision to make Creative Directors redundant was taken prior to the claimants' complaint. Mr Peon's evidence was that he *"did not recall the timings"* but that it was likely to be in week commencing 21 May 2018. His case is that all the Creative Directors, including freelance/fixed-term employees were put into the pool. Ms Hoyle's witness statement says *"At a Senior Leadership in around this time (I cannot recall the precise date or who exactly attended) we discussed and agreed the resumption of the redundancy consultation…"* (paragraph 110). Mr Whitehead's witness evidence: *"At a Leadership Team meeting later that week (I cannot recall the precise day…)".*

75. Mr Peon's evidence was that no minutes were taken at the meeting when this was decided, that there was no business proposal or document in writing setting out the rationale for selecting 2 Creative Directors (or the 3 Senior Creatives also selected for redundancy, who had also complained about the Creative Equals Conference.). Mr Peon stated that this was *"discussed during our leadership meetings … it had been discussed many times";* he stated that the CFO stated that the redundancies needed to be *"this pool, this level, it was Senior Creatives initially and then another point was Creative Directors".*

76. Mr Peon's evidence is that individual attendees took their own notes. None have been disclosed. His evidence on Worzel 2 was also *"we did not want it [redundancies] to get out - we did not get papers and did not distribute papers.";* however we found that documents on Worzel 2 had been produced previously, most recently March 2018. All those who gave evidence on this point said they have retained no notes, and no one could say whether anyone else present who

is not a witness in this case, including the CFO and other senior managers, took notes.

77. Ms Hoyle's evidence was that she did not know why the decision to make redundancies was not recorded. Her evidence was that she *"… would have made notes in meetings, but I did not retain notepads."* She was unable to explain why there was a slide deck for redundancies on 14 March 2018, also the October 2017 ppt (which was disclosed by the respondents during the course of the hearing); but no documentation on the decision to proceed with the redundancies of 3 Senior Creatives and 2 Creative Directors in May 2018. When asked why this was not recorded her answer was *"I don't know".*

78. There are emails regarding Worzel 2 between HR and Ms Minaidis on 24 & 25 May 2018. HR's 24 May email references a discussion with Mr Peon the day before, that dates for consultation meetings were agreed, *"…Please let me know if any of the people in scope will not be in on the following dates…"*. In response, Ms Minaidis writes *"There were some discussions about who is on worsel, could I have a list so I can make sure I am checking the right people."* The initials of seven employees - three teams and one individual were given, and Ms Minaidis provided their dates of availability. It is accepted that the claimants initials were on this list. No other Creative Director was listed. Ms Hoyle was cc'd into this email (485-6).

79. There was significant evidence on the meaning of this 'in-scope' email. Ms Hoyle's witness evidence is that the Creative Director pool comprised 7 individuals, that all were scored, she believed, in w/c 28 May 2018 (paragraph 110 statement); Mr Whitehead's evidence is the same. Mr Peon's evidence on this email was *"it's a strange list. Unless there is a mix-up in dates I do not understand what this means…".* He accepted that this *"suggests"* it had already been decided who will be made redundant *"… but I did not decide before scoring, definitely".* He had no explanation for this list when asked during his evidence. Ms Hoyle was unable to explain why HR would be providing this list of those *"in scope";* she had *"no explanation"* why the claimants were on this list. Ms Hoyle was cc'd into the list, her explanation was that *"it passed me by, I can't explain why I did not notice or react to it at the time".*

80. Just prior to this decision, Mr Peon accepts that he asked for one Senior Creative to be taken off the potential pool of redundancies, this was a creative who had scored bottom of the redundancy pool in 2018. Mr Peon accepted that this creative's name was removed, because she is a woman, that he wanted to save her from redundancy because she was a woman; he agreed that he *"took sex into account"* when deciding on this, as the email dated 18 May from Ms Hoyle to Ms Minaidis states: *"… his first response was the same as yours … that we are losing all our female creatives. Therefore he would like to see what can be done to save her"* (former claimants' bundle page 39).

81. On 25 May 2018, Ms Hoyle and an HR colleague finalised the wording of an email to the claimants clarifying what was meant in the Creative Equals presentation *"… to describe our reputation as opposed to our reality and certainly not our current employees. You agreed with us that we should always*

hire the best person for a role …" (487-9). Taking into account the wording of Mr Jenner's email to Ms Bruges on 22 May, the Tribunal accepted that this statement by Ms Hoyle was an accurate summation of what the claimants said and agreed towards the end of this very difficult meeting.

82. While the individual redundancy assessment sheets of Mr Whitehead, Mr Peon and Ms Minaidis, all of whom scored the claimants, have been retained, none have been disclosed for the other Creative Directors who, the respondents say, were marked at the same time. The 1st respondent's position on the scoresheets for the other Creative Directors is that the documents were likely destroyed when the 1st respondent's owner changed and there was a change of business address; at the same time current employee information was scanned into the new HR system. Mr Peon's evidence is that he *"scored them all, I can guarantee that…".* The claimants point out that the dates for disclosure of documents in this case took place before the sale of the business.

83. Mr Peon accepted that it was an *"unfortunate correlation"* that those who had complained in writing were selected for redundancy; his view was that it was being handled by Ms Hoyle and by the CFO, that he was *"focussing on the day to day; this was a process which needed to go ahead. … there was an urgency it needed to happen...".* Mr Peon accepted in answer to questions that, other than the feedback from Mr Tsolkas, he had no other contemporaneous or documentary evidence of the claimants' performance and no evidence in support of the claimants' redundancy scores, and no evidence to test the accuracy of the scores against performance.

84. The Tribunal concluded from all of the above that that while the other Creative Directors and Senior Creatives employed by the 1st respondent were given scores, the scoring was not done on assessment sheets as it was for the claimants, accordingly there were no assessment sheets to retain and disclose. The Tribunal concluded that the reason for this was because the decision had already been made prior to the scoring exercise that it would be the claimants who would be made redundant. In fact, in a subsequent grievance interview, Ms Hoyle confirmed that Mr Peon had made the decision in advance of the scoring that the claimants would be made redundant, as set out below.

85. The scores of the claimants included the following – *"rarely displaying"* Creative Leadership – Mr Whitehead's comments for both claimants - he was *"Continually disappointed by active ownership and leadership on projects…"*; *"rarely displaying"* digital or integrated skills; Ms Minaidis scored them as *"does not demonstrate"* Creative Leadership, saying that they are *"not visible culturally"* in the department. Their scores of 44 (Mr Bayfield) and 46 (Mr Jenner) contrasted with a highest score of 80, the next worst score being 60.

86. On 11 June 2018 the claimants received letters informing them of *"potential redundancy"* and inviting them to a meeting that day. The letter states that because of the loss in revenue in 2017 and further losses into 2018 *"we are reviewing the senior leadership roles within the Creative Department to provide a more efficient structure. The proposed structure reduces the number of Creative Directors….You have been pooled with other Creatives at your level*

and you have been scored against defined selection criteria. As you received the lowest overall score (44) your position had been provisionally selected for redundancy..." A two week consultation commenced (494-7).

87. The meetings with the claimants took place on 13 June 2018, with Ms Hoyle, Mr Peon and a notetaker. Mr Peon accepted in his evidence that this was *"probably"* the first time he had spoken to the claimants since the argument following the Creative Equals conference. The meeting notes refer to a tough 2017 and 18, *"Yes, new business is coming in but there have been contractions in scope and account losses. Clients expectation have grown and are more demanding. We have had loss of clients… The creative department is always busy and probably feels as busy as ever but the work is reducing… There have been headcount reductions across Planning and Account Management …"*. On showing the current organisation chart, Mr Peon referenced a changed structure, which would mean 2 deputy Executive Creative Directors (i.e. deputies to him), and reducing the number of Creative Directors from 7 to 3, this would mean having *"two deputy ECDs that will have more managerial qualities as opposed to everyone solely reporting into me."* (500-01, 505-6).

88. On 26 June 2018 the claimants submitted a joint grievance to Ms Hoyle and Mr Peon stating that they believe they have *"valid complaints"* of *"discrimination on the basis of our gender, race, nationality, sexuality and age; Victimisation for having expressed concerns about discrimination."* It recites the history of the Creative Equals Presentation and their emails after. It sets out their account of Mr Peon and Ms Hoyle's subsequent visit to their office and their views on this meeting; it sets out some social media quotes sent by the Agency containing similar language to that given at the Creative Equals presentation; it states that the claimants are *"strongly in favour of encouraging diversity in the workplace. This should be done lawfully…",* instead the 1st respondent was *"endorsing an approach [which] is misconceived and illegal";* it states *"we found it difficult to believe [the redundancy meeting] was not directly connected to the events set out above";* it states that the redundancy scores *"are largely subjective and the scores do not reflect reality"*; it states that those undertaking the marking *"have little or no involvement in our daily work...";* it argues that they have good relations with difficult and demanding clients. It states: *"We have no doubt that the whole thing has been fixed and we are being targeted because of gender race nationality, sexuality and age or because we have raised concerns about discrimination."* It references 65 creatives in the department of whole 21 are currently freelancers *"suggesting there is plenty of work to go around…. Those of us who are being let go are all aged around 50."*; it references their experience over others who were not made redundant (517-525).

89. Ms Berk, a US based employee within the Group, was appointed to investigate the grievance. She met with Ms Hoyle, Ms Minaidis, Mr Whitehead and Ms Bruges, In her meeting with Ms Hoyle she stated at the outset that *"… the reason for the meeting was to understand the process of decision making regarding selection of people for redundancy and the criteria used."* Ms Hoyle explained the following: the need to reduce costs; the *"Creative redundancy process was delayed and discrete because of big pitches."; "at the beginning of the Creative exercise, [Ms Hoyle] said they needed to take out more senior, more expensive*

roles…" that the "*business changes on a weekly or even daily basis which makes it difficult to prove that there has been a reduction in work… even if the business looks over-resourced this can change weekly because of the churn rate…"*; that there had been *"a reduction in paid work and scope of work with current clients"*. Ms Hoyle explained that others on the redundancy list had previously been on the list in Qu 4 2017, this did not include the claimants, but that subsequently a decision had been taken to *"restructure the senior team and have a deputy structure".*

90. Ms Hoyle stated that the 1st respondent *"… spent time going round the houses deciding how to fund the changes. It was decided to change levels at the top end of the Creative team…. The proposal regarding [the claimants] redundancy was to take two Creative Directors from the pool and with some of those savings, find two promotions into the Deputy ECD positions from the remaining Creative Director pool…"* She stated in response to a question about promotion to the Deputy ECD, that redundancies would occur first and then the promotions. *"It is not the other way round because of the requirement for fair consultation with people selected for redundancy …. [the claimants] are difficult to put on other pieces of business because of their performance and people are not willing to work with them. And Lucas has given them performance feedback about this … about being too traditional…".*

91. On being asked about the allegation of discrimination raised by the claimants, Ms Hoyle stated *"… there is nothing but white males to eliminate…"*. We found that this statement was not correct – there were two female members of the Creative Scheme who, says the respondents, were scored.

92. Of the claimants Ms Hoyle said: *"[they] are difficult to put on pieces of work, Account Directors don't want them and some of the other creatives feel the same. Lucas did not look further than [the claimants] for Creative Director candidates for redundancy as there was already a problem here so there was no need to look further."* Ms Hoyle, referencing the need to bring in young diverse junior teams and growing them, states that if, say, Ms Wallace was appointed a Deputy ECD *"… which has been funded by eliminating white male middle-aged Creative Directors, then that could be used as an argument, However there is nobody else to choose from within the Creative Director pool without losing the diversity which already exists within the team.*" (564-569)

93. Ms Berk then met with Ms Minaidis who stated that the nature of the work was changing from TV to *"Integrated/Social and this has been a shift over the past 3 years. There's been a substantial reduction in TV and the team is set up for a different type of workload which has now changed".* She said that Mr Peon has a collaborative style *"…so teamwork quality of output productivity etc. are key".* She stated that client budgets mean redundancies are necessary, *"The scoring is against Lucas's vision".* She stated that she was able to mark the Senior Creatives in a redundancy exercise because *"she knows their temperament, experience, skills etc."* Because she assists with appraisals, she sees the feedback *"…and is interacting with them every day in person too."* She stated that the claimants had been *"going through the motions"* when undertaking the appraisals for Senior Creatives, that the claimants reject working with junior

teams and *"repeatedly ask for different ones to be assigned to them. There is a pattern of behaviour … maybe they did not have the management skills, experience or the knowledge to be Creative Directors … [the claimants] were not visible in the department staying in their office and not integrating. They haven't mentored or development younger more junior teams, instead they request a different team if things aren't working well. They take a back seat sometimes and are not energised. .. .they haven't won any new business and are struggling to find a client match. They have been removed from clients. [The claimants] are too tv focussed … they say they are digital but their work always seems to be TV based. … In the area of collaboration, they didn't take the opportunity to build creative relationships, there's a lack of energy, but possibly it's just their style. There seems to be a lack of enthusiasm."* (570-572).

94. Ms Bruges was interviewed and gave her input on working with the claimants on their appraisals of more junior staff – she said *"… Lucas was concerned about how [the claimants] were managing some young talented creatives. That they were 'two old blokes' who may not deliver feedback in a motivating way ... [the claimants] did good preparation but Kate felt they weren't very inspiring/giving actionable feedback for the person to take away Lucas and Kate worked on usefulness/being inspirational".* Ms Bruges was *"asked for examples of how they were behaving like 'old blokes' … the room felt low energy and the tone felt critical.. She was sure comments were made about juniors not respecting hierarchy, not respecting the Creative Directors. It didn't feel like a vibrant creative environment but a stifling old-fashioned department feel".* Ms Bruges subsequently provided additional information, saying that the claimants had asked for help with the appraisals as they had never done them before, *"they took the help and executed the review competently. In fact one person reached out … after their review to ask how to develop a certain skill, which Kate said had never happened before."* (574-77).

95. In his interview with Ms Berk, James Whitehead said the following: that the business had *"declined catastrophically"* with revenue falling £49m to £30m over the past two years; that this was the 3rd round of redundancies in 3 years; with September/October 2017 being the first step, *"by November 2017 they knew that … millions would need to be costed out of the business in 2018"*, that *"the exit rate had picked up really fast"* accordingly *"they wouldn't have to make an enormous amount of redundancies…"* that there had been *"far fewer"* redundancies in the creative department as Mr Peon *"had already done more restructuring … it already felt refreshed and many of the people he felt were right performers …. The quality of work, the type of work and attitude (in owning it; believing what we are trying to do…)";* that in this round of redundancies the emphasis needed to be on the creative department, hence a decision to make 6 creatives redundant. *"The management team looked at who these people should be".* He stated that given the lack of diversity amongst creatives *"… there was a high likelihood they would be white, and … they were probably not going to be young either."* On the issue of *"traditional"* background, … *"they need to have fit for purpose talent to deliver the type of work our clients want. It's based around Quality - Capability – Attitude …. capability is the breadth of approach to developing client solutions that can fit with client challenges and briefs."* The claimants, he said, *"they are a team who had more potential than was realised*

in actually getting great creative work made. There were also some issues and problems in their attitude impacting their working with some teams…" (582-5 & 590-1).

96. Mr Peon was interviewed, stating that some business wins had occurred, but not enough to avoid redundancies. He stated that he *"… would have kept"* two of the at risk Creative Directors (not the claimants) if he could, *"they do a lot of work."* About the claimants, Mr Peon said *"… in all honesty, it's not that they were a performance problem but they were getting a bit of a push on performance. They were in the process of being coached: how to create better work and have a better attitude. So they scored lowest."*

97. The claimants were interviewed together; they were asked about a reference to Ms Wallace being given their work on one account; that said they had *"minimal contact with Glega Minaidis…. There were just a few conversations about creative teams who can work on various projects… James Whitehead … doesn't know their day to day work. … And Lucas has been ECF for 18 months but they've had one meeting. He's never been in a client meeting with them."* Mr Jenner stated that junior and senior staff had provided feedback for an appraisal which had never happened (603-5).

98. In a subsequent call with Ms Hoyle, Ms Burke asked for information on freelancers, and was told that most are design or category specialists, but that one freelancer was pooled with the others *"as they all do similar work regardless of employment status…"*. On another acting Creative Director Ms Hoyle stated that she was not in the pool as she was only acting up in the role (616).

99. An email was sent to all staff on 18 July 2018 on the gender pay issue saying *"we've made some good progress in a short time and are looking forward to sharing this with you…"* 599. Ms Hoyle's evidence was that this was not meant to imply "progress", instead it was to convey *" … you are enthusiastic - trying to move an entire agency - to think positively - but we were not saying we wanted to make short-term or immediate progress. Tone/optimism - after news of being bottom of list; a message of optimism was sensible."* The Tribunal accepted that there was not, at this stage, any real progress to report, but that the emphasis was showing that progress 'was being made'.

100. In advance of the grievance process being formalised, a decision was taken, that given the investigator would be a woman that the 1st respondent would *"… get a male to chair the grievance hearing to give this balance given the context etc…"* (526). Mr Tony Taylor, Regional Director Europe was given this task. He reviewed the documentation and asked for clarification. He asked whether those engaged in consultation are the ones who have made grievance complaints; this question was not answered correctly, as in fact all those selected for redundancy had made grievance complaints (617-8).

101. No grievance hearing took place. Mr Taylor produced a draft report, on which Ms Burke made annotations and Ms Hoyle provided *"corrections"* (620). One request was for the timing of the decision to make the claimants' redundant. Ms Berk's comment was that the marking had taken place after the Creative equals

conference, *"… but it had been discussed by leadership prior to the presentation. Lucas had not yet filled out the paperwork." (*629).

102. The 2nd draft of the report states that the comments made at the Creative Equals Conference did not represent bias; that the *"… required costs savings will only be achieved if the proposed restructuring of the creative department employs new people in new roles at lower salaries. Given the stated aim to achieve greater diversity … in filling new roles JWT will actively recruit from a much wider demographic in future,…".* The report, incorrectly, states that the claimants appeared in a redundancy pool *"… in late April/early May, prior to the conference"*. It states that seven CDs were placed in the pool in late April/early May, including the claimants, that evaluation criteria was drawn up in early May with input from a law firm, and evaluations were carried out independently by the 3 markers and results collated one week after the CE issues. It states that *"…the redundancy process would appear to have assessed a pool of people based on job title/role (CD) including males and females, a similar ethnic backgrounds and all with a level of seniority … this indicates that no discrimination existed due to 'gender, race, nationality, sexuality and age"*.

103. In relation to the allegation of victimisation, the report considered three areas – the legitimacy of the criteria, the veracity of the scoring, and the possibility of collusion. It says that the claimants scores, along with the other complainants, were *"consistently lowest for all three assessors"*, that there is no direct accusation of collusion between the markers and no *"overt evidence or mention of this in the interviews… Such an allegation would of course impugn the reputations…"* of the markers.

104. The grievance report stated that there was no conscious bias. The report considered the question of unconscious bias given the difficult conversation which occurred between the claimants, Mr Peon and Ms Hoyle. The report concluded that Ms Minaidis interview with Ms Berk *"…perhaps sheds the best light on the issue… her assessment is that [the claimants] had not excelled on the management aspects of the Creative Director role, notably on giving feedback on work to colleagues, mentoring juniors, levels of engagement and energy within the department. … Her feeling was that they had not 'evolved into the roles', as others had."* Also comments made by Ms Minaidis and Mr Whitehead relating to the claimants having weak client relations and being 'difficult to place on business.' It states that the scores on 'creative leadership' collaboration and client relationships *"… are aligned with the observations made several months ago.. prior to the Creative Equals event"*. The conclusion of the report is that there was no bias, that the claimants *"… are a strong creative team for their work, but weak as Creative Directors, relative to peers, in their leadership and management roles. This seems a credible justification for their selection as the two CDs to be placed into consultation…"* (633-641).

105. Mr Taylor was asked why there was no grievance hearing; he stated that he was asked to review evidence that Ms Burk had presented, *"my work was to review documents and to write an independent report based on my understanding and analysis of what I had read. The grievance hearing was the discussions with Ms Burk and my review of Ms Burk's documents."* He had several calls with Ms Burk

and clarification was provided by Ms Hoyle *"on the sequencing of events … clarification on some dates/timing".*

106. Mr Taylor's evidence for rejecting the grievance was predicated on the fact that a *"process was in place …. my understanding is that the process started some time before, it was delayed, and now needed to be reinstated…"* Mr Taylor accepted that the date the pools were decided and people placed in them was a *"crucial factual assessment"* which was determined by the actual *"sequence of events".* He accepted that he needed to be satisfied when the redundancy proposal was decided on, and when it was decided that two Creative Directors would be made redundant. He accepted that the *"timeline is crucial".* He stated that he did not know the exact date, but *"my belief"* it was April/May 2018, *"It was in answer to a question I had posed to Ms Burk I was told if from a source."* Mr Taylor's understanding was that *"100% of the Creative Directors were included … So 7 Creative Directors on the list and a permanent freelance contract was considered an employee - … So 100% of these were on the pool. And I believed that all Creative Directors had been scored as part of the evaluation process. This is what gave me confidence that it was thorough when came to [the claimants]".*

107. When it was put to Mr Taylor that the evidence was that the claimants were evaluated after their complaint, he stated that he *"saw the ambiguity. The pool was created prior, but internal discussions took place after. But I accept completion of evaluations took place after the conference";* he stated that he *"can't answer"* why this was omitted from his report. On the 24/5 May emails with Ms Minaidis, Mr Taylor accepted the question put to him that this was evidence of predetermination, of a decision made before selection process *"I was disappointed, it was worth being brought to my attention. … I may have asked questions if I had seen this…".*

108. The claimants were given a letter containing the grievance outcome (632), but not Mr Taylor's grievance report, at 2.40 pm 13 August, and given until close of business New York time on 17 August (10.00 pm UK time) to submit their appeal.

109. The claimants asked for and were refused an extension to this deadline. The claimants asked for but were not given the majority of the interview transcripts; the grievance report was provided to them two days later, 15 August 2018. It is the claimants evidence that the reason this was delayed was because Ms Hoyle was *"angry"* with them, Mr Jenner saying that this was *"perhaps victimisation".* It was put to the claimants that they had the *"standard time"* to appeal, Mr Jenner stated that *"we felt it would be kind to be given some leeway"* as they had a redundancy appeal meeting also.

110. The redundancy consultation was recommenced, Mr Bayfield asked why other Creative Directors were not selected or put at risk, including Ms Wallace; Mr Jenner was told that *"the highest paid" are those who are under review for redundancy and that other CDs are "attached to brands".* Mr Bayfield also asked for details on the process of the scoring – how they were scored; Ms Hoyle accepted that he was not provided with these documents at any stage of the redundancy process.

111. The claimants submitted a joint appeal against the grievance outcome on 17 August; stating (amongst other complaints) that there were issues with procedure, including no grievance hearing; they had not been provided with the investigation report or statements or notes; denials of discrimination were accepted at face value; Ms Hoyle was overseeing and advising on the process despite *"Being a central subject of the grievances".* They had a call with Lew Trencher who heard the appeal; the decision outcome was sent on 4 October 2018: Mr Trencher stated that he had reviewed all documents and concluded that a reasonable decision was reached; that he did not believe there had been discrimination or victimisation, that a fair process was conducted (706-8).

112. The claimants letters of termination were given on 24 August 2018, they were dismissed on 3 months' notice, their employment ending on 23 November 2018 (685-688). The claimants appealed, citing issues of discrimination as raised in their grievances (690-693).

113. When under notice, Ms Hoyle agreed that she would send to the claimants details of jobs with the Group company which may come available. She spoke to Francis Illingworth who led talent acquisition for the Group. Ms Hoyle's evidence was she asked the claimants for information *"and did not get anything back."* The weekly vacancy list by email contained, she said, more junior roles. She accepted that one Creative Director who had been freelance was offered a permanent role in July 2018, as he had been working on a particular project.

114. Mr Toby Hoare heard the claimants' appeal against dismissal. In his evidence he accepted that the claimants were challenging the fairness of their dismissal, including the motivations of those conducting the process, that this included assessing their credibility and motivations. He accepted that Mr Whitehead and Ms Hoyle reported into him, that he thought very highly of Mr Peon, that Ms Hoyle asked him to conduct the appeal and that he was aware of the claimants' complaints, which had been discussed at senior leadership meetings. He stated that he still considered it possible to conduct a fair appeal, even with allegations against managers he knew and liked. He accepted that Ms Hoyle gave him advice on the appeal process, on how it should be conducted.

115. Mr Hoare said that he was given a bundle of papers, that *"I read what I was asked to read"* before meeting with the claimants. He did not see or read the 24/25 May 2018 *"in scope"* emails. The HR manager who was involved in this email chain, Ms Zaidi, was assisting Mr Hoare at the appeal meeting. In the meeting Mr Jenner asked for evidence in writing of the timings of conversations to back up the findings, to which Ms Zaidi responded *"These conversations would have been off emails for confidentiality reasons".*

116. On the issue of freelancers remaining with the 1st respondent, Mr Hoare said that he could not recall who he had the discussion with, but he was clear that two freelancers on fixed-term contracts were pooled with the claimants in the redundancy exercise. On the allegation made in the appeal letters that the 1st respondent had *"refused my requests for information and documentation related to the decision to dismiss me"* (691), Mr Hoare could not recall the outcome of

this request. He accepted that he was *"… not sure of the timing"* of the decision to select the claimants, that if he had known the date *"Certainly it may have encouraged me to look more closely at it"* that it was *"concerning"* that the claimants were on a list of those being made redundant before scoring; *"I saw no evidence - if I had I would have wanted to look very closely at what had happened."*

117. The appeal outcome letter states that all 7 Creative Directors including freelancers and those on fixed-term contracts were *"placed in the same pool and scored using the same selection criteria"* that the scoring process was conducted fairly; that all scored higher than the claimants (712-9). Mr Hoare accepted that this letter was drafted by the company's lawyers *"based on what had been said at the meeting",* that they were *"reasons I was happy with, so I signed it".* He said that the planned restructure set out in the letter *"was described to me",* that the findings on the restructure was *"the advice of my team, I can't recall specifically who, one of the members of the management team."* He accepted that he spoke to Mr Peon for information, that *"I took what he said as face value … I trusted and respected his view".*

Closing Submissions

118. Mr Leiper and Mr Roberts provided written closing submissions which we read. As well as the cases referred to above, we considered the cases referred to in the written and oral submissions.

119. Mr Leiper for the respondents dealt first with the issue of combined discrimination: that the claimants were arguing in effect that their direct discrimination claim was one of "combined characteristics", their case was that either consciously or unconsciously, the respondents *"had in mind reputational and commercial objectives, and these involved getting rid of middle aged straight white British men".* However, s.14 EqA 2010 (combined characteristics) has never been brought into force. Additionally, s.14 EqA only refers to *"two characteristics - not two or more…"* (page 30 submissions). He argued that the claimants can only succeed if they can show that the reason was because of 'a' protected characteristic'.

120. Mr Leiper argued that O'Reilly/BBC says that you can argue combined characteristics, *"but can still make out your claim if you can show one of them is reason for the treatment. And the claimants' case is explicitly because they are straight, white, British males".* This is a combination of characteristics, that even if they argued two characteristics, e.g. white men, s.14 is not applicable, and so *"it brings an end to the case".*

121. EU directives do not exclude multiple discrimination – (Recital 3 Equal Treatment) – the aim to eliminate inequalities and promote equality between men and women especially as women are subject to multiple discrimination, for example pregnancy, maternity, equal pay, that women face multiple strands of discrimination which must be combated; it refers also to *"promoting equality between men and women – it's explicitly gender based."* In summary – if relying

on combined characteristics there is no claim; while EU directives do not exclude multiple discrimination, UK legislation does.

122. Factually, the claimants' age was not a factor; the 2nd highest creative director scored was a similar age as the claimants, he saw business wins in early 2018: *"… which is inconsistent with concept that the respondents marking down on grounds of the claimants' age."*

123. On the age discrimination claim what are the claims? S.5 EqA references a person in a particular age group/range of ages: while the 'late 40s/early50s' argument is *"conceptually possible"*, the claimants have never identified the age group - and the nearest one gets to it is the general references to the 'younger' and the 'older', preferences to those who are younger: the claim is that the respondents *"embraced the youth and rejected the older".*

124. On the alleged comment *"two old blokes"* – Mr Peon says this is not his words, English is his third language, his evidence was *"I do not say blokes".*

125. But the issue is *"how the case is put",* a comparison to be drawn *"is between older and younger"* . And *"who are the younger creatives".* The allegations that the respondents favoured for example creatives in their 20s, who were treated well and those in their 40s were treated badly. The claimants case is that it's an ageist industry, the older are less well treated, but the pool for redundancy is one of older people. But the difference – 43 v 49, is not a profound difference.

126. This is not a case of 20s v 40s – the claimants cannot say this because the pool itself is an age group *"not flush with youth".* The claimants are saying younger creatives are preferred, and the claimants rely on several factors, but there's no evidence that ageism is commonplace within the respondent. Mr Hoare and Mr Taylor are not prejudged by their ages; Sir Martin Sorrell is going strong in his 80s, *"this is not an industry imbued with ageism"*.

127. *The "two old blokes"* comment is in inverted commas in notes of interview, and it's far from clear what it means. Mr Peon denies saying this, and do not doubt evidence that would not have said it; also he's the same age as the claimants. And his background is in TV, He would not say this of his contemporaries *"it does not make sense".*

128. The time with younger employees allegation, Mr Peon denies this. The claimants and their witnesses have *"an axe to grind, 'he surrounds himself with younger creatives' – it lacks particularity and it does not make commercial sense"*. And the notes of 23 November whish state that 'he spends all day in meetings, no one think's he an active ECD; *… "It's not saying he surrounds himself with more junior staff, and more senior staff feels he's not active it's 'no-one feels..'"*

129. *"And most telling - age was not a feature in the grievance, it does not reference age discrimination, the claimants have come up with it after the event"*

130. For the respondents, traditional is not a pejorative term, it's that you're not aligned with the agency if you only do this type of work. Even if it is pejorative,

it's because its pejorative of the type of work rather than a euphemism for old. The 23 November 2017 notes of Mr Bayfield are explicit - ' feedback not great and we're seen as traditional' – i.e. TV work. Mr Peon is reporting the reputation they have back to them – you can have a reputation which can be identified and sought to be corrected, 'you're perceived as this', which is different from saying 'I've a problem with your work'. The claimants have acknowledged that their output was traditional side of work – *"this is what their clients wanted - this is output because of their clients requirement, and so this is their reputation and Mr Peon is encouraging them to take steps to change their reputation. - and they took it on board, and they doubled-down, leading to the Ribena work"*. This supports the view that the claimants were taking on board what was being said, because it was an open and constrictive and amicable meeting. And Mr Peon is saying their work is good, but he wants to motivate them to do other types of work. The claimants then had a good meeting with him on 6 December 2017, He's seeking to make sure they're at their best in their role, and this is not related to their age. The claimants had no perception that what he was saying was related to age. They had recently been promoted, which is contrary to discrimination on grounds of age.

131. On the allegation that their complaints were protected acts and public interest disclosures: The meeting is addressed with *"astonishing brevity"* argued Mr Leiper. What is it that was said? What is alleged in the claim is not in Mr Bayfield's notes, and does not appear as an allegation in Mr Jenner's statement. It is critical – what is it that was said. Mr Bayfield's evidence – he mentions *"a general thrust … a feeling…".* If what is alleged had been said it may amount to a protected acts – but this is not in his notes and Mr Jenner does not refer to this allegation at all in his statement. There is no clarity from the claimants about the protected act; it is not sufficient to say that there is a backdrop of discrimination - that it was in the air. The Tribunal needs to determine what was said and whether it amounts to a protected disclosure. If no protected act/disclosure at the meeting, the claimants are left to fall back onto the emails.

132. On the email at 472, this is not an allegation of discrimination *"it's an assertion"* that there are some worried people. It's not saying 'us', it does not reference the Equality Act, it fits neither a protected act nor a protected disclosure. There is also the technical argument that if you can't have discrimination on multiple characteristics, then it can't be a protected act on the same allegation of multiple characteristics. In fact it is making an unfounded allegation and saying people are *"worried"* about it. In relation to the allegation of being sacked – this is a query, it's not aligned to legal obligations, this is not in connection with the EqA. It's not saying we're being discriminated against. Also the email omits the fact of 'reputation'; this cannot be by reference to the EqA, or a whistleblowing disclosure.

133. Also, the claimants rely on an assertion that Mr Peon reacts with hostility to challenge; if in fact the claimants are treated differently because they keep on going off to HR, the subject matter of the allegation is irrelevant. The claimants case is that Mr Peon is consistently hacked off when they go to HR.

134. On jurisdiction: The last act alleged is the time given to appeal; the claimants complained against Ms Hoyle on 14th August 2018 (658). They complain of nothing after this date, meaning the claim against Ms Hoyle is out of time. The claimants are contemplating a claim at the time this event occurred, and it cannot be just and equitable to extend time.

135. The claimants have criticised the respondents choice of witnesses, but it is not for the respondents to call evidence from all conceivable witness, for example all of the scorers, there is an acknowledgement this is a redundancy situation. *"I'm not going to pretend there's a clarity of evidence on meetings and when the decision occurred."* But there's the finance evidence and the history of redundancy, the FCO is no longer employed, but it's not in dispute the 1st respondent was in financial difficulties.

136. There has been a *"constant refrain"* about disclosure, can the Tribunal draw inferences? Are documents missing - the very fact there are no documents on the redundancy programme illustrates an absence of documents rather than negative issue, and it also disregards whether documents could be produced.

137. Scoring on pools and the lack of evidence – does this mean that its linked to the complaints? Or is it related to the merger at the end of 2019? The respondents accept there was the prospect of litigation but they had merged hard copy files and there was a turnaround in personnel and people involved no longer employed by the 1st respondent. A sign of upheaval in this period is one explanation for an absence of documents.

138. On the 24/25 May 2018 emails: *"it's difficult, no one can explain what that this document might mean".* There's the inclusion of two people not in scope and not made redundant, this demonstrates that it's not predetermined. We can't say what it means, *"So it's a curious part of the case",* but we do have the respondent's witnesses saying they scored on w/c 29 May 2018. And the Senior Creatives on the list had been put at risk earlier in the year. *"If this is as the claimants say 'Respondents are being clever and coming up with sham'; this is the most pathetically executed sham I've ever seen"*. So it's a *"rubbish theory"* and it supports the fact that the absence of documents is because of a problem getting documents, rather than they support the claimants.

139. Leadership meetings and the absence of notes – *"it's the type of business, not formal, and no notes recording decisions as this is not the way the business approached such issues."* The claimants' case is a counsel of perfection, seeking a collective process, and in fact this was legitimate, an individual consultation. Consultation changes according to whether it's on a collective basis or an individual basis. Where individual consultation, focus on the individual circumstances and the chances of alternative employment. The 1st respondent cannot be criticised, there's no need to go through the process of who should score, and employee/union input *"This is not a feature of individual consultation."*

140. And on meeting the claimants, on 13 June 2018, there is consultation. A consideration of the criteria and scoring. "*But if scores are low, that's a fact"*.

141. Restructure, before redundancy, why undertake the restructure and then have the redundancy process? But this does not work if it's a vertical restructure, the posts are more senior, and the claimants are not going to be put in the more senior posts because of their low scores.

142. On the difference in scoring between the 2018 and the 2019 redundancy scoring of the claimants. They are scored in different roles with different scoring requirements. The claimants criticise the scorers, but who could have scored them. Appraisal type process as suggested by the claimants, this would be self-selection. And what would have been a better criteria in a creative role - how do you assess digital creativity? But *"selling to clients" is* key. So there is an unreality regarding the claimants' approach.

143. In conclusion, if it's a sham *"… it's a uniquely bad sham, this indicates that there is no sham logically".* This is a process that was used and there is no evidence to support the idea that there was discrimination on grounds of age, or a combined characteristic.

144. Mr Roberts for the claimants argued that *"on the whole it was an effective sham".* Ms Hoyle and Mr Peon come out of the meeting on 21 May 2018, Ms Hoyle is at the lowest point of her career and wants to dismiss the claimants for misconduct. But there's no need to because of Worzel – *"why not adjust and get rid of these 5 blokes who are not on board with our diversity agenda. Kill two birds with one stone".* And the 1st respondent was committed to getting rid of a certain kind of reputation, we can get rid of people we don't like, and immediately start to improve diversity.

145. If it was a sham you would keep documents in writing to a minimum. And then there was the advice not to use names in emails. And then line up some people to score them and tell them who to select, which happened. Say they are scored 1/2s and everyone else 3/4 and keep comments vague - so they can't be changed. And then conduct the whole process - selection, time-frame, criteria and scoring - all done before a word mentioned to the employees at risk. And them meet and say 'sorry, you've scored bottom'. And also say it's a restructure - get some bubbles on a piece of paper - even if not accurate - give them something.

146. And when they complain, deal with it off the books, reassure the decision maker that these roles were earmarked for redundancy before they complained. And the HR adviser says there are no documents, while she is sitting on an email which disproves the respondents' case. *"It's hard to conceive of a more perfect sham."*

147. On the rare occasions there are documents, these contradict the respondents' case. E.g. the 24 May 2018 email is not confusing: it's purpose is to line up the dates to termination and is asking Ms Minaidis for the availability of those selected. Also, one employee was earmarked for redundancy *"but Mr Peon saved her … this supports the case that the documentation is incomplete and incorrect."* All we can see is that Ms Hoyle receives the email and that Ms

Minaidis and Mr Peon are involved in a discussion. *"I can't think of more obvious predetermination, a list of people to sack."*

148. The respondents' case on documents will not help them on unfair dismissal; it may help on the discrimination claims, save that the respondents have adduced no evidence as to how it handles other processes; documentation is important. And there's a positive case of victimisation.

149. We know that the respondents can engineer the outcome. The real focus is why? And the evidence is that this was within 2 days of their complaints, and they save someone from redundancy because she's a women: the respondent has come no way to establishing these factors played no part at all in the decision.

150. On the burden of proof – under the EqA the burden is on the respondents to show the protected characteristic formed no more than a trivial part of the decision making; it may be unconscious. The documents at the time are more reliable than recollections after the event. The reason why the respondents wants the Tribunal to rely on Mr Peon's answers under cross-examination is that his answers can't be tested. The fact that the 1st respondent was sold *"I do not understand why this affects disclosure"*. And Emma Hoyle's evidence that the files were archived and destroyed. "*But disclosure was in October 2019, before the merger."* Also this was before Ms Hoyle and Mr Peon had left the respondent, and so the respondents were able to get access to the documents.

151. The argument that the 1st respondent is not *"formal"* on documents? Ms Hoyle's evidence was that it is good practice to record, and she could not explain why not; and the witness evidence is that everyone took notes in meetings. *"So are missing 8 sets of notes. We know that Ms Hoyle was thinking about disclosure at the outset - and the 1st respondent had lawyers at outset … Ms Hoyle went searching for metadata for to help her case. So why not look for notes?*"

152. Also, the respondents assert that the claimants' performance was not a relevant issue, which is why there's no disclosure on performance. This is clearly wrong and is inconsistent with what the respondents say, that we should take at value the cross-examination of Mr Peon. More generally - how can this ET genuinely see why the claimants scored bottom? How much work did Ms Wallace win before she was dismissed? Client relations, her awards, what were her revenue figures? So the Tribunal cannot reliably assess what the relative performances were when no documents for this.

153. The burden of proof is on the respondents to tell us why, and to show that it has nothing to do with the protected acts. The 1st respondent has the documents; if it does not disclose, an adverse inference can be drawn.

154. And on the few occasions they do have documents they contradict the respondents' case. The only two specific examples they have are the claimants coming off HSBC and Ribena; but the respondents were forced to accept that there is no positive evidence that the relationship was bad, and they could not say specifically say why the claimants came off these accounts. Ribena shows that the claimants were doing a good job, they had good feedback and there are

no documents as to why they came off; the claimants case is that everyone came off this account.

155. The claimants agree that the issue of combined discrimination is not an issue; the issue is whether the claimants can bring multiple s.13 claims on the same detriment. The pleaded case (page 36) states that the claimants are claiming "and/or", there are separate claims under each of the 4 protected characteristics.

156. It's accepted that an employee can bring multiple discrimination claims; Nagarajan is not talking about the "sole reason" for dismissal; it's recognising that you can have multiple claims in relation to the same act. E.g.: an employee could allege discrimination because she is black and because she is a woman; but not that she is discriminated against as a black woman.

157. Age discrimination and the age bracket: the claim is a general bias towards younger and against older people creatives. It's a sliding scale; but at the relevant time the ages are : 49 and above and comparators are below.

158. The claimants accept that the juniors can be marked differently with different thresholds. But what is relevant here is the way it's done. It's so vague that it indicates that it's a 'well done' for being enthusiastic, hungry; but not expect this of a 40 year old who works on one account all year.

159. The claimants also say that Mr Peon did not know older employees, that he is able to give feedback in detail on the juniors but does not know the name of one of the senior creatives was, who he marked. And see this across older appraisals - visible; passion and enthusiasm hustle, be more proactive '.

160. The fact Mr Peon is a similar age: this is a 'debunked' argument the Equality Act expressly guards against - s.24.

161. On the protected acts and protected disclosures: the written disclosures. The claimants' case is this was a disclosure that the 1st respondent *"intended to obliterate people of particular protected characteristics."* This is plain on the wording of the emails. The respondents rely on the fact that there is no reference to the legislation but it need not be express – see Cavendish Munro; the test is whether the allegations are of facts 'which tend to show'. *"And it is hard to think of a more blatant allegation".* There is no need to reference protected characteristics; and there is no need to show that there is a breach of a legal obligation not to discriminate. There's a risk of an over-analysis.

162. 'Good faith' has not been pleaded; query whether respondent can run this defence, and in fact it's not been shown that the claimants were acting in bad faith, at best the claimants are inaccurate. And *Chalmers* - look at the full context when deciding was this a protected act.

163. The words are: that there is an intention to obliterate people with protected characteristics. Mr Bayfield is saying the word reputation is missing, *"but our interpretation is that your agenda is to obliterate people"*. So the Tribunal must take into account context and the fact that the claimants said *"you're planning to*

obliterate" and them believing this is the case - this is a protected act. The fact that some complained who were not sacked *"is a feeble argument … the fact that they sacked most is relevant"*

164. Redundancy and the suggestion that nothing is unfair: the criteria needs to be objective. 'Attitude' is entirely subjective, and this feeds into an unconscious discrimination claim. Also, enthusiasm, responds positively, respected are all subjective, even if in good faith, it's so easy to be infected.

165. If there can only be a highly subjective criteria, then the consultation needs to be proper before being judged on the criteria, the 1st respondent should have allowed feedback. Mr Peon gave evidence that he did not know about some of the claimants work. And one of the reasons for this is a failure to consult. And being marked down for HSBC, an issue over a year ago. The respondents were only prepared to disclose the claimants' scores; Mr Bayfield wanted to know the methodology and how they had got there under the process. The respondents gave them nothing, *"So this was lip service, the results were never going to change."* Why not follow good practice? The failure to do so can inform the unlawful motive.

166. And on the criteria – Mr Peon's comments on whether the claimants should lean forward, not lean back, how is this objective? And if there must be subjective criteria, it must be must be marked objectively. And the absence of evidence makes it impossible to decide that the criteria has been fairly applied. There is a latitude on an employer to choose the criteria, but it needs to be objective and reasonable. In the context of this case, it should be a standardised assessment across 58 creatives based on managers views and past appraisals.

167. The markers in this assessment: Mr Peon is suitable given his role, but he does not know them: a need for clear and objective evidence and not day to day recollections ; there was no appraisal feedback as the respondents did not seek feedback from other employees.

168. In the earlier redundancy consultation: the 1st respondent informed all at act risk employees and the claimants were informed - and there were a number of group meetings. So there was effort at consultation and information at an early stage in other rounds.

169. Victimisation: there are 11 reasons why the respondent has not discharged its burden and has not provided an satisfactory explanation for acts alleged to be discrimination. Firstly, "commonality" there are three people at the Creative Equals presentation – Ms Hoyle, Mr Whitehead and Mr Peon; two of these were at the meeting with the claimants on 21 May and they went into the meeting horrified and left angry; and then two days later the list of those in scope. Even if these are the only facts – "they are overwhelming facts on their own". Also Mr Peon says that the Creative Equals discussion with the claimants ended inconclusively and he intended to discuss this again, but the next time they spoke was at the at risk meeting. "the writing was on the wall"; and Mr Peon acts with hostility to challenge. When Mr Bayfield asks for evidence of complaints at the

2nd consultation meeting, Mr Peon took it straight back to the 6 December 2017 meeting.

170. Secondly, the odds of the claimants being selected are minute; the numbers – 2 Creative Directors and 3 Senior Creatives are never canvassed before, but were urgently settled on 21 May; and this matches the numbers of complainants – *"it's infinitely unlikely that this was chance"*. And the timing is important, the proximity and connection, an inference can be drawn.

171. Thirdly, the missing documents: The reason given by the respondents is untrue – the lack of documents is *"inexplicable"* given disclosure obligations. On the burden, if the respondents want to satisfy it was a genuine process, the burden is on the respondents to produce the documentation – this is *"fundamentally important when considering the burden of proof"*. And it's an inexplicable destruction of documents: on Worzel 2, there's one email; contrasting with the two proposals in October 2017 and March 2018, this is totally inconsistent with the evidence on the previous redundancy proposals. There is no evidence of an important decision which should be recorded. The claimants are not seeking 8 witnesses – it's just that there are no notes of even one witness who is *"at arms-length"* to the proceedings The fact of *"missing witnesses"* and no documents; if the burden of proof is on you and you have missing documents, *"call the witness"* – e.g. Ms Minaidis – was a scorer who was involved in the email chain showing the claimants had been selected before the marking exercise. She marked them 3.8 in 2017 and in 2018 1/2s. *"Where to explain the dramatic change?"*

172. On the difference in role between Creative Director and Senior Creative in the scoring, this is *"shallow, as it's the same criteria used and they are scored on their work and other skills".* And the claimants were acting as CDs when scored, this is what led to their promotion – they were a 'perfect example' of the direction of the organisation in 2017. Also, where is the evidence of a dramatic decline of performance? On HSBC and Ribena – they came off HSBC when the client loved them, and with the agreement of the respondents and when they are being promoted. *"So whatever the reason was, it wasn't bad".* Also Mr Peon accepted that what work they did was dependent on what was assigned to them - as they did not have control over their briefs.

173. The respondents could have called witnesses and did not. Ms Bruges and the *"two old blokes"* comment – if this is wrong get Ms Bruges to give evidence on this. She made this comment *"and no one blinked".* It's not investigated, and it shows the cultural view of older people – *"if you're 50 you're fair game"*. Ms Zaidi wrote the 24 May 2018 email *"why not call her on this and she can say ' – this is why I wrote it'"*. The FCO – why not call him as Mr Peon could not give the rationale for redundancies at this time and he referred to the Finance Department decision.

174. On the March 2018 Worzel document; again this disproves case and both Mr Peon and Ms Hoyle accepted that there was no proposal at this stage to make Creative Directors redundant *"this drives a coach and horses through their witness evidence which says this was proposed at end January and then*

suspended". The claimants position is *"we can't work out what has happened … the evidence is incomplete, contradictory and misleading"*. The respondents say the proposal was in January, they now agree that this was after the claimants had complained *"such a dramatic shift in the evidence"*.

175. The 24 May 2018 email shows that redundancies were only proposed after the claimants had complained, contrary to the respondents case which is that the proposal was January and selection was 28 May 2018.

176. On what the respondents characterise as the restructure: what is being told to claimants is that they're being dismissed as part of a restructure. But the only evidence is the organogram. It is *"implausible"* that this was due, signed off and got approval, and this is the only document, it's undated and inaccurate. Also, if this restructure involves new roles - why not give the claimants the chance to apply? Why sack first and then create roles? Why not create roles and then have redundancies? In fact the whole process was designed to create an outcome of dismissal, and when the claimants ask for documents they are ignored, they are taken off the rota, clients are told and there is no effort to find alternative roles.

177. While the claimants were being told that there was not enough work, other staff are being recruited, including one creative Director on a 12 month fixed-term contract in July 2018. Another member of staff was acting up as Creative Director. Senior Creatives were recruited, it's inconsistent that redundancies were also needed.

178. On the direct discrimination claim, look at the Creative Equals presentation, to "obliterate our reputation", the gender pay gap issue, and within a week a redundancy proposal has sprung up and five older white straight men are going to be made redundant. There is *"overwhelming evidence of direct discrimination"*. While the presentation was not an act of discrimination, it's what the presentation means and its consequences, *"the pressure this applied on the 1st respondent to make changes they had promised… This puts the claimants in the firing line".*

179. The respondents say that they fact 5 older straight white men were chosen for redundancy is a coincidence and not motivated by personal prejudice. But they had a commercial and reputational reason to improve the composition of Creative Directors. Contrary to the respondents case, this is not a case of combined characteristic discrimination, the reputation was too many old Creative Directors, and that they did not have enough women, staff from minority groups, gay Creative Directors.

180. And regardless of the reason, the proposal arose after their complaint and was sealed by 23 May; *"it is striking that this is so close to the Creative Equals conference".* There was fury at the claimants – and this is at the forefront of their mind. There is a 2nd thought process - 2 birds – dismissing the claimants deals with the issue of reputation also.

181. The fact the claimants complained is more than a material factor when taking this decision. Mr Peon admitted to seeking a change to a process to avoid dismissing a woman *"a startling confession"* because of the need for diversity. But direct discrimination cannot be justified – saving an employee because they are a woman - and this decision was made on the day of Mr Bayfield's complaints and 3 days before their selection. So if there were just claim of sex discrimination, there is overwhelming evidence given Mr Peon's actions that day.

182. On age discrimination, the case is put differently on age: the refence to two old blokes, the fact that only 6% of the advertising workforce is over 50, and there is a campaign to have a younger workforce. Also evidence that Mr Peon spent time with younger people and did not know who older creatives were. The comments of "traditional" - this is wording that "can be infected with prejudice" . and how did they take their agenda out of their mind when marking "collaboration" for example, when they are put under pressure to get rid of their reputation.

183. On time: Mr Roberts accepted that the claim against Ms Hoyle is out of time, but it is just and equitable to extend time; the most important factor is balance of prejudice - 3 months delay and circumstances which Ms Hoyle conceded would turn legal, so she is in a position to be prepared. On the balance of prejudice – has the delay caused her any prejudice? Only narrow detriments are pleaded but she is involved in every aspect of this case. The focus in claims against Ms Hoyle focusses on the grievances, but she took a much larger part, from the 23 May meeting to her involvement in the grievance decision.

184. Mr Leiper had two points in response: On the issue of multiple discrimination, if the claimants are saying these are separate they have to be dealt with as separate claims. But at their heart, their position is the claimants were dismissed because they are straight middle aged white British men - and question is, where is their case? We must understand why the burden shift to the respondents, " What are facts that are made out from which inference could be drawn?" for example what are the facts to infer age discrimination, the facts put forward are not advanced on sexual orientation of sex, for example. The claimants are taking the analysis the wrong way around. The claimants have to show, say, as a man they are less favourably treated than a woman, but in fact some of the men scored more highly than woman. This goes back to an understanding that the claim is in reality a combination of protected characteristics.

185. The two birds with one stone argument, also victimisation. If this is floating in the respondents' collective minds, the comparator also has to be one who has complained about the conference, there's a need to disentangle and consider each claim at a time and consider if there's a prima facie case on each.

Conclusions on the law and the evidence

Protected acts

186. We first considered whether Mr Bayfield's email of 18 May 2018 and Mr Jenner's email of 21 May 2018 amounted to protected acts (EqA). The claimants' argue

their claim under EqA s.27(2)(c), that they were doing 'something in connection with' the Act. Does the wording of these emails in the broad sense show that the claimants were doing something in connection with the EqA?

187. The wording of Mr Bayfield's email is that they had heard that the 1st respondent had *"vowed to obliterate"* white, middle-class, straight people from its creative department. Mr Jenner's email says the same, speaking of the *"concern"* that the 1st respondent wants to *"obliterate an agency full of white, privileged British straight men*…". One refers to *"very worried people"* the other refers to *"… the way this has been perceived".* We noted that there is no explicit reference to age in this email, also noting there is no explicit reference to the Equality Act, also that some of the characteristics the claimants refer to - 'privileged', 'middle-class' - are not protected characteristics.

188. The emails did not refer to the what the respondents say is the critical word in the presentation *"reputation"*. Does this mean that the claimants were misrepresenting the position, that their emails were incorrect, or sent with bad faith? The Tribunal concluded not: the claimants were genuinely worried that the implication, the logical conclusion, of the words used in the presentation was that change was coming quickly, and that the reputation would be obliterated by losing those employees who met that reputation - male, straight, privileged, white creatives who created traditional advertising.

189. Taking all the evidence into account, by these emails were the claimants 'doing something in connection' with the Equality Act? And does the reference to multiple characteristics make this a combined protected characteristics issue, outside of the Equality Act? We concluded that by these emails the claimants were doing something in connection with the Act. We noted *Aziz*, that there is a wide interpretation on the meaning of 'doing something'. We concluded that the claimants emails were a direct response to what they considered the presentation slides and commentary inevitably meant in practice: that the 1st respondent was going to obliterate, or lose creatives, who were white, British, male, straight, and middle-class, who created traditional advertising; and that this was causing worry and concern.

190. The Tribunal concluded that the claimants were saying that they and others were worried about this use of words and the implications for them on their future with the agency. We also noted that this was a presentation given in the context of the 1st respondent's awful gender pay gap figures, an issue of equality itself, and the need to address this urgently – with a 'rocket'. We also concluded that the claimants were not 'combining' characteristics – they were quoting what the presentation said and saying they believed this meant their jobs were at risk, on grounds which included their sex, sexual orientation and race. We concluded that the emails were directly referring to issues of unfair treatment based on protected characteristics; that by sending the emails they were doing something in connection with the Equality Act.

191. We also noted that it was the perception of the respondents, that the complaints made by the claimants were made in the context of issues of equality, including legal issues of recruitment and retention, as shown by the context and discussion

in the meeting which followed on 21 May 2018. The claimants believed that they were having to defend their position on equality and inclusion. Ms Hoyle believed that the claimants were deliberately misrepresenting the position of the agency on these issues, but she also accepted that Mr Jenner's viewpoint was, how can the reputation of the creative department as being white, straight, middle-class and male be obliterated without dismissing people. Ms Hoyle also accepted that this was a legitimate question to ask.

192. The discussion also touched on the issue of hiring the best people, and not hiring just because that person was of a particular protected characteristic, that Ms Hoyle felt that the claimants position was exclusionary. The claimants believed they were stating that all candidates should be appointed on merit, also the 1st respondent had to widen its pool of potential candidates to achieve equality in relation to all protected characteristics. Taking all this into account, we accepted that the comments of the claimants at this meeting, both defending their position on their view that their roles were clearly at risk of being 'obliterated' and reaching in part a common understanding on issues of equality in recruitment, amounted to doing something in connection with the Equality Act.

Protected disclosures

193. Were these emails also protected disclosures? We concluded not. We concluded that the emails were a recitation of the claimants' view on what the slides were strongly implying, and were in terms allegations that the 1st respondent may discriminate against employees, including themselves, in the creative department. These emails were not providing information, there was no specific factual content other than a concern that the respondent was saying in effect that their roles may be obliterated. This was, we felt, squarely within the *Cavendish* example, that they were saying that in the future their right not to be discriminated against may be breached, but without any information as to how this was or would be the case.

194. We considered the same about the 21 May 2018 meeting – the claimants were making allegations and were defending their position, without providing information about how a legal obligation was going to be breached. They were saying that it was a prospect that they would lose their jobs because of the 1st respondent's position on the creative team's reputation, but with no information as to how or when. We concluded that the claimants emails and comments did not provide information which tended to show it was likely that there would be a breach of Equality Act.

195. If we are wrong on this point, we considered whether the claimants had a reasonable belief that their allegations were true. We concluded yes. While the claimants omitted the word reputation from their emails, it is clear that they viewed the presentation as meaning the only way the reputation can be obliterated was by changing the make-up of the Creative department. This context was explained in the meeting. We concluded that the claimants genuinely believed that the logical conclusion of the presentation was that roles would be put at risk based on race, sex, sexuality, and other non-protected characteristics, and that they and others within the creative team were at risk as

a consequence. We concluded that this belief was reasonable based on the words used, the fact that the presentation was given by their manager and that the CEO and Head of HR were present at the presentation and appeared to give it their support.

196. We concluded that the allegations made by the claimants were not in the public interest. We noted the public nature of the presentation, that it was designed to shock and gain publicity and that it did do so. We noted also that the 1st respondent is an organisation which is newsworthy, that as a leading agency there is a wider public interest in issues of discrimination and poor treatment of its employees. We noted also that the claimants were saying in terms that the respondent was, by obliterating the reputation, going to breach their rights at work, a serious and significant issue.

197. However, all the claimants were doing by their emails and their comments in the 21 May 2018 meeting was, in effect, repeating what the respondents were already making public – their reaction to the gender pay gap figures and their intention to do something about it – including by obliterating the 1st respondent's reputation. This was reported on within the industry. We did not consider that in these circumstances the claimants were disclosing information in the public interest, as all they were doing was repeating back what was very much already in the public domain; in fact they gleaned the information in their emails in part from the press.

198. We accept that the claimants believed that their emails were sent in the public interest, the same with their comments in the meeting that followed. However we did not consider it was a reasonable belief for the same reasons – the information was already public when they repeated it back to the respondents, there was no public interest in making this disclosure.

<u>Victimisation - dismissal</u>

199. An assessment of victimisation requires consideration of the respondents' states of mind; there is no need for the 'discriminator' to be consciously motivated by the protected act, what needs to be shown is the link in the mind of the discriminator between the protected acts and the less favourable treatment. We noted that the 'core reason' for the treatment must be established, that if there is more than one motive, the discriminatory reasons should be of sufficient weight.

200. Our conclusion is that the respondents determined to dismiss the claimants within 2 days of their 21 May 2018 meeting with Mr Peon and Ms Hoyle. There is no documentation evidencing this decision, and we concluded that despite the respondents' protestations in their evidence, the decision to make the claimants redundant was made before a redundancy process was undertaken. We noted the 24 May 2018 emails and the statement by Ms Hoyle at the grievance hearing that Mr Peon had made up his mind that the claimants were to be made redundant. We concluded that the claimants were the only Creative Directors in scope, with no documentary evidence (apart from the organogram) as to why it was decided Creative Directors were to be made redundant at this time. We note that records of previous redundancy proposals were retained by the 1st

respondent, that the basic rationale of each change in proposal was provided in documents at senior management meetings. No such documents were disclosed, about the sudden urgency of this requirement, or what was agreed about the substantial change in structure of the team. Witnesses were vague about what was discussed, when the meeting was, who attended, why no notes have been retained.

201. We concluded that if this senior management meeting took place, it was only to rubberstamp the process after the decision had been taken to select the claimants. We concluded their selection took place on 22-23 May 2018, in discussions (referred to by Ms Minaidis in her email) between the 1st respondent's senior management team who included Mr Peon and Mr Whitehead. They reached agreement in advance that the claimants, and three senior creatives who had also complained, would be dismissed. There was an agreement to put dates in the diary for individual consultation meetings with the 5 members of staff who had been selected.

202. The next week, the scoring was undertaken on individual assessment sheets for the claimants. We concluded that the remarks on the claimants assessment sheets were retrofitted to fit the decision taken earlier, and that they were, in some cases, unreasonably made. We deal with the unreasonable remarks in the 'victimisation-detriment' section below.

203. The other Creative Directors were not marked on individual assessment sheets. Instead they were given a generalised comparative score by each scores. The final numbers were then entered into the consolidated score sheet.

204. We accept the claimants position that the date for disclosure of documents was prior to the sale of the business and likely therefore prior to the actual transfer of any employee files. Also, the fact of the legal claims was well known at this time and we considered HR would know or have been told as a matter of precaution that documents such as score sheets were to be retained. If some were still employed by the 1st respondent at sale, their files would have been copied over.

205. We noted also the anger of Ms Hoyle and Mr Peon from 21 May 2018 to the date this decision was taken – at the latest 23 May 2018. Also the fact that Ms Hoyle believed the claimants comments were worthy of dismissal. We concluded that there was a consensus amongst the 1st respondent's senior management team that the claimants had overstepped the mark with their comments in their emails and at the 21 May 2018 meeting, that there was anger at what the respondents considered a challenge to their plans on the gender pay gap issue.

206. We concluded that the decision to dismiss the claimants at this time and the decision to institute Worzel 2 to do so, was because of the comments that they had made in their emailed response to the Creative Equals conference and the meeting that followed, which were protected acts. Therefore their dismissals amount to unlawful acts of victimisation contrary to the Equality Act.

<u>Victimisation – detriment</u>

207. We next considered the allegations of detriment during employment. We note that there is significant repetition of detriment-related allegations, between harassment, victimisation and direct discrimination, as set out in the list of issues. We have attempted to deal with them below and in the sections on direct discrimination and harassment without undue repetition.

208. We found that the meeting on 21 May 2018 was difficult with anger on the parts of Ms Hoyle and Mr Peon. Was this treatment because they had raised allegations of discrimination in their 18 & 21 May emails? Can this be seen in the angry rebuttals made by Ms Hoyle and Mr Peon, also their quite serious allegations that the claimants were against equal opportunities and diversity? On careful consideration, we concluded that the conduct of Ms Hoyle and Mr Peon at this meeting did amount to victimisation. Both Ms Hoyle and Mr Peon were angry from the outset of the meeting, and it continued in this vein. They were angry because of what was written in the claimants' emails. Voices were raised by Mr Peon and Ms Hoyle, and the claimants were forced to defend their position, why they had written the emails. Their explanations were not at the time accepted and their points of view were angrily dismissed, despite what we considered to be a likely convergence of views on the steps to be taken to resolve the perception – active steps to hire and promote a younger and more diverse workforce. Ms Hoyle accepted in her eventual response that there was agreement on this point.

209. We concluded that the reason why the meeting was had was because Mr Peon and Ms Hoyle were angry, and the tone and nature of the meeting was negative for the same reason. We concluded that this meeting could reasonably be seen to be of detriment to the claimants, given the anger expressed towards them and the failure to accept that they had any valid concerns about the Creative Equals presentation; that in fact their views were regarded as unacceptable. We concluded that the treatment they experienced was to their detriment, it would objectively be seen as a detriment, that a reasonable employee would see it as such.

210. Were the respondents' failures to consider alternatives to making redundancies, including voluntary redundancies, or reduced hours, or terminating the engagements of freelances acts of victimisation? We concluded not. We considered that there was no link between the protected acts and the failure to consider alternatives to redundancy. First, we concluded that the respondents were not dismissing the claimants on grounds of redundancy, that there was no thought therefore given to alternative employment. Secondly, we concluded that there was evidence that in a genuine redundancy exercise the respondents pre-selected employees, as suggested by the 14 March 2018 presentation, and when they did so they did not consider alternative employment. Hence, there was no conscious or unconscious failure to consider alternatives to dismissal linked to their protected acts.

211. We concluded the same with the redundancy selection criteria, that its use did not amount to victimisation. The claimants were pre-selected before the criteria was applied and we concluded on the basis of the 14 March 2018 Worzel 2 plan that in any selection process the same decision would have been taken – to pre-

select candidates. We note that the criteria is criticised for being inappropriately subjective, itself the claimants argue, evidence of victimisation. However, we accepted that similar criteria had been used in previous redundancy rounds including in the 2017 selection exercise. While two criteria were double-weighted this time round (Creative Leadership and Client Relations), we accepted that this is because it was a Creative Director selection and that the seniority of the position meant that these were genuinely considered criteria for the Creative Director post, which would have been used (at some stage) in a genuine redundancy exercise. Accordingly there is no link between the use of this criteria and the claimants' protected acts.

212. We concluded that the decision not to include named staff in the pool/exclude others was not an act of victimisation. Again, the reason is because once the claimants were selected, the pool became a redundant factor, that the decision taken in relation to the pool was in effect the respondents giving the pretence that this was a fair process. Also, we found that with one member of staff who was acting up it was not reasonable to include this staff member in the pool, that their exclusion was not linked to protected acts. Of the two members of staff on fixed-term contracts who were included, we found that the respondents viewed these staff as having specific skills and were working on specific projects. There was no link between the protected act and the decisions taken on the composition of the pool.

213. We concluded that the individuals who scored the claimants, Mr Peon, Ms Minaidis and Mr Whitehead, would have been the scorers in a genuine redundancy exercise, that this was not an act of victimisation. Ms Minaidis marked the claimants when they were Senior Creatives, without any complaint. Mr Peon was an obvious choice as he headed up the creative team, and we saw no reason why Mr Whitehead would not have been involved in a genuine exercise. We concluded that there was no link between the claimants' protected act and the decision taken that these managers would score the claimants.

214. We concluded that the claimants were not fairly scored in the redundancy process. We concluded that the scores were detriments linked to and motivated by their protected acts and amounted to victimisation. We concluded that the scores and the comments made to justify the scores were consciously motivated by their decision to dismiss the claimants which was in turn motivated by the anger and concern of Ms Hoyle and Mr Peon, and the 1st respondent's senior management team including Mr Whitehead's concern and agreement with this course of conduct.

215. We concluded that while there may have been some truth in some of the comments made on the redundancy score sheets, they were deliberately and unfairly negative overall. For example Mr Whitehead's comment he was *"constantly disappointed by active ownership and leadership on projects":* the examples he gave in his evidence (HSBC, Oxo) were not accurate (the claimants had wanted to come off HSBC, and this was prior to their promotion at a time when they were receiving praise from the client). Mr Peon's initial comment on the appraisal sheet for Mr Jenner *was "same as CB",* he had to be asked to write comments. We concluded that his comments were also unfair – for example the

whole team was moved off Ribena at a time the client was happy with their ideas. Ms Minaidis scored them low for not winning new business at a time when little new business was being won by the agency, but the other Creative Directors were scored higher; she said they had not mentored juniors, again we found this was inaccurate.

216. We also found that there was no real concern about their work. Mr Peon did not undertake their formal appraisals, he did not spend time with them, he did not seek comments from a wider pool including names put forward by the claimants, his only comments to the claimants in December 2018 was that they needed to push against the perception that they were seen as only having expertise in 'traditional' advertising. At the grievance appeal stage it is stated that the claimants were having to be performance managed – this was an inaccurate statement, again used to justify their selection.

217. We also noted that they were scored on the assessment forms, we found that the other staff ostensibly marked were not scored on these forms. We concluded that the manner of marking, the lower than warranted scores, the differential marking methods, and the comments made on the assessment forms were because of the claimants' protected acts. We found that many of the comments made were not true, and the scoring exercise was not genuine. Accordingly the scoring exercise amounted to an act of victimisation.

218. We concluded that the failure to provide the claimants with copies of witness statements/interview notes, emails, documentation and information supplied by Celia Berk to the claimants was not an act of victimisation. We noted that the grievance policy did not provide for this, it says that there would be a grievance hearing at which the employees could bring documents and witnesses. We did not consider that there was a link between the claimants' protected acts and the failure to provide documentation, we concluded that the respondents were following the 1st respondent's grievance policy.

219. The same with the failure to provide the claimants a copy of the grievance report of Mr Taylor prior to issuing the grievance letter. There is nothing in the policy that says a report will be provided, and we saw no link between the claimants' protected acts and this failure.

220. On the 1st respondent's refusal to grant an extension of time in which to issue an appeal against the grievance decision, we noted that the grievance policy allows for an appeal in writing within 5 working days of the decision. We noted that 5 complete days were not given, however the claimants' appeal deadline was 'within' 5 working days. We noted that following a policy can amount to victimisation, however in the present case we saw no link between the protected act and this decision, no conscious or unconscious motivation that this decision was taken because of the claimants' protected acts.

221. We considered the same on the allegation of fixing a date for a further redundancy consultation period during the period in which a grievance appeal was to be issued; once the purported redundancy process was in train the 1st respondent was following its processes on redundancy hearings. It was entitled

to have a hearing on the redundancy without regard to the appeal on the grievance and we did not see a link between this decision and the claimants' protected acts.

222. We considered whether the failure to invite the claimants to a grievance meeting with Mr Taylor was an act of victimisation. We noted that the policy presumes a hearing will take place. However we concluded that there was no link conscious or unconscious between the claimants' protected acts and this decision. We concluded that the decision on the grievance was a predetermined decision, that there was a decision taken that it would be dealt with as quickly as possible, but that this was out of a desire to conclude the grievance process as quickly as possible; this was not linked to their protected acts.

223. Was there a failure to carry out a fair and proper investigation, consideration and determination of the claimants' grievances, and if so did this amount to an act of victimisation? We concluded that the grievance process and the grievance decision amounted to acts of victimisation. There were obvious failures in the process, and the investigation was not a fair and proper one. As Mr Taylor accepted, he did not see documentation which showed the decisions to make the claimants redundant was after their complaint and before the scoring took place. We concluded that Ms Berk was not made aware of the 24/25 May email chain. Both she and Mr Taylor were told that the selection had taken place prior to their complaint. Mr Taylor was told that all of the creatives were properly scored, they were not. We concluded that Ms Berk and then Mr Taylor were fed inaccurate information throughout the process on critical issues relevant to the claimants' grievance. We concluded that this was motivated by a wish to ensure the grievance outcomes were in favour of the company, to then move to finalise the claimants' dismissals. We concluded that this in turn was motivated by the claimants' protected acts and the respondents' wish to dismiss the claimants. We concluded that there was a significant link between the claimants' protected acts, the desire to dismiss the claimants and the grievance process and decision.

224. We concluded that the failure to give documents to Mr Taylor and Ms Berk, the provision of inaccurate information on the timeline, was provided to ensure that the decision was prejudged. We concluded that it was inevitable there would be a wish to prejudge the position, because to provide accurate information would assist to prove the claimants' case. We did not consider that Ms Berk or Mr Taylor consciously victimised the claimants in the consideration of their grievances, they were in effect hostage to the information they were being given. However the grievance investigation, determination and decision was prejudged by the misleading information given to the investigator. This made the process consciously predetermined by members of the 1st respondent's senior management team. We concluded that this all occurred because of their protected acts and the consequent desire to dismiss them and therefore amounted to acts of victimisation.

225. We concluded that the failure to properly investigate and determine the claimants' appeals against the grievance decision and their appeals against dismissal also amounted to acts of victimisation for the reasons set out above. There was a failure to provide documentation and inaccurate information on the

timeline. We concluded that this was because the decisions not to uphold the grievance and dismissal appeals were taken in advance and documentation provided to the appeal managers to ensure that these decisions were upheld, we concluded that this was because of the protected acts and the desire to dismiss the claimants.

226. Was holding the claimants to their notice period an act of victimisation? Again, we concluded not. We were not made aware of any policy or practice that the 1st respondent would invariably dismiss and make a payment in lieu of notice, that their failure to do so was connected to their protected act. We saw no link between this decision and the protected acts of the claimants.

Direct Discrimination - dismissal

227. The parties agree that s.14 EqA does not apply. The claimants' case is that they were not dismissed because they are straight while British middle-aged men, but that the respondents relied on multiple discriminatory motives for dismissing them. Because they had complained; because their dismissal would assist the gender pay gap issue; because they fitted the profile the respondents wanted to 'obliterate' – they are men, they are middle-aged, they are straight, they are white British. The claimants' case is that there were multiple reasons for dismissing the claimants, that each of these reasons had a significant influence on the decision to dismiss (per Nagarajan).

228. We noted also the respondents' case, that if we find that the discrimination was because of a combination of protected characteristics, (for example that they are older, straight, men), the claims must fail as this would amount to a finding of combined discrimination.

229. We therefore considered the individual strands of discrimination, and also whether or not there was evidence that their treatment was because of a combination of protected characteristics. We note also that the claimants rely on hypothetical comparators.

230. We noted that prior to their promotion the claimants had been acting as Creative Directors on accounts including HSBC and Ribena, and they were promoted on the basis of their work as Creative Directors. They had scored highest in the Senior Creatives redundancy exercise in 2017 in part on their work as Creative Directors. On their promotion their work was praised and it was also referenced in at least one employee's appraisal as an exemplar of good digital work. In his evidence Mr Peon conceded that some of their digital ideas were *"good"*. Within six months of their promotion, certain negative opinions were being expressed, for example Mr Peon's comments at their November 2018 meeting that there were *"rumours"* that they did not have digital skills, Ms Minaidis had drafted an emails which was not sent with some negative comments; there were remarks that the claimants were low energy, that they can only be placed on TV work because this is where their strengths are perceived. There is the reference to the 'old blokes', a remark we find was made by Mr Peon.

231. We also found, that despite these perceptions of the claimants, there was no real concern about their work; Mr Peon did not undertake their formal appraisals, he did not seek comments from a wider pool including names put forward by the claimants, his only comments to the claimants in December 2018 was that they needed to push against the perception that they were seen as only having expertise in 'traditional' advertising. They were not being performance managed as later alleged.

232. In October 2017 a new Creative Director was appointed whose views aligned with those of Mr Peon, on the need to shake up the creative team to ensure they were seen as experts in non-traditional advertising, and to lose the reputation as the 'Knightsbridge boys club'. Tweets publicly supporting these views were sent and re-tweeted by the 1st respondent.

233. There was clearly significant issues of concern potentially affecting all of the creative team, that of falling business and revenue. There was a constant balance between the potential of work being won and the need to cut costs, as set out in the respondents' evidence. The creative team were all busy over this period, creating ideas on pitches, submitting work for awards, again as set out in the respondents' evidence. In January 2018 the 1st respondent stayed its redundancy process, at this time they were considering one Creative Director redundancy, which was not pursued because one Creative Director resigned. In March 2018 Worzel 2 was in motion, neither of the claimants were in scope for redundancy according to this document, nor were any other Creative Directors, notwithstanding the apparent plan which the respondents say was under consideration from January 2018 to reduce the Creative Director team from 7 to 3, involving 2 redundancies and 2 promotions.

234. By March/April 2018 the Gender Pay Gap report produced shock waves within the 1st respondent, and the Creative Department was highlighted as an area of particular concern, with its creative team at a more senior level being predominantly male and on higher salaries.

235. This led to a PR campaign, including the presentation at the Creative Equals Conference, attended by Mr Whitehead and Ms Hoyle. This presentation, the Tribunal concluded, presented a negative opinion of and negative attitude towards those creatives, including the claimants, who fitted within the general perception the speakers at the CE conference said existed; while maybe not from privileged backgrounds they were senior within the creative team, they are white, male, straight, and the perception was held by some in the agency that they created only traditional above the line advertising. There was a promise to obliterate the reputation of the agency as being full of creatives with these characteristics. The claimants complained, and their complaints were regarded as being of significant concern within the 1st respondent, including Ms Hoyle, Mr Peon, and we found Mr Whitehead; they were discussed at senior management meetings, as Mr Taylor confirmed in his evidence.

236. The Tribunal concluded that the claimants' views as expressed in their emails of 18 & 21 May 2018 and in the 21 May meeting with Ms Hoyle and Mr Peon were seen as out of step with and a challenge to the 1st respondent and its senior

management team's desire to rid the 1st respondent of its reputation; as one example the claimants' expressed views were seen as potentially gross misconduct by Ms Hoyle. A dismissal process purportedly on grounds of redundancy was immediately instituted, within a few days of their complaints, and the claimants were, we found, pre-selected for redundancy immediately, as confirmed by the 24/5 May 2018 emails and by Ms Hoyle's comments at her grievance interview.

237. We considered the claim of age discrimination. We accepted the respondents contention that the claimants had failed to precisely identify the age or range of ages of a comparator team. We concluded that a hypothetical team would be one who has significant experience and depth of work of the same type, who were regarded as senior creatives on a similar salary. The claimants argued that comparators could be within the 40-43 age bracket, and we used this bracket. The comparators would be white British, male and straight, with an established portfolio of good work prior to joining the respondent, who would have been promoted with praise, whose work including digital was praised, but who were also seen as traditional, on a similar salary to the claimants. This comparator team would have complained in similar terms about the Creative Equals conference. Such a team, unlike the claimants, would not have been called 'old blokes' or had pejorative refences to being of low energy – we concluded that these were remarks related to the claimants age.

238. We noted that the presentation's main reference to age was in relation to the Knightsbridge boys club, a pejorative reference to class, and about younger not older employees. The presentation otherwise did not explicitly refer to age, nor did the claimants emailed complaints.

239. We considered whether this difference in age between the claimants and their comparators would have produced a different result. We considered whether or not there would have been an angry exchange and then their preselection for dismissal. We concluded that the hypothetical team would have been treated in the same way, as a challenge, as resistant to change, a challenge to the desire to rid the agency of its traditional reputation. We concluded that the respondents would have regarded this challenge as in part made in self-interest, as they were refusing to accept changes which would affect them and other 'worried' senior male creatives. We concluded that an angry exchange would have occurred, with similar perceptions held by Mr Peon, Ms Hoyle and by members of the 1st respondents senior management team.

240. We noted also that a desire to save money was one reason given by Mr Peon to justify the process. These comparators would be on the same salary as the claimants. We also considered that the gender pay gap issue was significantly in the mind of the respondents at this time.

241. Despite the pejorative age-related remarks made about the claimants, on the basis of this evidence we concluded that this comparator team would have been treated in the same way as the claimants after their complaint, with hostility in a meeting on the 21 May 2018 and that there would have been a similar process

leading to their dismissal at or around the same time as the claimants. Accordingly the claim of direct age discrimination fails.

242. We next considered whether the claimants' dismissal was because of their sex. We concluded that it was. We considered that the respondents viewed the senior creative team as male-dominated, and a significant reason for the gender pay gap figures being so poor, particularly in the Creative Department. We considered that a significant factor in the respondents' minds at this time was the gender pay gap issue, and that a reason for dismissing the claimants was that there would be an impact, both in terms of the figures, and by the prospect of having senior positions opening which could be filled by women.

243. We considered how a hypothetical comparator team would have been treated: i.e. a female team of the same age as the claimants who had a similar career profile and a similar reputation within the agency as being more interested in traditional advertising, who were on a similar salary and who had made allegations in similar terms following the Creative Equals conference.

244. We concluded that there would have been a different reaction to this hypothetical team's complaint. We concluded that there would have been a push back against their views, but it would not have led to a furious reaction, or an immediate consideration of disciplinary action or a decision within 2-3 days to pre-select them for redundancy. The reason, we considered, is that such a complaint made by a female team would have not been seen as a threat to the desire to rid the 1st respondent of its reputation. Also, we considered, there was no motivation to remove a team of senior female creative directors, this was exactly the type of employees who would improve the gender pay gap figures in its Creative Department. We noted in support of this that Mr Peon, in the days before the claimants' selection for redundancy, saved a senior woman creative from redundancy, one reason for this was because she is a woman.

245. We also concluded that such a hypothetical team would have been seen as fitting the mould of what the creative department was looking for – senior female creatives. The 1st respondent was urgently seeking a changed perception of the agency as white, male, straight and 'traditional'. To dismiss the claimants would assist in changing this reputation. Contrarily, dismissing the hypothetical female creatives would have the opposite effect as it would be decreasing the number of senior female creatives.

246. What of the fact that the senior creative female hypothetical comparators would be on comparable salaries to the claimants, and one of the reasons for dismissing the claimants was the need to take out senior more expensive roles? We concluded that having senior female creatives on comparable salaries as the claimants would be of significant benefit to the poor gender pay gap figures, far outweighing the potential costs savings of dismissing them.

247. What of the fact that a hypothetical senior female creative director team would also have the issue of 'traditional advertising' as an issue. We concluded that such a team would have had their digital output more readily acknowledged in the process, that their digital output would have been regarded more positively

when considering a dismissal process, contrary to the way the claimants were treated.

248. The Tribunal concluded based on the above that a significant reason for dismissing the claimants was because of their sex. We considered that this factor, the claimants' sex, was on the mind of the respondents when determining to dismiss them, an equal factor with that of the anger at their complaints. This would immediately assist the gender pay gap issue within the creative team, it would rid the team of two creative directors who were because of their sex seen as resistant to change; also female creative directors were exactly what the respondents were seeking.

249. We considered whether the claimants were dismissed on grounds of their sexual orientation. We heard little evidence on or submissions in relation to these claims. We concluded that while the claimants are straight, a comment with a negative connotation on the Creative Equals presentation, the claimants' sexual orientation played no part in the respondents' thinking when making them redundant, we saw no evidence that their sexual orientation played any part in this decision, that there was any link between the claimants sexual orientation and the decision to dismiss them. While we accepted that such discrimination can be unconscious, we considered that the respondents were primarily motivated by their complaints and because of their sex.

250. We also considered whether the claimants were dismissed on grounds of their race. Again, we heard little evidence on or submissions about a claim of race discrimination. We noted that being 'white British' was a disparaging remark made – that the aim was to destroy the reputation of the agency as being, amongst other things, made up of white British creatives. However, we concluded that the claimants' race played no part in the decision to make them redundant; that a hypothetical team of senior male straight creative directors of a different race and nationality would have been treated in the same way as the claimants. We concluded that the conscious decision making of the respondents was, instead, related to the sex of the claimants, that dismissing them would assist with the gender pay gap figures in a way that dismissing a hypothetical male team of a different race or nationality would not do.

<u>Direct discrimination - detriment</u>

251. On the acts alleged to amount to direct discrimination within employment.

252. Meeting 21 May 2018:

    a. Did this amount to direct sex discrimination? We concluded that a hypothetical female creative director team would not have been challenged in the way that the claimants were, that there would not have been the anger expressed towards this team, that the comments of the hypothetical female team would have been treated in a more considered and less angry manner While there would have been concern about what was said in the emails, we concluded that the meeting would have not started with anger and that the points of view expressed would have been addressed in a

calmer manner. Importantly, the views expressed by the hypothetical team would not have been seen as a challenge to the respondents views on diversity and inclusion, it would not have been taken so personally by Mr Peon and Ms Hoyle, there would not have been angry allegations that they were against diversity; particularly given the context of the gender pay gap report.

We concluded that significant reason why the claimants had such a difficult meeting was because they are a team of senior male creative directors, that the same treatment would not have occurred with a hypothetical team of senior female creative directors. We concluded that the anger and division which Mr Peon and Ms Hoyle expressed and felt at this meeting was an act of direct sex discrimination.

b. We concluded that this treatment did not amount to an act of age discrimination: we considered that a team of younger male creatives would have been treated in the same way as the claimants were treated. Their views would have been seen as a challenge to the respondents, an act of resistance to the changes that the respondents wanted to make; they would equally have been seen as negatively and potentially acts of misconduct. Also, we concluded that a younger team of male creatives would have been seen as much as a challenge for the gender pay gap figures as the claimants were; we concluded that a younger team would have had equal anger expressed towards their views as was expressed towards the claimants.

c. As above, we heard little evidence or submissions on whether a hypothetical team of Creative Directors of a different sexual orientation would have been treated any differently than the claimants. We concluded that there would have been no difference in treatment; that a significant factor behind the respondents anger at this meeting was the fact that they were senior male creative designers who were perceived as refusing to accept the respondents' position on diversity and equality, and in part this was related to the gender pay gap figures. While we considered that the respondents would have welcomed employees of a different sexual orientation, we considered that equal anger would have been expressed towards such a hypothetical team who expressed their concerns in the same way as the claimants.

d. We concluded the same on a hypothetical team of a different race and nationality with the same characteristics as the claimants: equal anger would have been expressed towards such a team, as this team would have been seen as not accepting the respondents' position on, in particular, gender diversity.

253. Was the respondents failure to consider alternatives to making redundancies including voluntary redundancies, or reduced hours, or terminating the engagements of freelances an act of direct discrimination?

a. In relation to sex, we concluded that a hypothetical team of female creatives in this redundancy situation would have been treated the same way as the claimants were treated; that once the decision had been taken the process adopted would have been the same for the claimants as this hypothetical team. We concluded that no thought was given to the possibility of alternatives to redundancy, and that this would be the same for any team once the decision to dismiss had been taken, that the protected characteristics of the team would have not have been an issue at any stage of the process. We considered that the hypothetical team would have been preselected, and the process would have inevitably have been followed to its preordained conclusion, that of dismissal on the purported ground of redundancy.

b. We concluded the same for a hypothetical older team; also a hypothetical team of a different race and nationality; also a hypothetical team of a different sexual orientation – once the decision to make this team redundant had been taken, they would have been treated in the same way as the claimants.

254. We concluded that the use of this redundancy selection criteria did not amount to direct discrimination on any of the grounds alleged. We accepted that this selection criteria had been used in previous redundancy rounds, that it would have been used on any team which had already been selected for dismissal, no matter what the protected characteristics of the senior team. There is no link between this criteria and the claimants' protected characteristics.

255. We concluded that the decision not to include named staff in the pool/exclude others was not an act of direct discrimination based on any of the protected characteristics. We concluded that the same pool would have been used in a genuine redundancy exercise. The claimants were preselected for redundancy, and we accepted that the pool was only ever used as a pretence that a fair process was being followed. However this was the pool that would have been used in a genuine exercise, and so we concluded that the reason why this pool was used had nothing to do with the claimants age, sex, nationality or race, or sexual orientation, instead it was used simply to justify the decision already taken, the claimants' preselection for dismissal.

256. We concluded that the individuals who marked the claimants would have been those who would have undertaken the marking in a genuine redundancy exercise, that this was not an act of direct discrimination, for the reasons set out in the victimisation section above.

257. We concluded that the claimants were not fairly scored, and we concluded that the scores and the comments made to justify the scores amounted to acts of direct sex discrimination; a senior female team would not have been so scored, their assessment would have been a fair assessment and there would have been no decision to retrofit the scores to justify their selection as this team would not have been pre-selected. For the reasons set out above, we did not consider that the failure to fairly score the claimants amounted to discrimination on grounds of any of the other protected characteristics.

258. We concluded that the failure to provide the claimants with copies of witness statements/interview notes, emails, documentation and information supplied by Celia Berk to the claimants was not an act of direct discrimination. A senior team of female creatives would have been treated in the same manner in any grievance process.

259. The same with the failure to provide the claimants a copy of the grievance report of Mr Taylor prior to issuing the grievance letter. A senior female creative team wold have been treated in the same way.

260. On the 1st respondent's refusal to grant an extension of time in which to issue an appeal against the grievance decision; the allegation of fixing a date for a further redundancy consultation period during the period in which a grievance appeal was to be issued; the failure to invite the claimants to a grievance meeting. We concluded that a senior female team undergoing a grievance process and redundancy process would have been treated the same way. Once the redundancy process was in train and employees selected for redundancy, the same process would be undertaken for any employee, no matter their protected characteristics, and these were not acts of direct discrimination.

261. Was there a failure to carry out a fair and proper investigation, consideration and determination of the claimants' grievances and grievance appeals, and appeals against their dismissals and if so did this amount to acts of direct discrimination? We concluded that it did not. We considered that once a comparator team had raised a grievance, a grievance appeal or an appeal against dismissal, they would be treated the same and the processes concluded in the same ways. We concluded that the reason why the processes were concluded as they were was not because of any protected characteristic, but motivated by the desire to conclude the processes as quickly as possible, to move towards dismissals. We concluded that while this amounted to an act of victimisation, a team made up of employees of different protected characteristics who had complained and who it was decided would be dismissed would have been treated the same way.

262. Was holding the claimants to their notice period an act of direct discrimination? Again, we concluded not, we saw no evidence that a comparator team made up of different protected characteristics would have been treated any differently.

<u>Harassment – dismissal</u>

263. On the basis that we are incorrect in our findings of direct discrimination, we considered the alternative claim of harassment. Did the respondents' conduct amount to (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimants dignity; or (ii) creating an adverse environment for them; (c) on the prohibited grounds of their age, or sex, or nationality and race, or sexual orientation?

264. Were the claimants' dismissals acts of harassment? We concluded that they were. Their dismissals was clearly unwanted conduct which created an adverse environment for them – they were being dismissed in circumstances which they

considered to be unfair and discriminatory and where we have found their perceptions to be accurate in large part. This was a significantly adverse work environment.

265. We considered whether the claimants' dismissals was on the prohibited ground of sex. We noted that the conduct must be 'related to' the claimants' sex, including conduct associated with that characteristic. Also that the context is relevant, the mental processes can be considered. The Tribunal concluded that the decision to dismiss was related to the fact the claimants are men, that this was a conscious motivation in the decision to dismiss, for reasons including the desire to improve the gender balance in its senior creative team, the improvement to the gender pay gap figures which would result in their dismissal, as set out above. Accordingly the claims of harassment related to the claimants' sex succeeds.

266. For the same reasons as set out in the direct discrimination section, we concluded that the claimants' dismissal was not related to their age. We accepted that the word traditional had been used about them, also they were 'old blokes' thought to be lacking energy. However, we concluded that the claimants' age was at best a trivial reason in the decision to dismiss, we concluded that their sex and their complaints were the principle and dominating motivations for their dismissal.

267. For the same reasons, the claims that their dismissal was an act of harassment based on the claimants' race and nationality, and their sexual orientation, also fail.

Harassment – detriments

268. We concluded that the respondent did not consider alternative to redundancies – such as voluntary redundancies, reduced hours of terminated the engagements of freelancers. We concluded that this was not an act of harassment. When the decision to dismiss the claimants had been made, the process adopted thereafter had no connection with the claimants' protected characteristics.

269. We concluded that the decision to include freelance CDs in the pool and exclude an acting CD from the pool was not an act related to the claimants' protected characteristics. When the redundancy process was in train, this is a decision they would have made in any event.

270. We concluded that Mr Peon, Ms Minaidis and Mr Whitehead were properly chosen to mark the claimants on the redundancy exercise, for the reasons set out above, that this was not connected to their protected characteristics.

271. We concluded that the claimants were not fairly scored in the redundancy process, and we concluded that the scores and the comments made to justify the scores amounted to acts of harassment. Their scores were unwanted conduct which created an adverse environment, particularly in circumstances where they had not been marked under a proper process and were not told the

truth about this. We concluded that this treatment was related to the claimants' sex; the reason why they were selected for redundancy was in part related to their sex, and the scores were retrofitted to justify their selection.

272. We concluded that the respondents did not make any attempts to redeploy the claimants. We concluded that this was not an act of harassment – it was not related to their protected characteristics as the respondents would not have redeployed any candidate for redundancy after their selection.

273. We concluded that the actions of Mr Peon and Ms Hoyle at the 21 May 2018 meeting amounted to an act of harassment connected to the claimants' sex. It was unwanted treatment and it was a hostile meeting with anger and raised voices on the part of Mr Peon and Ms Hoyle, we concluded that it was a hostile environment. It was connected to their sex, as the claimants were seen to be against the 1st respondent's agenda on the gender pay gap and the need to change its perception, and the reason why they were seen to be against the agenda is because they are men; we considered that this treatment was related to their sex.

274. The 1st respondent's failure to provide the claimants with documentation in the grievance process. We concluded that this is did not amount to an act of harassment; the 1st respondent's policy does not allow for documents to be provided, and we considered that this treatment was no in any way related to the claimants' protected characteristics.

275. We considered that the JWT's failure to provide the claimants with a copy of the Taylor report prior the grievance decision was not an act of harassment. Again, there was no requirement to provide the report and we considered that this treatment was not related to the protected characteristics of the claimants.

276. We concluded the same for the 1st respondent's refusal to grant an extension of time to appeal. The 1st respondent was acting within the policy in giving 5 days to appeal, and this treatment was not related to the claimants' protected characteristics.

277. We concluded the same for the fixing a date for a further redundancy consultation meeting when an appeal against the grievance outcome had been made. This was not a decision related to the claimants' protected characteristics, this decision would have been taken in any event.

278. The failure to invite the claimants to a grievance meeting: again we determined that this did not amount to an act of harassment. We noted that the grievance policy states that a meeting should be held. However we determined that this decision was not related to the claimants' protected characteristics, that the same decision would have been taken no matter their protected characteristics.

279. We concluded that there was a failure to properly investigate and determine the claimants' grievances, grievance appeal and appeal against dismissal. We concluded that this was unwanted treatment which had the effect of providing a hostile working environment. We concluded however that this treatment was not

related to the claimants' protected characteristics, that this treatment was motivated instead by a desire to move through the process as quickly as possible, because of the claimants' protected acts.

280. We concluded that holding the claimants to their notice periods was not an act of harassment, that it was not related to their protected characteristics, that there was no evidence that this was not the 1st respondent's usual practice.

The claims against the 2nd respondent:

281. We heard little about why the 2nd respondent is liable for acts of discrimination. We note that on a literal reading of the list of issues, the claims against Mr Peon are the dismissal-related claims, (paragraph 5 and 6 above). We concluded that Mr Peon could not be held individually liable for acts which were not taken just by him, but in concert with other senior managers within the 1st respondent. For example, one allegation is that the claimants were not fairly and properly scored. Mr Peon was one of three managers marking the claimants; his contribution in the process was important, but he did not make decisions on his own, including the decision to dismiss the claimants. We concluded that the acts of unlawful discrimination, victimisation and (in the alternative) harassment, were decisions taken by and on behalf of the 1st respondent, and that Mr Peon is not personally liable for the acts of the 1st respondent.

The claims against the 3rd respondent:

282. The claims against the 3rd respondent are ones of harassment. One of the allegations made against the 3rd respondent has been upheld as amounting to harassment – the events of the meeting dated 21 May 2018. We concluded that this claim was brought out of time and that it was not just and equitable to extend time; the claimants were aware of the time limits, they were determining to make a claim against all respondents, yet did not submit a claim until well after the primary 3 month limitation period of this act. We noted that no reasons have been given for putting in a late claim. We concluded that it would not be just and equitable to extend time.

Unfair dismissal:

283. We concluded that the 1st respondent has not proven that the claimants' dismissals were on the ground of redundancy, or for some other substantial reason. We concluded that while there was the background of redundancies, there was no decision taken to make 2 Creative Directors redundant in April/May 2018 as alleged by the respondents. We concluded that the reasons for their dismissal was instead motivated by their complaints and because they were seen as resistant and an impediment to the 1st respondents agenda on gender pay and the make-up of the senior creative team.

284. In the alternative, we also considered the process followed. We concluded that the process undertaken was unfair. Bearing in mind the obligation of the Tribunal not to substitute its view for that of a reasonable employer, we concluded that there was no consultation prior to the claimants being selected for redundancy,

we considered that a reasonable process would have informed the creative directors of the risk of redundancy and invited proposals and comments.

285. We considered that the selection criteria was reasonable, that it was similar to that used before. We also concluded that it was not inappropriately subjective, what was being marked was in part expertise in generating ideas, itself an impressionistic and subjective exercise. Objective criteria, such as revenue generated or sales won, would not necessarily have been fair, for example an idea can be a great idea but may not be chosen by a client. We concluded that the criteria used was reasonable given the creative ideas-based nature of the work.

286. However, the scoring of the claimants under this criteria was not reasonable; a similarly sized and resourced reasonable employer would not have pre-selected its employees for redundancy and would not have retrofitted the scores or used different scoring methods for marking those selected for redundancy versus those who were not selected (i.e. the use of the assessment score sheets only for the claimants, not for the other Creative Directors). We noted that the comments made, as one example "*not natural and fluent"* at digital work, was contradicted in part by praise given to the claimants' 'non-traditional' Ribena campaign. We noted that no comments were provided by Ms Minaidis or Mr Peon on their digital /integrated skills despite being marked *"rarely demonstrates"* this behaviour. Several boxes were left blank with no comments. Mr Whitehead says that he is *"constantly disappointed by active ownership and leadership on projects"* without giving examples of the same. We concluded that the scoring was a sham designed to ensure the predetermined decision to dismiss the claimants was seen to be justified.

287. The respondents did not consider alternatives to redundancies, including voluntary redundancies. The failure not to do so was because the claimants had already been selected, and the respondents were determined to dismiss the claimants. We considered that this was not reasonable, that it was outside of the range of responses open to a similarly sized and resourced employer, which would have considered voluntary redundancies.

288. The claimants argued that reduced hours or terminating the engagements of freelancers would have been a reasonable step to take. We did not consider that either was a reasonable step to take. The freelancers had specific skills and were in the main employed on specific projects where their skills were utilised.

289. For the reasons set out above, the appeal process was unreasonable as documents were withheld from the process and a misleading timeline provided, meaning that the outcome of the appeal was effectively decided against the claimants, based on inaccurately supplied information. This was unreasonable and unfair.

Case numbers: 2200540/2019V
2200546/2019V

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EMPLOYMENT JUDGE M EMERY

Dated: 5 July 2021

Judgment sent to the parties
On: 05/07/2021

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For the staff of the Tribunal office

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