EMPLOYMENT TRIBUNALS

Claimant: **Ms S McKendry**

Respondents: **1. Switalskis Solicitors Ltd**

2. Mr J Durkan

3. Mr M Kennedy

Heard at: **Leeds** **On:** **6, 7, 8, 9, 10 March 2017**

Deliberations 13 March 2017

Before: **Employment Judge Davies**
Mrs L Anderson-Coe
Mr K Lannaman

Representation

Claimant: Ms S McKie QC and Mr S Mallett, counsel
Respondents: Mr M Rudd, counsel

RESERVED JUDGMENT

1. The Claimant's claims of less favourable treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and of victimisation in respect of the allegation that the First and Third Respondents withheld disclosure of the fact that reports had been made to the ICO, SRA and Official Solicitor, are dismissed on withdrawal by the Claimant.
2. The Claimant's claim of unfair dismissal against the First Respondent is well-founded and succeeds.
3. The Claimant's claim of indirect sex discrimination against the First and Second Respondents is well-founded and succeeds.
4. The Claimant's claims of direct sex discrimination and victimisation are not well-founded and are dismissed.

ORDERS

1. The remedy hearing will take place on **4 and 5 May 2017** at Leeds Employment Tribunal.
2. The parties shall by way of disclosure send to each other copies of any further documents relevant to the issues to be decided at the remedy hearing by **6 April 2017**.
3. Witness statements for any person on whose evidence a party seeks to rely at the remedy hearing shall be sent to the other parties by **13 April 2017**.

4. The Claimant shall provide an updated schedule of loss by **20 April 2017**.

REASONS

1. Introduction

1.1 This was the hearing to decide claims of direct sex discrimination, indirect sex discrimination, victimisation, unfair dismissal (ordinary and automatically) and less favourable treatment of a part-time worker brought by the Claimant, Ms S McKendry, against her former employer, Switalskis Solicitors Ltd. Mr Durkan was named as a Respondent to the discrimination complaint and Mr Kennedy to the victimisation complaint.

1.2 EJ Davies dealt with an application by the Claimant for specific disclosure on 17 February 2016. She ordered disclosure of a number of documents and documents of clear relevance to the issues in the Tribunal proceedings were disclosed as a result. Those documents were included in a supplementary bundle of documents for the Tribunal hearing. No satisfactory explanation has been given as to why a firm of solicitors, itself instructing experienced employment solicitors, failed to disclose such documents in the ordinary course of disclosure.

1.3 The Claimant was represented by Ms McKie QC and Mr Mallett of counsel and the Respondents by Mr Rudd of counsel. The Tribunal was provided with an agreed file of documents and the supplementary file to which we have referred. We considered those documents to which the parties drew our attention. Further documents were admitted by agreement during the hearing.

1.4 The Tribunal heard evidence from the Claimant on her own behalf. A number of written statements in support of the Claimant were taken as read. For the Respondent we heard evidence from Mr J Durkan (managing director), Mr M Kennedy (director), Mr R Uppal (director) and Ms L Law (director).

1.5 EJ Rostant had directed in November 2016 that this hearing would deal with liability only and that remedy, including contributory fault and the question whether the Claimant would have been fairly dismissed in any event ("*Polkey*") would be dealt with separately, if required. At the outset of the hearing the Tribunal indicated that it intended to deal with contributory fault and *Polkey* at this stage. The parties agreed. In closing submissions, however, counsel for the Respondents indicated that the Respondents were disadvantaged because they had not had the chance to call relevant evidence to deal with the underlying allegations of misconduct. Ultimately, counsel made an application that the Tribunal deal with those matters at the remedy stage, as originally intended. The Tribunal decided to do so. We had great sympathy for the Claimant and we noted that the Respondents had not raised this issue over the course of the hearing, but we decided that the overriding objective and the interests of justice required us to proceed in that way. Fundamentally, we accepted that the Respondents would potentially be disadvantaged because they had not been able to call relevant evidence. They had not applied to do so during the course of the hearing, but if they had it could not have been accommodated within the timetable. Putting these two issues off to the remedy stage ultimately only restored the position as both sides must have understood it on the first morning of the hearing. We record that the Respondents confirmed that they would not seek to re-call those witnesses who have already given evidence. That was the

basis on which the Tribunal had approached the application. This is not an opportunity for those witnesses to improve their evidence. Further, cross-examination of the Claimant took place when the parties were expecting the Tribunal to deal with *Polkey* and contributory fault. To the extent that the Claimant's evidence on these matters was not challenged, the Respondents cannot now re-open the position.

2. The Issues

2.1 The issues to be determined were:

Unfair dismissal

2.1.1 What was the reason for the Claimant's dismissal?

2.1.1.1 Was the reason or principal reason that she alleged that the First Respondent had infringed her right under the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") to the continuation of her previous contractual terms and conditions?

Note: The First Respondent accepted that the Claimant alleged an infringement within the meaning of s 104A Employment Rights Act 1996 in an email of 5 February 2016.

2.1.1.2 If not, was the reason misconduct? Did the First Respondent have a genuine belief in misconduct on the Claimant's part?

2.1.2 If the reason was misconduct did the First Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard in particular to whether:

2.1.2.1 there were reasonable grounds for that belief;

2.1.2.2 at the time the belief was formed the First Respondent had carried out a reasonable investigation in the circumstances;

2.1.2.3 the First Respondent otherwise acted in a procedurally fair manner;

2.1.2.4 dismissal was within the range of reasonable responses?

Direct and indirect discrimination: preliminary

2.1.3 Has the Claimant established the detrimental action upon which she relies?

2.1.4 If so did the acts amount to conduct extending over a period, so that the claims relating to acts occurring before 19 April 2016 (First Respondent) or 9 June 2016 (Second Respondent) were brought within three months (plus early conciliation extension) of the end of that period as required by s 123 Equality Act?

2.1.5 If not were those claims were brought within such other period as the Tribunal thinks just and equitable pursuant to s 123(1)(b)?

Direct sex discrimination

2.1.6 Did the First and Second Respondents treat the Claimant less favourably than an actual or hypothetical comparator (in whose case there was no material difference in circumstances compared with the Claimant) by:

2.1.6.1 the Second Respondent "bullying" the Claimant by seeking to impose on her a pattern of working on Wednesdays, in particular at a meeting on 4 February 2016, in emails in

February 2016, at a meeting on 17 March 2016 and in an email on 20 May 2016;

2.1.6.2 suspending the Claimant on 6 June 2016;

2.1.6.3 the Second Respondent's "oppressive" behaviour in an investigatory meeting on 22 June 2016, at which he went too fast, did not give the Claimant a chance to respond, adopted a mocking tone and did not allow the Claimant access to the relevant documents;

2.1.6.4 not awaiting the Claimant's written response following that meeting before proceeding to a disciplinary hearing;

2.1.6.5 dismissing the Claimant on 8 July 2016?

2.1.7 If so, was it because of the Claimant's sex?

Indirect sex discrimination

2.1.8 Did the First or Second Respondent apply a provision, criterion or practice ("PCP") to the Claimant namely, that all full-time directors were required to work Monday to Friday?

2.1.9 If so did or would the PCP apply to men?

2.1.10 If so did or would the PCP put women at a particular disadvantage compared with men?

2.1.11 If so did it put the Claimant at that disadvantage?

Note: The Respondents did not dispute that if there was such a PCP it put women generally and the Claimant personally at a particular disadvantage. They did not argue that any such PCP was justifiable.

Victimisation

2.1.12 It was not disputed that the Claimant did a protected act, namely making an allegation of sex discrimination in her response to disciplinary allegations on 4 July 2016.

2.1.13 Did the First or Third Respondents subject the Claimant to a detriment because she did a protected act by:

2.1.13.1 dismissing the Claimant on 8 July 2016;

2.1.13.2 removing her from directorship of the First Respondent without due process;

2.1.13.3 failing to respond to her data protection subject access request ("SAR") on 3 August 2016;

2.1.13.4 refusing to respond to her SAR on 30 August 2016;

2.1.13.5 reporting her to the Information Commissioner's Office ("ICO"), Solicitors Regulation Authority ("SRA") and Official Solicitor ("OS") on 20-21 July 2016;

2.1.13.6 failing to report to the OS and the Claimant that the SRA and the ICO had decided to take no action in response to the reports to them?

3. The Facts

3.1 The First Respondent is a firm of solicitors with around 13 branches and 250 staff across Yorkshire. Its managing director is Mr Durkan, an accountant by profession. The First Respondent has around 14 directors who have equal shareholdings and, in terms of hierarchy, are of equal status. There is a strategy committee, comprising four of the directors: Mr Durkan, Ms Law, Mr Uppal and Mr Kennedy. Ms Law, Mr Uppal and Mr Kennedy are all solicitors. On the evidence before the Tribunal, the First Respondent does not have clear decision

making structures or processes. It was far from clear, for example, who within the organisation was responsible for hiring and firing. The First Respondent has one employee responsible for HR – Ms Paga. Ms Paga does not have any HR qualification. The First Respondent has a retainer with Chadwick Lawrence solicitors, to handle its own legal issues.

3.2 The Claimant is a solicitor of 22 years' qualification. She is highly regarded within her field, Court of Protection ("CoP") work. At the time of the events with which the Tribunal was concerned, she had an extensive practice in the area, was ranked highly in the professional directories and had a strong professional relationship with the OS. Witness statements provided on her behalf by members of the legal profession attest to her professional standing.

3.3 From 2009 to 2014 the Claimant was employed by (and latterly a partner in) Langleys solicitors. However, the loss of a legal aid contract led to a transfer of the CoP team from Langleys to the First Respondent in October 2014. TUPE applied. The First Respondent was very keen to acquire the Claimant's services, not least because of her connection with the OS. The Claimant became a director of the First Respondent. At that time she was made joint head of the First Respondent's CoP team, alongside Ms Kaye, who was based in Leeds. The Claimant's team were based in York. Essentially her whole team from Langleys transferred, namely: Ms Caroline Hurst (legal executive), Ms Natalie Coates (trainee), Ms Rita Black (legal assistant/secretary) and Ms Rose Raynor (legal secretary).

3.4 By the time of the events with which the Tribunal was concerned, the Claimant's York CoP team had expanded and included two solicitors: Mr Stephen Williams, who was based in the north-east and worked from home, coming into the office about once a week; and Ms Nicki Burridge-Todd, who we understood was on maternity leave for some of the relevant period. There was also a paralegal, Ms Emily Park, and an administrative assistant, Ms Liz Andrews-Wilson.

3.5 The Claimant was never provided with a written service agreement by the First Respondent. At the time of transfer, her terms and conditions with Langleys were governed by a partnership deed. As the Tribunal understood it she had a contractual disciplinary procedure at Langleys. That transferred with her under TUPE. The First Respondent also had a disciplinary procedure. It made clear that employees were entitled to fair, just and consistent treatment and that all complaints and allegations would be fully investigated before disciplinary action was begun. Among other things, it provided for an appeal against any disciplinary action, which was to take place as quickly as possible and, in any event, within 10 working days. One notable difference between the Langleys policy and that of the First Respondent was that the former provided for an appeal to be heard by the senior partner or by two partners. The First Respondent's policy simply said that the employee would be notified in writing who was to hear the appeal.

3.6 The First Respondent had an equality and diversity policy, which said that it was committed to eliminating discrimination and promoting equality. The person responsible for the policy was Ms Law. The First Respondent also had a flexible working policy. That was not disclosed by it until Mr Durkan was asked about it in cross-examination. He said that he did not know if the First Respondent had

such a policy, and that evidently led to enquiries overnight that revealed the existence of the policy.

3.7 The First Respondent is a limited company. It is required to have a Compliance Officer for Legal Practice ("COLP"). Mr Kennedy undertook that role. He was at pains to explain his expertise and the training he had undergone to fulfil that role, but in cross-examination it became evident that his understanding was in some respects flawed, out-of-date or inadequate. He understood one of his areas of responsibility to be data protection breaches. He regularly circulated within the firm emails and other material advising on data protection issues. The documents circulated included some undated FAQs, which were said to provide "guidance on some of the more common data protection queries you may have." One of the scenarios addressed was a letter being sent to the wrong address. The guidance given was: "The first thing to do is to report the matter to the Director with responsibility for your department, and Michael Kennedy (or in his absence George Lockley)." The Tribunal noted that this was, on its face, a guidance document not a set of formal rules. Furthermore, as Mr Kennedy himself accepted, the section we have quoted was somewhat ambiguous. Given the advice to report a breach to the relevant director, it was not clear whether it was aimed at directors themselves.

3.8 The Claimant's evidence to the Tribunal was that she had a longstanding arrangement with Langleys (and her previous firm) that she worked full-time hours but compressed over four days. She did not work Wednesdays unless that was required, when she did so. The Tribunal does not need to resolve whether the Claimant in fact had such an arrangement (although a remarkable proportion of Mr Durkan's witness statement was devoted to an attempt to demonstrate that she did not). What is relevant for present purposes is that, as set out below, she informed the Respondents that she had such an arrangement. At the time of the TUPE transfer Langleys provided a spreadsheet to the First Respondent. That indicated that she worked full-time hours. It made no reference to flexible working in respect of any employee. The Claimant's partnership deed with Langleys tended to suggest that she worked Monday to Friday (although her evidence to the Tribunal was that she was given a verbal assurance at the time she signed it that her compressed hours arrangement remained in place). The Claimant's evidence was that at the time of the transfer she prepared a business plan, which referred to her compressed hours working pattern. Mr Durkan remembered the business plan but did not remember whether it referred to that working pattern. The Claimant had a clear recollection and the Tribunal accepted her evidence.

3.9 The Claimant's unchallenged evidence was that when she was working for the First Respondent she regularly worked from about 7.00am to 8.00pm Monday, Tuesday, Thursday and Friday (i.e. 52 hours per week). She turned her phone off at 11.00pm. She also regularly did work on Wednesdays when required, for example dealing with emails or phone calls, attending meetings or attending court.

3.10 The Claimant has two children at school. Her husband works away from home Monday to Wednesday. He is responsible for child care Thursdays and Fridays. They have help from family and a childminder on Mondays and Tuesdays, but the Claimant is generally responsible for childcare on Wednesdays. Further, Wednesday may be the only occasion on which she sees her children at the start

and end of the day. She takes them to after school activities on those days, which includes taking her daughter to an exercise class that is important for her health because of a medical condition she has.

3.11 The Claimant referred to evidence produced by the ONS in January 2017 showing that there remains a difference between the number of male and female part-time workers and the number of men and women seeking part-time work. She drew attention to the fact that only two of the First Respondent's directors work part-time and both are women. Although this case concerns compressed full-time hours, not part-time working, the Tribunal accepted that those statistics were relevant to the question whether proportionately more women continue to be responsible for childcare within families. That is a changing position, but the Respondents did not dispute that a PCP requiring directors to work five days per week would put women at a particular disadvantage and put the Claimant at that disadvantage. The Tribunal so finds as a matter of fact on the evidence before it.

3.12 The Claimant's performance was all that the Respondents had hoped. She had a billing target based on full-time hours, which Mr Durkan accepted she "smashed." He described her performance as "phenomenal." She was rewarded with a £3,000 pay rise in July 2015, when Mr Durkan told her that he would review her pay again in six months.

3.13 In July 2015, Mr Durkan noticed that an internal financial report referred to the Claimant as working four days per week. He emailed Ms Paga. Ms Paga told him that the Claimant had told her "from day one" that she worked four days per week and that she had never worked Wednesdays since joining the firm. Mr Durkan asked to see the information Langleys had sent at the time of the TUPE transfer. When Ms Paga reported that that information said the Claimant was full-time, Mr Durkan asked her to contact Langleys HR to clarify. Ms Bell from Langleys emailed to say that the Claimant had increased her hours to full-time in 2011 but that there was an unwritten agreement that she had the flexibility to work from home on a Wednesday. Mr Durkan said that he thought that there had been a simple misunderstanding about home working.

3.14 What was striking was that Mr Durkan did not take the simple step of asking the Claimant at the time. Had he done so, no doubt she would have explained that she was working full-time hours, compressed across four days, but working on Wednesdays when that was required. When asked, he said that the Claimant and Ms Kaye were not getting on at that time and he felt that if he rang the Claimant about this, she would see him as taking sides with Ms Kaye. When asked to explain that, he said that this was a key term of the Claimant's employment and very sensitive. He was asked why he apparently saw this as something contentious. He said, "I just did. It was my state of mind. It was my understanding she was contracted to work Monday to Friday and I was being told she was not working Wednesdays." Mr Durkan's answers more generally seemed to the Tribunal to betray a lack of understanding of flexible working. He seemed to equate that with part-time working or home working. The possibility of working compressed hours did not appear to be on Mr Durkan's radar. That no doubt accounts for that fact that in July 2015 it apparently did not occur to him that the Claimant might be working full-time across four days. But it does not account for his failure to take the simple step of asking the Claimant about it. However, apparently satisfied that the Claimant must be working from home on Wednesdays, Mr Durkan did not pursue the matter at that stage.

3.15 There were some other issues at that time. One was the Claimant's relationship with Ms Kaye, which was evidently strained. The Tribunal did not hear any detail about the reasons behind that. Mr Durkan "resolved" the issue in November 2015 by removing Ms Kaye as joint head of the CoP department, and appointing Mr Kennedy in her place. That was done without any consultation with the Claimant.

3.16 Another ongoing issue appears to have been the Claimant's need for additional resources within the York CoP team. She evidently made repeated requests for additional staff. Clearly some staff were recruited. Her perception was that the Respondents were not generally supportive of her need for more staff. The Respondents were certainly aware that she considered that more staff were required throughout the relevant period. It was apparent to the Tribunal that the York CoP team had a heavy workload and this may well have led to people being overstretched and stressed.

3.17 On 7 December 2015, the first meeting with Mr Kennedy as joint head of the CoP department took place. That involved Mr Kennedy, Mr Durkan and the Claimant. During that meeting the Claimant indicated at one stage that she could not attend a meeting on a particular date because she did not work Wednesdays. Mr Durkan's witness statement said that he was "in shock." He said that the fact the Claimant had said in front of him that she did not work Wednesdays caused him "a great deal of concern" because he now "knew" that this was not a simple misunderstanding. He said that he had "never come across such a contentious and potentially damaging personnel issue involving an employee of the company, never mind an employee who was also a director of the company … ." This seemed to the Tribunal a surprising reaction to the simple question of whether somebody worked on Wednesdays or not. Yet again, it was capable of being very readily addressed by Mr Durkan speaking to the Claimant. But, again, he chose not to do so. He explained in evidence that this issue would have implications for all directors. He was concerned that everyone might want to work full-time hours over four long days and have 30 days' annual leave. The Tribunal sought to understand why that was a matter of concern. Mr Durkan said that it would be "damaging to the business" because they would "lose a day's work per director." Given his own evidence that the Claimant, as a director working compressed hours, was performing "phenomenally", Mr Durkan was asked why that would be "damaging". He said that it was "just how he felt about it." Again, he seemed essentially to consider the Claimant's working pattern as part-time working.

3.18 Although he did not speak to the Claimant, Mr Durkan did seek legal advice in January 2016. At about that time, the Claimant requested a meeting with Mr Durkan to discuss a salary review. Mr Durkan said that he was pleased she had asked for a meeting because it gave him a chance to explain to her that there was an issue around the First Respondent's and her understanding of her contractual terms. Mr Durkan had taken no steps himself to set up a meeting to discuss the matter.

3.19 The meeting between the Claimant and Mr Durkan took place on 4 February 2016. The Claimant had prepared for a salary review meeting. Mr Durkan sprung on her the question of Wednesday working and refused to discuss a salary review. There was some dispute about what was said at the meeting. Mr

Durkan produced a note, which was first provided to the Claimant in May 2016. He said that it was written at the time. On his own account of the meeting set out in that note, he told the Claimant that he had not been aware that she was not working Wednesdays until the meeting in December 2015. He accepted in cross-examination that that was untrue. On his own account of the meeting, he told the Claimant that he had gone through the TUPE information provided by Langleys and her personnel file, which "clearly stated" that she was working full-time Monday to Friday. He said that there was no reference to four days or to her not working Wednesdays. He accepted in cross-examination that that was misleading. Mr Durkan recorded that the Claimant told him that she worked full-time hours across four days, although she did work a lot of Wednesdays and on the whole did significantly more than 40 hours per week across four days. Mr Durkan's account is that he told the Claimant that this was "an issue." All directors worked significantly more than normal working hours, but that did not equate to them taking "a day off." They were all available and contactable five days per week. On his own account, Mr Durkan said that the Claimant had the flexibility to work from home if she required. Mr Durkan's note also included the following:

> JD confirming that if it was the case that SMK had a regular appointment on a Wednesday (SMK mentioned something about a back appointment) which was why she did not work that day, she would not be required to make the time back on that day, but across the week, the firm is and has been flexible in this approach. JD confirming to SMK that he could not and does not agree that she only works 4 days each week simply on the basis of her putting significantly more hours in over the days she is in the office as she has stated.
>
> JD confirming that further to this meeting a contract would be supplied to SMK confirming the TUPE terms of her transfer in that she worked 5 days per week – 37 hours and 30 days holiday per annum. JD explained further this would link into all directors being sent new contracts to sign to reflect they work for a company. … If it turns out that SMK requires the flexibility to work from home one day per week, that was fine, but SMK is expected to be available and contactable 5 days per week. ….

3.20 The note concluded with reference to the possibility that the Claimant might leave the First Respondent if she was unhappy with her salary. In the light of that note, the Tribunal accepts the Claimant's evidence that Mr Durkan indicated that he did not believe what she said about the arrangement at Langleys.

3.21 The Claimant said that during the meeting Mr Durkan told her that he did not mind what she did on Wednesdays and could "have her nails painted for all he cared" just as long as she worked Monday to Friday. Mr Durkan denied making the comment. There were some shortcomings in the evidence of both Mr Durkan and the Claimant. At times the Claimant contradicted herself, but the Tribunal was satisfied that, as she explained, she was upset and confused. She had produced a long and careful witness statement and the Tribunal accepted that she was a truthful witness, doing her best to give an accurate account. Mr Durkan accepted in cross-examination a number of shortcomings in what he did at the time. As we have indicated, he accepted that what he told the Claimant on 4 February 2016 was, in some respects, untrue or misleading. The Tribunal considered that the Claimant's evidence about Mr Durkan's comment had the ring of truth about it. If it had been said, she was likely to have remembered it. We noted that she did not make reference to it in the emails that followed, but we

were satisfied that this was because her focus was on trying to resolve the Wednesday question. The alleged comment chimed with Mr Durkan's note that he had told the Claimant that if she had a regular appointment on a Wednesday she could make the time back across the week. In that context the Tribunal could well imagine Mr Durkan saying that the Claimant could have her nails painted for all he cared, and, taking all the above matters into account, we find that he did so. We have referred to Mr Durkan's readiness to accept with the benefit of hindsight that he got things wrong at the time. In preferring the Claimant's account, the Tribunal acknowledged that Mr Durkan may not have remembered making the remark.

3.22 Mr Durkan said in evidence that it was his belief across the firm that all directors were working 9.00am-6.00pm or 7.00pm five days per week. If they were contracted five days they "should be working" five days. Mr Durkan did not refer to the Flexible Working policy (of which he was apparently unaware). He did not involve Ms Law, who was responsible for promoting equality and diversity. He accepted in cross-examination that he could see how he could have come across as telling the Claimant that she would work five days per week. The Tribunal did not consider that Mr Durkan was, as he repeatedly suggested, trying to "resolve" the Wednesday issue by way of compromise. At this stage his position, clearly stated, was that the Claimant must in broad terms work Wednesdays, either in the office or at home. That was the only acceptable "resolution" as far as he was concerned, and he made clear his intention to impose it.

3.23 Immediately after the meeting, the Claimant emailed Mr Durkan thanking him for being "so frank" with her. She suggested in oral evidence that this was sarcastic. The following day she emailed him saying that she had transferred under TUPE and that her working arrangement at Langleys was that she did not work Wednesdays. She said that she was upset and distressed that she was being asked to change this arrangement after 16 months. Mr Durkan knew that she chose to work Wednesday when there was a business need (for instance she had worked 12.30 to 7.30pm that Wednesday). She always exceeded full-time hours and was significantly above her costs target. Mr Durkan's reply on 13 February 2016 was that he "did not accept" that this was the position. He was "very disappointed" at having to clarify two matters. He repeated the assertion that there was no evidence on her personnel file or in the TUPE information that confirmed that she did not work Wednesdays at Langleys and said that the Claimant's employment with the First Respondent was clearly based on her working Monday to Friday. Mr Durkan accepted in cross-examination that the Claimant might reasonably have concluded at that stage that she was going to be put on a contract requiring her to work Monday to Friday.

3.24 The Claimant emailed Langleys seeking confirmation of her working pattern while working there. So too did Mr Durkan. Among the documents disclosed only as a result of EJ Davies's order were emails between him and Mr Thompson at Langleys. They had already spoken. Mr Durkan's email was plainly an attempt to persuade Mr Thompson to agree with Mr Durkan's view. For example, he suggested what was "clear" from the Claimant's personnel file and wrote that he "could not believe for a moment" that Langleys would have paid the Claimant an additional 25% "just for working longer hours on the four days she was currently working". The Tribunal was not given any adequate explanation why this email was not disclosed previously. What was disclosed was an email from Mr Thompson to Mr Durkan on 23 February 2016. Mr Thompson suggested that Mr

Durkan speak to Ms Brown. He said that there was nothing on the system, but that the HR team did recall that the Claimant did not work Wednesdays, and the suspicion was that there was some loose arrangement that she worked from home or did what she pleased.

3.25 There was further email correspondence, culminating in an email from Ms Brown to Mr Durkan on 7 March 2016, which Mr Durkan forwarded to the Claimant. On 16 March 2016 Mr Durkan emailed the Claimant to say that he was still making enquiries and did not intend to discuss the matter at the CoP meeting the following day. The Claimant replied on 17 March 2016, reiterating her position.

3.26 On 17 March 2016 there was a CoP department meeting, attended by the Claimant, Mr Kennedy and Mr Durkan. At the end of the meeting the Claimant spoke to Mr Durkan about the Wednesday issue. She pleaded with him to allow her to continue with the arrangement, which her life was built around. He was intransigent. She became upset. Mr Durkan described the Claimant becoming exasperated when he said that he would not agree with her. They went "round the houses a few times" before he ended the meeting.

3.27 At this stage, the Claimant had recorded £181,288 fees, as against a year to date target of £150,000. Mr Kennedy had recorded £48,590 against a target of £65,000 and Ms Kaye had recorded £76,669 against a target of £150,000.

3.28 By mid-March, the Claimant had herself taken legal advice about the Wednesday issue. On 22 March 2016 she called Mr Kennedy to see if he could suggest a way forward. Mr Kennedy's evidence was that when the Claimant spoke to him, he was already aware of "the Wednesday issue". He said later in his evidence that it was Mr Durkan who told him but he could not remember when. He and the Claimant agreed to speak after the annual directors' meeting on 24 March 2016. They spoke for about half an hour. The Claimant told Mr Kennedy that she had been advised that not allowing her to continue with her working arrangement was discriminatory. Mr Kennedy told her that it was up to Mr Durkan. Mr Durkan accepted in cross-examination that he spoke to Mr Kennedy about this at the time. Mr Kennedy told him that the Claimant had spoken to him about the Wednesday issue and was very upset. She had taken legal advice and had been advised that this was discrimination. Mr Durkan said that that did not ring any alarm bells.

3.29 Mr Durkan was asked about his handling of the Wednesday issue. He said that with hindsight he should have dealt with it differently. It was put to him that if the Claimant had been a man he would have dealt with it differently and he denied that.

3.30 The Claimant's evidence was that in April the staff appraisal process started. Staff in her team begun to complete their part of the appraisal forms. Nobody raised any concern about the Claimant. While the Respondents were not clear about when forms were completed, they accepted that nobody had raised any concern about the Claimant in an appraisal form.

3.31 We have referred above to a trainee solicitor who transferred as part of the Claimant's CoP team to the First Respondent, Ms Coates. By May 2016, Ms Coates had moved to Mr Kennedy's mental health team. On 18 May 2016, she approached Mr Kennedy. His evidence was that she told him that she had been

struck by the difference between the mental health team and the York CoP team. She referred to problems in the York team, including a terrible atmosphere, attempts to move the team elsewhere, derogatory comments about team members by the Claimant, chaos about who was doing what on cases and "near misses" in terms of court deadlines. Ms Coates said that she had discussed this with other members of the team and they agreed that something had to be done. Ms Coates asked Mr Kennedy to speak to other members of the team. Later that day, when he was in York, Mr Kennedy spoke to Ms Coates together with Ms Park. He then spoke to Ms Park alone. Ms Black then joined them.

3.32 Mr Kennedy, an experienced solicitor, took no notes of these discussions. He reported them to Mr Durkan. It is not clear precisely what was said. Mr Durkan referred in oral evidence to two calls from Mr Kennedy. He indicated that he was available in Leeds on 23 May 2016 and that the individuals could come and speak to him.

3.33 The Tribunal did not think it was a coincidence that, two months after their conversation on 17 March 2016, Mr Durkan emailed the Claimant about the Wednesday issue on 20 May 2016. That seemed to the Tribunal to be a carefully crafted email, written with the benefit of legal advice and attempting to suggest that Mr Durkan remained open minded and wanted to meet the Claimant to find a "resolution that works for all parties." The content rang hollow in view of Mr Durkan's own account of the meeting on 4 February 2016 (which was provided to the Claimant for the first time with this email), and the correspondence that had followed. Even in the email of 20 May 2016, Mr Durkan stated that the firm would not agree to "a change" in contractual terms that "significantly enhanced" the Claimant's terms compared with her peers. Mr Durkan was again making clear that he would not agree to the Claimant working compressed full-time hours over four days.

3.34 On 23 May 2016, Ms Coates and Ms Park went to see Mr Durkan at the Leeds office. He saw them both together. He did not take any notes. His evidence was that he told them to think about whether they wanted the firm to take the matter further, in which case they should put something in writing. Both subsequently produced written statements. Ms Coates said that she had first approached Mr Kennedy after a conversation with Ms Park the previous evening, when Ms Park had told Ms Coates about comments the Claimant was said to have made about Ms Raynor and Ms Hurst. That, of course, was different from Mr Kennedy's recollection of Ms Coates's reason for approaching him.

3.35 Ms Coates made a number of allegations, including:

3.35.1 that the Claimant had approached her, Ms Hurst and Ms Park on 21 April 2016 saying that she planned to leave the firm and wanted to move the whole department to another firm;

3.35.2 that the Claimant approached Ms Hurst and Ms Coates again on 10 May 2016 after a COPPA event;

3.35.3 that the Claimant was not managing the York CoP team properly, including lack of supervision, poor organisation, failure to deal with data protection breaches and expecting staff to work long hours;

3.35.4 inappropriate comments about employees, referred to as "the incident on 18 May 2016" and "making comments about Emily Park's inappropriate clothing to other staff members;"

3.35.5 inappropriate comments about other directors; and

3.35.6 speaking openly to the York CoP team about the issue between her and Mr Durkan about working Wednesdays.

3.36 Ms Coates attached some emails to her statement. They included, for example, an exchange of emails about who was to sit behind counsel in a particular case. They also included an email from a client AS on 11 May 2016. AS pointed out that he had been sent a Deprivation of Liberty paper for someone else by mistake. He said that he would discard it. Ms Coates included an email from her to, among others, the Claimant, asking that the relevant people be contacted and asked to delete the information and saying that this was a "MASSIVE" breach of data protection. She included a further email she had sent on 12 May 2016 to the Claimant and Ms Park, asking if anybody had replied to the AS and suggesting that he be asked to send the papers back to the First Respondent for shredding.

3.37 Ms Park also provided a written statement. She referred to an incident on the evening of 18 May 2016. She said that the Claimant had discussed Ms Andrews-Wilson's application to become a secretary with Ms Andrews-Wilson, in front of Ms Park. Ms Park said that the Claimant had asked Ms Andrews-Wilson whether she would like to take over Ms Raynor's secretarial position on a Wednesday. Ms Raynor would then work on reception as a "break." Ms Park said that the Claimant said that Ms Raynor was "too old" for the position and had "memory issues." Ms Park said that there was then a discussion about staffing. The Claimant said that when Ms Coates came back to the team (presumably once she had qualified) she would have a secretary and a paralegal. Mr Williams would have a secretary and a paralegal and the Claimant would have Ms Black and a paralegal. Ms Andrews-Wilson asked about Ms Hurst, and the Claimant said that she was "disabled", did not take on as much work, and should not have any support because of this. Ms Park said that the Claimant "made a point of complaining" that Ms Hurst had left at 5.30pm that day, and that she "wanted to be treated like a solicitor but did not work like one." Ms Park said in her statement that she immediately called Ms Coates "as [Ms Raynor] is Natalie's secretary and I felt this concerned her." [The Tribunal noted that Ms Coates had moved to a different team at this stage, so it is difficult to understand the suggestion that Ms Raynor was her secretary or that this concerned her]. Ms Park said that Ms Coates was "extremely upset by this development" and therefore spoke to Mr Kennedy. That suggested that one possible reason for Ms Coates complaining to Mr Kennedy might have been a personal concern about losing the person she perceived as her secretary.

3.38 Ms Park went on to set out a number of concerns. She alleged that on one file the Claimant had instructed her to record her time as a paralegal at the Claimant's rates. She attached an email in which she had subsequently raised concerns about this with the Claimant. Ms Park also referred to the data protection breach on 11 May 2016. She said that she had asked the Claimant whether Mr Kennedy should be informed and had not received a reply to date. Ms Park also said that on 21 April 2016 the Claimant had expressed concerns following a meeting with Mr Durkan and Mr Kennedy and had said that she was going to put together a business plan to move the entire team to another firm. She asked Ms Coates, Ms Hurst and Ms Park whether they would come with her. They did not respond and she said that she would simply look for another role herself.

3.39 Ms Hurst, Ms Black and Ms Raynor also produced written statements. It appears that this was as a result of conversations with Ms Coates and Ms Park. Ms Hurst referred, among other things, to the Claimant holding discriminatory views in respect of age and suggesting that one team member change to become an administrative assistant because of her age; to an allegation that at a dinner with barristers the Claimant referred to sexual tension between two team members; that the Claimant had made comments about the clothing some staff members wore; that on 21 April 2016 the Claimant had said that she was preparing a business plan to provide to law firms in the hope that she could move the team; and that on 10 May 2016 the Claimant had indicated that she was looking elsewhere. Ms Hurst said that she was aware of the dispute between the Claimant and the firm about Wednesdays. The Claimant had told her that she had been advised she was being discriminated against. She had asked Ms Hurst to sign a statement saying that she did not work on Wednesdays at Langleys. Ms Hurst agreed that she did not, but felt uncomfortable being asked to sign a statement. Ms Black and Ms Raynor made a number of allegations. Those made by Ms Raynor included the allegation that the Claimant had made a comment about "sexual tension" between her and a colleague at a dinner with barristers, and that she had on one occasion commented that "all people over 60 had dementia."

3.40 We do not set out the content of the statements in any greater detail. It is clear that a range of concerns were raised. Some were serious and some more trivial. Some people were plainly reporting hearsay or opinion at times and some of the allegations were in extremely vague terms.

3.41 The Claimant was on annual leave from 30 May 2016 to 3 June 2016. She returned to work on 6 June 2016. She had an eye infection, but went to work because a new staff member was starting that day. In the afternoon, Mr Kennedy and Ms Law arrived, called her into a meeting and suspended her. She was not told why she was being suspended, simply that colleagues had made serious allegations about her. The Respondents did not make any notes of the suspension meeting. The Claimant was unable to write because of her eye infection. Her evidence was that she spoke to her husband when she left, and told him what had happened. She subsequently produced a typewritten note of what had transpired. Her evidence in cross-examination about when and how that was produced was inconsistent. The only real issue of dispute was the Claimant's allegation in her witness statement that Mr Kennedy had escorted her to her desk, stood by while she collected her things and visibly escorted her from the building. It seemed to the Tribunal that she put it somewhat higher in her witness statement than in her note made at the time, and perhaps higher still in oral evidence. Mr Kennedy said that he had not stood over the Claimant while she collected her belongings. He had remained in the glass fronted office for a while, then joined the Claimant at her desk and walked with her from the building. The Tribunal found that what had happened most likely lay somewhere in the middle. We did not accept that Mr Kennedy had stood over the Claimant throughout, but we did accept that he joined the Claimant when she was at her desk and still collecting her belongings, and then walked out with her. It would in the Tribunal's experience be normal for an employer to accompany a suspended employee until they left the building.

3.42 The following day, Mr Kennedy wrote to the Claimant confirming her suspension as a result of "serious issues" raised by colleagues. He said, "… I have decided to suspend you with immediate effect."

3.43 Mr Kennedy's evidence was that it was Mr Durkan's decision to suspend the Claimant. Mr Durkan contacted him and told him he had to suspend the Claimant. He accepted that the letter of suspension was inconsistent with that, but said that he thought it referred to him actually suspending the Claimant rather than taking the decision. He had not read it properly because he was under stress. He said that he did not want to be involved after speaking to Ms Coates, Ms Park and Ms Black. It was not his decision. It was clear to the Tribunal that Mr Kennedy did not want to be involved and we accepted his evidence that it was not his decision to suspend the Claimant. He did not take any steps to satisfy himself about why the Claimant was being suspended or whether that was appropriate.

3.44 Mr Uppal said that from the point the allegations about the Claimant came through the firm took legal advice. As a result, it was clear that Mr Kennedy would suspend the Claimant, Mr Durkan would carry out an investigation, Mr Uppal would deal with a disciplinary hearing if that arose, and Ms Law would handle any appeal. He said that the issue was co-ordinated by the legal advisers and that their recommendations were accepted. Mr Durkan was asked why he instructed Mr Kennedy to suspend the Claimant. He said that it was legal advice. It was pointed out to him that lawyers only advise; the decision is the employer's. He said that it was his decision after liaising with the firm's lawyers. As we have indicated, there was no clear process for decision making. It was far from clear who within the First Respondent had responsibility for deciding whether a director should be suspended. The Tribunal accepted that the decision was in fact taken by Mr Durkan alone. We acknowledge that legal privilege prevents us from having a full picture. Nonetheless, from his evidence to us, it appeared to the Tribunal that Mr Durkan did not have clearly in mind the distinction between legal advisor and client. Mr Durkan did not give the Tribunal a clear explanation of why he thought suspension was required. He referred to legal advice and said, "It was just a case of suspension was seen to be appropriate." He referred to the "volume" of allegations and that they "seemed all quite serious."

3.45 Despite the provisional decision that Ms Law would handle any appeal, she was asked to be present at the Claimant's suspension. Ms Paga was available. It seemed to the Tribunal to be a misjudgement for Ms Law to be involved.

3.46 Mr Durkan undertook the investigation. He spoke to the five individuals who had provided written statements, and to Ms Andrews-Wilson and he had a meeting with the Claimant (see further below). Mr Durkan accepted in cross-examination that when the allegations about the Claimant were made, he did not consider any alternative approach, for example mediation. He did not familiarise himself with the First Respondent's disciplinary policy. Mr Durkan was asked what he understood his role as investigator to be. He said that it was, "Mainly to go through the witness statements, ask questions on the witness statements and document the answers." He was asked what else and he said, "Just that. Go through the witness statements, ask questions and document." He was asked whether he saw it as his role to investigate and he said, "No." By way of example, Mr Durkan was asked about the allegation relating to a data protection breach and the emails that Ms Coates and Ms Park had provided. He was

referred to the fact that, in response to EJ Davies's recent disclosure order, the Respondents had disclosed for the first time other, relevant emails. It was put to him that it must have been obvious that there might have been other emails. He said that it was not. There was such a volume of allegations, he just saw his role as documenting. It was put to him that the volume of allegations was irrelevant, if it needed more time and detail to investigate properly, that was required. He accepted that with hindsight it would have been better to "look at it in detail." He accepted that he did not look in detail at all. Mr Durkan was reminded that one of the allegations was the potentially highly damaging allegation that the Claimant was essentially overcharging or committing fraud. He had not investigated that at all and accepted that he should have looked at the actual files and the costs review undertaken at the time. Apart from Ms Andrews-Wilson, Mr Durkan did not speak to anybody else within the York CoP team, for instance Mr Williams and Ms Burridge-Todd, the two solicitors. His reasoning broadly was that this was because they were not in the office much. In cross-examination he accepted that they could potentially have given relevant information.

3.47 As noted, Mr Durkan spoke to the individuals who had provided written statements and to Ms Andrews-Wilson. Those interviews took place between 8 and 14 June 2016. Ms Paga took notes. The interviews were of varying quality. For example, the questions asked of Ms Hurst were on the whole relatively open questions seeking to probe what she had said in writing, and Ms Hurst gave a little more detail. On the other hand, the questions asked of the other witnesses included numerous inappropriate and leading questions: e.g. to Ms Park, "so this was a clear data protection breach, which you raised in an email to Sue and Sue did not respond to the concerns you raised?" Then (following an affirmative answer): "Instead of Sue taking the lead on this serious matter it was instead left to you to take the lead in terms of flagging up obvious concerns and being completely left unsupported to deal with serious matters such as regulatory data breaches?" Answer, "yes." The interview with Ms Coates was similar, e.g. "Would Sue often say things to you that you thought were inappropriate?" and "Is that how you felt at times? That you were doing her job, as the Line manager/director?" During the course of the interview, Ms Coates did provide more detail on some matters. She also said that the Claimant had said that Mr Durkan was bullying her about the Wednesday issue and Mr Durkan probed that. Ms Andrews-Wilson was asked about her recollection of 18 May 2016. She referred to the Claimant "intimating" that Ms Raynor's capacity was not what it had been. Mr Durkan then asked, "Emily's recollection … seemed to suggest that there was a comment that Rose was too old for the job, can you recall anything like that being said?" Ms Andrews-Wilson said that there was "something about age" said. She remembered the Claimant saying that Ms Raynor was 63 and that it was a hard job to be doing. The Claimant said that it took it out of her. Ms Andrews-Wilson believed there was genuine concern behind the comment.

3.48 Correspondence between the Claimant's legal advisors and the First Respondent's took place in June 2016. The Claimant also made a SAR (see further below).

3.49 On 17 June 2016 Mr Durkan wrote inviting the Claimant to an investigatory meeting. He said that the meeting was "informal in nature". It was not a formal disciplinary hearing and she was not entitled to attend with a representative. Mr Durkan accepted that there was discretion within the First Respondent's policy to

allow an employee to be accompanied at an investigatory meeting and that it ought to have been exercised in the Claimant's favour. The Claimant wrote on 20 June 2016 saying that the meeting would have little purpose unless she was told what it was about. Mr Durkan wrote on 21 June 2016. He said that the meeting was to discuss "various allegations under the following headings". The headings given were:

- Failures to follow the Company's Equal Opportunities Policy;
- Concerns relating to the understanding of your role within your Department;
- Inappropriate comments made in relation to fellow Directors and other departments within the Company;
- Disseminating confidential information to members of your team;
- Concerns relating to an alleged corrosive atmosphere that has developed within your team;
- Apparent breaches of the firm's Data Protection Policy.

3.50 The Claimant agreed to attend and the meeting took place on 22 June 2016. Ms Paga was present to take notes. This appears to the Tribunal to have been a wholly unsatisfactory meeting. Mr Durkan had with him a file containing the various witness statements, interview notes and emails. He did not provide a copy to the Claimant. The notes record the Claimant repeatedly asking for detail of vague allegations that were being put to her, and none being provided. She repeatedly said that she could not answer. For example, the Claimant was asked if she had made comments about "Emily's attire". She pressed for detail about what specifically she was supposed to have said. None was given. When specific questions were put to her, she sometimes answered, for example she said that she had not said that Ms Raynor was too old for her role or had memory issues and she said that she did not say that Ms Hurst was disabled so did not do as much work as the other team members and therefore needed less support. The Claimant repeatedly said that she needed access to other material, for example her diary or emails. For example, she was asked whether she had reported the data protection breach to Mr Kennedy and she said that she needed access to her emails to remind herself and when asked about inappropriate time recording she said that she needed access to her emails. As the interview progressed and the Claimant maintained her insistence that she was unable to answer, Mr Durkan made comments such as "I don't see how you can't answer the question, it's a simple question, have you said to your team, on a number of occasions that various directors are bullying you?" The Claimant said that she could not answer a "huge question" like that. The Claimant repeatedly said that she could not answer, she needed time to take this in, the questions were too vague. Mr Durkan repeatedly demanded yes or no answers. The meeting was plainly far from the "informal" meeting Mr Durkan had suggested it would be. At the end of the meeting the Claimant said that she needed time to consider what had been said before responding. Mr Durkan accepted in cross-examination that it was clear at the end of the meeting that the Claimant needed more time to respond. It was his understanding that the Claimant would be preparing a written response.

3.51 The Tribunal noted Mr Uppal's evidence that when he came to deal with the disciplinary hearing he attached little weight to the notes of the investigatory interview, because of the obvious shortcomings in it.

3.52 The Claimant's evidence was that Mr Durkan's behaviour in the meeting was "oppressive" and "bullying". She said that he adopted a "mocking" tone. Such matters are, of course, in part about perception. It is difficult for the Tribunal to make a qualitative finding about the tone of voice used, for example. However, we do find that there were serious shortcomings in the meeting. For example, the meeting notes make clear that Mr Durkan repeatedly pressed, inappropriately, for yes or no answers and indicated his incredulity that the Claimant was unable to provide such answers. The questions as recorded do not suggest that Mr Durkan realised that that the allegations had come as a shock to the Claimant, that she might need time to process them, or that it was reasonable for her to ask for more detail or for the underlying documentation.

3.53 Ms Paga emailed the Claimant on 22 June 2016 with her notes of the investigatory meeting. The Claimant replied on 24 June 2016 to say that she was preparing her response, which would be with them at the earliest opportunity. However, on 27 June 2016 Mr Uppal wrote to the Claimant inviting her to attend a disciplinary hearing to consider allegations that potentially amounted to gross misconduct. The allegations were listed. They included breach of the First Respondent's rules on equality and diversity by making derogatory and stereotypical remarks about disability, age and sex or sexual orientation; breach of the First Respondent's rules and regulatory requirements relating to data protection by failing to report a data protection breach to Mr Kennedy; placing the company at risk by failing adequately to review correspondence and dishonestly and fraudulently time recording colleagues' work at her own hourly rate; causing working relationships with colleagues in the York CoP team to break down irretrievably by a number of actions; and causing her working relationship with the directors and First Respondent to break down irretrievably by a number of matters, including discussion of confidential matters with colleagues, criticism of directors to colleagues and ongoing discussions of a team move.

3.54 The Tribunal records at once that the allegation of fraud and dishonesty was not upheld. It had not been investigated adequately (if at all) before Mr Uppal wrote his letter on 27 June 2016.

3.55 Mr Uppal's letter enclosed the First Respondent's Equality and Disciplinary policies, as well as the various witness statements, notes and accompanying documents.

3.56 It was the Claimant's case that Mr Durkan lay behind the decision to instigate a disciplinary hearing and that, ultimately, he was orchestrating her dismissal. The Tribunal considered carefully the circumstances that led to Mr Uppal's letter being written. Mr Durkan said that once he had completed his "investigation" he "stepped away" from the process. Ms Paga had "the pack" and she passed it on to the First Respondent's lawyers. He did not see it as his role to report the outcome of his investigation to anybody. He did not take the decision to proceed to a disciplinary hearing. They were heavily reliant on their lawyers. It was put to him that he was part of the decision making process and he said that he was not. Mr Uppal had decided. Mr Uppal was a Deputy District Judge and would not take instruction from him. Mr Durkan accepted that he was aware that the Claimant was likely to make a Tribunal claim and was likely to allege discrimination, but he maintained that the decision to proceed to a disciplinary hearing was Mr Uppal's, taken with legal advice, and not his.

3.57 Mr Uppal said that he thought Mr Durkan called him after 22 June 2016 and told him that he needed to speak to Ms Paga and the lawyers. He said that it was his decision to proceed to a disciplinary hearing. The letter had been drafted by the firm's lawyers and amended by him. He instructed them to do so on Friday 24 June or Monday 27 June 2016. He thought that he saw them on the afternoon of 24 June 2016 and came away thinking about it, then he went back to them. He was adamant that Mr Durkan had no role at all in what he did.

3.58 In support of her contention, the Claimant said that at the start of the disciplinary hearing (see below) she asked who had taken the decision to have a disciplinary hearing and Mr Uppal told her it was Mr Durkan. She was accompanied at the hearing by Mr Williams, who made notes. His notes record that at the start of the hearing the Claimant asked why the letter of 27 June 2016 was written before the Claimant had put in her response to the allegations. Mr Uppal said that Mr Durkan had conducted the investigation then called the Claimant to a meeting. The Claimant said again that Mr Uppal wrote the letter before she responded, and she interrupted him when he answered. Mr Uppal said in evidence that the start of the meeting was "horrendous". The Claimant was firing things at him and was really stressed. It was very hard for him to get a word in. That comes across from Mr Williams's notes, and also from those kept by Ms Paga, which indicate that the Claimant asked this question four times. Mr Uppal said that he did not tell the Claimant that Mr Durkan decided to proceed to a disciplinary hearing. He told her that Mr Durkan did the investigation. After she saw Mr Williams's draft notes the Claimant emailed him to say that he had missed out an important question and reply. She said that when she had asked why the disciplinary process had been started before she had put in her response, Mr Uppal said that it was Mr Durkan who had made that decision. The Tribunal was not shown any revised notes prepared by Mr Williams nor any reply from him. He did not give evidence. Looking at all the evidence, the Tribunal found that Mr Uppal did not tell the Claimant that it was Mr Durkan's decision to hold the disciplinary hearing. It seemed to us that the Claimant misunderstood or got her wires crossed, in the context of a fraught start to the meeting, in which she was firing off questions and not listening to the replies. It is clear that Mr Uppal did refer to Mr Durkan when the Claimant was asking about why she had been called to a disciplinary hearing before she had responded to the allegations. But that was a reference to Mr Durkan doing the investigation, not a reference to Mr Durkan deciding to hold the disciplinary hearing.

3.59 Returning to the question whether Mr Durkan was involved in the decision to instigate disciplinary proceedings, the Tribunal found that he was not. His account and that of Mr Uppal were broadly consistent on this point. Given our finding about what was said at the disciplinary hearing, there was no other evidence to suggest that Mr Durkan was involved. The Tribunal accepted Mr Uppal's evidence that this was his decision, and that it was not influenced by Mr Durkan.

3.60 Mr Uppal was not familiar with the ACAS Code. As indicated above, he recognised that there were shortcomings in Mr Durkan's interview with the Claimant, because he attached little weight to it. He was aware of the limits to what Mr Durkan had done in terms of investigating. He was aware that the Claimant intended to put in a written response following the investigatory meeting. He was pressed as to why, in those circumstances, he considered it

appropriate to formulate disciplinary allegations and proceed to a hearing. He said repeatedly that he took the view that he should provide the information to the Claimant and get her in to see what she said. He would then "take stock" and decide if they "needed to do anything else." He wanted the Claimant to come in and go through it, then he would review the position. He repeatedly indicated that he considered this was "proportionate." He did not think he needed to wait for the Claimant's response to the allegations. He thought the "fairest" thing was to give her a copy of the file and ask her to come and see him.

3.61 The difficulty with that evidence is that Mr Uppal did not give the Claimant the file and ask her to come and see him. He formulated disciplinary allegations amounting to potential gross misconduct, including allegations of fraud and dishonesty, and called her to a disciplinary hearing to answer them. He accepted in cross-examination that an employee might respond differently in an informal investigatory meeting, compared to a formal disciplinary hearing at which such serious allegations had been made. Mr Uppal was asked on what evidence he based the potentially very damaging allegation of fraud. He said that it was based on what the staff had said about time recording and the post file. He acknowledged that the Claimant had not responded to the allegation. No investigation whatsoever of the relevant files had been undertaken, nor had anyone spoken to the reviewing partner. Mr Uppal acknowledged that sometimes the supervising solicitor will charge one unit for checking the post. Nonetheless, Mr Uppal maintained his view that it was appropriate in those circumstances to take an allegation of fraud to a disciplinary hearing.

3.62 On 4 July 2016 the Claimant, who by now had the information provided by Mr Uppal, sent a detailed written response to the allegations. She drew attention to the fact that she had been invited to a disciplinary hearing before she had provided her response. She raised concerns that there had been gossip and collusion between the witnesses. She pointed out that none of these concerns had been raised with her previously. She said that she had done her best to respond, but reserved her position until she saw the relevant records. She made clear that she required further information in order to respond to some of the allegations. She drew attention to the leading questions Mr Durkan had asked. In that context, the Claimant set out her response to the allegations. In particular:

3.62.1 She said that at the time Ms Andrews-Wilson had indicated an interest in applying for a secretarial role, she had spoken to her, Ms Paga and Ms Raynor about the possibility that Ms Raynor might cover reception one day per week, swapping with Ms Andrews-Wilson. Ms Raynor was not interested and she did not pursue it. She had discussed this with Ms Andrews-Wilson in Ms Park's presence. She did not say that Ms Raynor was "too old." She did not make any comments about Ms Raynor's memory to Ms Andrews-Wilson or Ms Park.

3.62.2 She said that Ms Hurst had epilepsy. She was open about that and had even published articles about being a lawyer with epilepsy. The Claimant accepted that she had referred to Ms Hurst having epilepsy. The reasonable adjustments she had put in place for Ms Hurst's disability included leaving work at 5.30pm every day and 5.00pm on Friday. That had caused discontent. Both Ms Andrews-Wilson and Ms Park commented on it during the conversation on 18 May 2016 and the Claimant explained that she had put these measures in place because of Ms Hurst's epilepsy. The Claimant said that saying that someone had a

disability was not discriminatory. She denied making the comments alleged.

3.62.3 She said that she had spoken to Ms Park about her dress, because she tended to wear low cut tops and short dresses, which were not suitable for court. Other colleagues had raised this with the Claimant.

3.62.4 She said that she was unable to comment fully on the data protection allegation without access to her diary or emails. She spoke directly to Ms Raynor and Ms Park about this issue. She thought she had told Ms Park and Ms Coates that she would deal with it but she could not remember. AS had agreed to destroy the papers. She could not recall Ms Park asking if Mr Kennedy should be informed. She did not inform him as the issue had been resolved and it did not seem necessary. She believed she had sent emails to the team about checking enclosures, and she spoke to Ms Raynor and Ms Black about it.

3.62.5 She said that she did not recall telling Ms Park or Ms Coates to record their time at her rate and would not have done so. She thought that the issue had arisen because Ms Park did not understand the basis of the private instruction from the OS. The arrangement was that, until the OS confirmed which funding arrangement they wanted to apply, a "blended" rate was used across the board on all activities by fee earners.

3.62.6 She explained that she used a post book to check and sign post. There was nothing improper in that. She was entitled to charge a single unit for letters issued in her name, and she was entitled to charge for amending letters produced by others.

3.62.7 She identified a number of occasions on which she had been upset following meetings with other directors and had told Ms Black that she felt she was being bullied. She added, "I do feel that I am being bullied over the fact that I do not have to work on Wednesdays and I do believe that this is discriminatory as I am being put under pressure as a result, even though the arrangement was designed to cater for childcare and family life."

3.62.8 She said that at no time was she in discussions with any other firm. She could not, would not and did not discuss a potential move with colleagues. She recalled going for drinks after the COPPA conference, but said that she had been probed by her colleagues, and not the other way round.

3.62.9 She said that she had not made any comment about "sexual tension" between colleagues at a dinner with barristers.

3.63 The Claimant concluded by asking for access to her diaries, work email account, personal drive and other material (including the DPA material requested by her solicitors on 17 June 2016).

3.64 The disciplinary hearing took place the next day, 5 July 2016. As indicated, it was evidently a difficult meeting. In her evidence to the Tribunal the Claimant acknowledged that she had not conducted herself as she would have wished to. She was angry and defensive. Mr Uppal took her through the allegations one by one. To a substantial extent, the Claimant referred to her written response, both as to the substance of her response and as to the criticisms she made of the evidence used against her. When it came to the allegation about a comment at a dinner with barristers, the Claimant turned to Mr Williams, who had been present, and asked whether she had said anything like that. He confirmed that she had not raised this with him in advance, and supported her position. At times, the

Claimant drew attention to her 22 years' experience, contrasting it with the view of a trainee or an unqualified paralegal. She referred more than once to "junior" members of the team. Ms Paga's notes indicated that she referred to Ms Coates as "young."

3.65 Mr Uppal did not carry out any further investigations after the disciplinary hearing. Nor was the Claimant provided with access to any of the material she had requested. Instead, on 8 July 2016 Mr Uppal wrote to her to inform her that she was to be summarily dismissed for gross misconduct. He did not uphold the allegation about "sexual tension" (about which Mr Williams had spoken at the disciplinary hearing) and he did not uphold the allegations about failure to review correspondence, dishonesty and fraud. He upheld the remaining allegations. In particular:

3.65.1 Mr Uppal found that the Claimant made derogatory and stereotypical remarks about age. He did not set out what comments he found to have been made beyond indicating that this related to comments about Ms Raynor. He relied on Ms Raynor's statement and referred to "corroborative evidence" more generally.

3.65.2 Mr Uppal found that the Claimant made derogatory and stereotypical comments about disability. He did not set out what those comments were although it appears to have been that the Claimant said that Ms Hurst could not carry out as much work as others as a result of her disability. He said that the fact of Ms Hurst's disability was irrelevant and that the Claimant's remarks were based on unfair preconceptions.

3.65.3 Mr Uppal found that the Claimant had failed to report the data protection breach to Mr Kennedy. He said that he was "extremely concerned" about her underplaying the issue and said that she had made no attempt to understand whether the papers had been destroyed; had conducted no investigation into how the papers were sent in error; had taken no steps to remind her team of the need to adhere to policy; and had not reported to Mr Kennedy. He referred to the FAQ document, and to "our general policy". He said that this was gross misconduct or gross negligence and was likely to have to be reported to the ICO.

3.65.4 Mr Uppal found that the Claimant had caused her working relationship with her team irretrievably to break down, amounting to gross misconduct. He referred to "numerous, corroborative examples" within the evidence, although he did not identify them. He said that it was "entirely inappropriate" to discuss staff and senior management issues with subordinates, which had created a culture of unease and isolation. He did not explain which matters he relied on. He preferred Ms Black's evidence, supported by Ms Hurst, Ms Raynor and Ms Coates, about the Claimant "outlining her concerns" to the office openly on regular occasions. He appears to have found that the Claimant did approach colleagues proposing a move to another firm on 21 April 2016. No mention was made of the later alleged occasion.

3.65.5 Mr Uppal found that the Claimant's working relationship with the directors and First Respondent had broken down, on the basis of the same matters.

3.66 In the dismissal letter, Mr Uppal said that he did not consider that an alternative sanction would be appropriate. He had not discussed mitigation with the Claimant at any stage. Mr Uppal dealt with some of the procedural issues identified by the Claimant. He said in terms that he had no reason to distrust the

honesty of the other witnesses. He expressed concerns about the Claimant's reference to her colleagues' age and lack of experience during the disciplinary hearing, which he described as a continuation of the "trend" of making stereotypical remarks about age. The dismissal letter did not identify particular allegations as being the ones that justified summary dismissal – the matter was dealt with in the round. That was consistent with Mr Uppal's oral evidence.

3.67 Mr Uppal was asked about why he did not speak to other witnesses, such as Mr Williams or Ms Burridge-Todd. He said that he did not want to go any further "at this stage". He wanted to act proportionately. It was put to him that he did go further; he dismissed the Claimant. He then said that he took the view that the evidence from the core team was "enough." Mr Uppal also accepted that there were some inconsistencies between what the different witnesses said in their written accounts. He acknowledged that words like "intimating" had been used. It was suggested that the individuals should have been interviewed. He said that he felt "there was enough there" and that it was "not proportionate" to interview them. He was asked what he understood by the word "proportionate". It did not seem to the Tribunal that he was able to articulate any proper understanding of the word. He certainly did not seem to understand that what was proportionate must take into account the fact that one potential consequence of the process was the dismissal for gross misconduct of a solicitor of 22 years' standing.

3.68 Mr Uppal was asked how he was able to uphold disciplinary allegations that the Claimant had caused relationships within the team and with the directors to break down "irretrievably" without hearing evidence from the team or the directors about that. He said that he felt that he was making the decision on behalf of the firm.

3.69 Mr Uppal was asked about the references within the evidence to the Claimant's belief that she was being bullied about the Wednesday issue. He did not feel that it was inappropriate for Mr Durkan to have been the investigator despite those remarks. He said that he did not know any detail about the Wednesday issue, and did not know the level of disagreement.

3.70 Mr Uppal was asked about his findings on the data protection breach. His attention was drawn to emails that had not been disclosed until EJ Davies's recent order. They included an email from the Claimant to AS on 12 May 2016 asking him to shred the papers or offering to send him a pre-paid envelope so that he could return them and asking him to let her know which suited him best. There was also an email sent by the Claimant to the team on 11 May 2016 (from Court) reminding people to be extra vigilant and to double check letters and enclosures. Mr Uppal said that he had not seen these emails at the time. When it was suggested to him that this did not demonstrate the flippant response suggested by the dismissal letter, he said that the bigger issue was the failure to report to Mr Kennedy. He was reminded of what he said in the dismissal letter and asked why he did not check the emails at the time. He said that he had spoken to the Claimant. He was reminded that the Claimant said that she had no access to any emails and was requesting it. Despite this, he maintained that he would have found the Claimant's failure to report to Mr Kennedy was gross misconduct. He said that the policy was to report. He accepted that there was no policy in the disciplinary pack. He was asked why the other team members had not been disciplined for failing to report to Mr Kennedy. He said that they had reported to the Claimant. It was pointed out that only Ms Park had done so.

3.71 Mr Uppal was asked whether the fact that he rejected the allegation about "sexual tension" – the only one on which someone else gave evidence – made him consider whether the other evidence of the original witnesses was undermined. He said that he "balanced it all."

3.72 It was suggested to Mr Uppal that Mr Durkan had steered him towards a dismissal. He was emphatic that Mr Durkan had nothing to do with his role. The Tribunal accepted that evidence. There was no evidence to suggest that Mr Durkan was involved. The Tribunal acknowledged that the Respondents chose not to waive their legal privilege, which meant that a central part of how they said that matter was handled was not before the Tribunal. The Tribunal also considered that there were manifest shortcomings in the process. Nonetheless, it did not follow that Mr Durkan must have been behind the dismissal. The Tribunal believed Mr Uppal's evidence that he was not. Mr Uppal's evidence did not present a picture of someone who would be persuaded in that way. It was not suggested to Mr Uppal that he personally was influenced by the fact that the Claimant had been raising concerns about Wednesday working and her TUPE rights or that she had made an allegation of discrimination; only that he had been influenced by Mr Durkan. The Tribunal accepted that Mr Uppal genuinely believed that the Claimant was guilty of gross misconduct. He was pressed on that in oral evidence, and remained insistent that the Claimant had committed gross misconduct. That Tribunal accepted that as truthful evidence.

3.73 The Claimant was a statutory director of the First Respondent. She was subsequently removed from that role and she sought disclosure of material relating to that. No such material was provided until EJ Davies's recent order for disclosure. The material disclosed indicated that on 11 July 2016 Mr Durkan emailed a Mr Lodder (the First Respondent's accountant) saying that the Claimant had left the firm on Friday and needed to be removed as a director at Companies House. The Tribunal noted that this was done before the Claimant had had the opportunity to appeal, which does give rise to a doubt about Mr Durkan's view of the appeal process. Furthermore, the Claimant had not resigned as a director. There was therefore a statutory process to follow in order to remove her. It was not followed. This was one of several examples of shortcomings on the part of the Respondents that seemed to the Tribunal to be of comparable seriousness to the matters for which the Claimant was disciplined. Mr Durkan accepted responsibility. He agreed that this was a "not insignificant" mistake by him and said that he was "embarrassed." Mr Durkan's evidence was that the Claimant was removed as a director because she had been dismissed and not because she had complained of discrimination. That evidence was not challenged.

3.74 The Claimant submitted a detailed letter of appeal on 15 July 2016. She suggested that it was not fair for Ms Law to handle the appeal, since she had been involved in the Claimant's suspension. She referred again to her letter of 4 July 2016 as setting out her response to the allegations. She suggested that at the core of the process was her disagreement with Mr Durkan about Wednesdays. She dealt in detail with the allegation relating to a comment about Ms Raynor's age, drawing attention to differences in the evidence, and the context of the comments relied on by Mr Uppal. She reiterated her explanation about comments relating to Ms Hurst's disability and took issue with Mr Uppal's suggestion that the fact of Ms Hurst's disability was irrelevant. She pointed out that there was no basis for the suggestion that she had preconceptions about the

condition. She repeated her position about the data protection breach and said that there was no need to involve Mr Kennedy. She said that she had recently involved him in a different issue and that he had "gone over the top" and appointed an independent assessor (who had upheld the Claimant's view). She referred to his "exaggerated approach." She contended that there were procedural shortcomings, including a failure properly to investigate, failure to consider evidence in the employee's favour as well as evidence to the contrary; and failure to provide information to her. She requested an opportunity to question the original witnesses, as well as Mr Durkan and Mr Kennedy; and requested a copy of the data protection policy she was said to have breached, emails from her to the team relating to that breach, information about other data protection breaches reported to Mr Kennedy, and other matters.

3.75 Ms Law replied on 25 July 2016. She said that she would re-interview some witnesses, offer them the "opportunity" to attend the appeal hearing, obtain the information relating to the data protection breach and discuss that with Mr Kennedy. She declined the remaining requests.

3.76 Ms Law said that the Claimant's dismissal was not discussed by the Strategy Committee. They rarely had the opportunity to meet. She had dealt directly with Chadwick Lawrence. It was not put to Ms Law that she was influenced by Mr Durkan or pressurised to uphold the Claimant's dismissal. The Tribunal accepts that her decision was her own.

3.77 Ms Law was asked about her knowledge of the Wednesday issue. She knew that there was an issue about the Claimant's working hours. Although she was the equality officer she did not ask any questions about it because she trusted Mr Durkan and assumed he would resolve it. Ms Law was asked about the Claimant's statement in her 4 July 2016 letter that she felt bullied into working Wednesdays and felt that she was being discriminated against. It was put to Ms Law that as equality officer she must have thought that she needed to look at this. She disagreed. She said, "I could not see why she would make such an issue. It was outside my experience of John Durkan. I've known him for 15 years. He is supportive of women." The Tribunal was surprised to see a solicitor of Ms Law's experience, who held the role of equality officer, apparently simply assuming that the Claimant was in the wrong.

3.78 There was delay in arranging the appeal hearing, partly because of annual leave commitments on both sides. However, it was pointed out to Ms Law that, in the context of a mandatory deadline of 10 working days to hear an appeal, she did not even reply to the Claimant's letter for 10 (calendar) days. She had no explanation for that. The Claimant was concerned to progress matters as quickly as possible, as she wished to overturn her dismissal and limit the damage to her professional reputation. The Tribunal could understand how the apparent lack of urgency on the First Respondent's part might give the impression that that outcome was unlikely. The hearing was eventually listed for 8 September 2016.

3.79 In the meantime, Ms Law informed the Claimant that the witnesses had declined to attend the appeal hearing and that this was their right. It was not clear whether Ms Law had considered giving a reasonable management instruction requiring their attendance. Ms Law conducted further interviews with the individuals. The Tribunal was very surprised that no note-taker was in attendance and that Ms Law produced remarkably brief attendance notes no

more than a dozen lines long. Mr Uppal had upheld allegations based on preferring one version of events to another. Ms Law was an experienced solicitor and former senior partner. There is no indication that she probed the matters the Claimant had identified.

3.80 Ms Law did indeed ask Mr Kennedy to respond to the matters relating to data protection. We deal in more detail below with Mr Kennedy's approach, and explain why we have grave concerns about it. For present purposes, we note that he wrote a witness statement for the appeal on 24 August 2016. In that statement he spent time explaining that his approach and the firm's was to own up to mistakes if they were made. He said that he was concerned that the Claimant did not share that approach. Her attitude to regulatory matters generally was "naïve and inappropriate." He said that in his view the breach in question was serious and had been reported to the ICO as a result. It had also been reported to the OS. He said that, despite what the Claimant said, the breach was not dealt with. He found her brief reference to discarding the papers concerning and was concerned that AS's response seemed to satisfy the Claimant. He said that the breach did need to be reported to him and that he could produce any number of examples from "junior" members of staff who had done so. He said that the Claimant knew "the rules". He said that he had taken action on other cases and referred to what the Claimant had done as "a particularly egregious breach." He referred to the Claimant's request to see emails where she had raised the issue and said that that only email from anyone showing any concern was from the trainee. He enclosed a log of risk management issues "providing examples." He concluded by saying that the Claimant's comments about him being "over the top" and "exaggerated" betrayed "an almost contemptuous attitude to … regulatory and ethical requirements …".

3.81 In cross-examination Mr Kennedy said that he did not look at any other information when writing this statement. He recalled responding without consideration of the information. He said that he was not investigating, just responding. He accepted that he had not done enough to investigate the Claimant's response in order to make the comments he did and that they were unfair. He said that he was annoyed that the Claimant had called him "over the top." Further, he accepted (see below) that the log attached did not include all the relevant data protection breaches and should have done so. Mr Kennedy said that he had carried out an investigation in early July, when he "sat with the file." He did not look at emails sent or received. He had definitely looked at the AS file. He did not know if he had looked at the file for the client to whom the confidential data related (PS). He accepted that that file might have contained a relevant attendance note by the Claimant. It was apparent that he had not seen the emails sent by the Claimant on 11 and 12 May 2016 that were disclosed late in the day (referred to above).

3.82 Ms Law's evidence was that, so far as the data protection allegation was concerned, she simply deferred to Mr Kennedy. She did not look at the files and said that she would be "ill-qualified" to look at those issues. She confirmed that she took what he said at "face value."

3.83 Ms Law was asked why she did not allow the Claimant to access her diaries, emails or files. She simply said, "legal advice." That was not an explanation of how the First Respondent or the relevant directors had decided that no such access was required in the circumstances.

3.84 Ms Law's evidence was that she was conducting a review, not a re-hearing. In cross-examination she was asked whether she understood the consequences for the Claimant's career and agreed that she did. It was put to her that she had conducted cursory 3 line interviews with the employees and she said that she did not feel that she needed to re-visit the evidence. She said that she had focussed on the challenges the Claimant had made. It was put to her that the Claimant had challenged every conclusion, and she said that she did not see it as her role to cross-examine or seek to undermine. She was asked how she could get to the truth if she did not challenge aspects of the evidence. She said that she did not do it. Then she said that she knew the individuals and "gained every sense that they were sincere."

3.85 The appeal hearing took place on 8 September 2016. The Claimant attended with a note taker. Ms Paga also attended to take notes. The Tribunal was struck by the fact that according to Ms Paga's notes, Ms Law asked scarcely any questions of the Claimant. On the contrary, in many instances the Claimant raised an issue and Ms Law gave an immediate response seeking to rebut the point made.

3.86 Ms Law did not carry out any further investigations after the appeal hearing. She wrote to the Claimant on 28 September 2016, dismissing the appeal. She upheld each of Mr Uppal's findings. In particular:

3.86.1 As regards the findings relating to comments about Ms Hurst's disability, she said that there was corroborative evidence from Ms Park and Ms Andrews-Wilson that the Claimant had "unfair preconceptions" about Ms Hurst's condition and said that she had "no reason to distrust the integrity" of the evidence. She supported Mr Uppal's view that the fact of Ms Hurst's disability was irrelevant – it was how the Claimant had behaved in relation to it that was the issue. She did not specify what that behaviour was.

3.86.2 She upheld the allegation about derogatory comments relating to age. In doing so she suggested that there were inconsistencies in the Claimant's appeal statement and said that, having interviewed the witnesses, she was satisfied that the remarks had been made. She, too, took the view that the Claimant's remarks in the disciplinary hearing indicated that she did not "value the views of younger employees."

3.86.3 As regards the data protection breach Ms Law upheld Mr Uppal's view. She said that there was a need to inform Mr Kennedy and that she shared Mr Uppal's concern about the Claimant's ongoing failure to appreciate the gravity of the issue and to follow policy by reporting the matter.

3.86.4 As regards the Claimant's team, Ms Uppal simply said that the number of members of the team who had expressed concern about the Claimant's behaviour led her to conclude that the allegations were well-founded. She said that there was a significant amount of corroborate evidence that the Claimant was seeking to move the team elsewhere, which had been reiterated as part of her supplementary investigations.

3.86.5 Ms Law simply agreed with Mr Uppal's view about the allegations relating to the relationship with the directors.

3.86.6 Ms Law said in terms that she was satisfied that the Claimant had been given a sufficient opportunity to answer the allegations. She did not accept that the dispute with Mr Durkan about working hours had any

bearing on the matter. She said that she was satisfied from interviewing the witnesses that their statements were not incorrect or unduly influenced by Mr Durkan. She was of the view that the allegations upheld amounted to gross misconduct. Ms Law acknowledged that she had gathered some evidence suggesting that some members of the team had engaged in discussions about leaving the business. She said that this was "minimal" and was "clearly" after the Claimant had first raised it.

3.86.7 Ms Law said in terms that she was satisfied that all material relevant to the disciplinary allegations had been disclosed to the Claimant. It is not clear on what basis she was in a position to make that statement.

3.87 Ms Law was asked in cross-examination to explain her findings about the alleged disability related comments, in view of the Claimant's explanation for what had been said. She maintained her view that the fact of Ms Hurst's disability was irrelevant to the allegations. She was asked to explain what the impugned comments were, and she said that it was comments to the effect that Ms Hurst could not take on as much work, did not work full-time hours and did not have the same support as others. She referred to the Claimant making "discriminatory remarks." Ms Law was pressed further. Counsel asked her to explain her understanding of discrimination. She was unable to give a clear explanation of direct discrimination or the circumstances in which there was a duty to make reasonable adjustments. She was asked what was "discriminatory" about stating that Ms Hurst could not work as long hours as others. She said that it was the context of how it was said and to whom. She was asked what she made of the Claimant's explanation for that context. She said that more than one person "said it" and that their perception was that the Claimant "said it in a discriminatory fashion." It remained unclear precisely what Ms Law considered the Claimant had actually said and why she considered it to be "discriminatory."

3.88 Having dealt with the Claimant's dismissal, we turn to deal with a number of other matters that form the basis of the Claimant's complaints of victimisation. We begin with those relating to Mr Kennedy.

3.89 As indicated above, Mr Kennedy purported to investigate the data protection breach that had occurred on 11 May 2016 in early July 2016. On 19 July 2016 he made a report to the ICO about that breach. That report said that the director responsible had not reported the breach to Mr Kennedy. It also said that the underlying breach was a simple human error and that it appeared the director did not check what was enclosed when signing the post. The report said in terms three times that Mr Kennedy did not become aware of the breach until the week commencing 4 July 2016, because of the director's failure to report it.

3.90 On 20 July 2016, Mr Kennedy reported the Claimant personally to the SRA. He enclosed the report to the ICO. That report again said that the Claimant had not reported the breach internally and that Mr Kennedy was not told until the week commencing 4 July 2016. The report said that if the matter had been reported when the director became aware, the firm would have "taken swift action".

3.91 On 20 July 2016, Mr Kennedy also reported the matter to the OS, who was by that time acting as litigation friend for PS. He suggested that he forward his report to the ICO and subsequently did so when requested.

3.92 No further action was taken by the ICO, the SRA or the OS.

3.93 The evidence before the Tribunal included the following:

3.93.1 Mr Kennedy accepted that he was aware of the data protection breach in May 2016 when he spoke to Ms Coates and Ms Park. He accepted that it was incorrect for him to tell the ICO, the SRA and the OS that he only became aware in the week commencing 4 July 2016. He said that he did not want to be blamed. He was angry about not being informed and he let that become the focus. He felt that he could be in difficulties. He accepted that what he said was misleading.

3.93.2 Mr Kennedy accepted that he should have investigated the data protection breach in May 2016. It was pointed out that the Claimant had been disciplined for her part in this. He said that his focus was on breaches being reported, and that he and Ms Lockley would "immediately investigate." He accepted that that was not consistent with the evidence about what he in fact did.

3.93.3 Mr Kennedy accepted that when he did purport to investigate the data protection breach he did not ask who had mistakenly put the wrong enclosure in the envelope. As indicated above, he did not look at emails or documents. He looked at the AS file. He did not know if he looked at the PS file; possibly he did not. He accepted that he did not know that the director had failed to check the enclosures, and that it was possible that a secretary had included the wrong enclosure from the post book. He accepted that he should have investigated in more detail before making such a serious allegation. He also accepted that the guidance in the FAQ document about reporting breaches to him was ambiguous and assumed that the person reading it was not a director.

3.93.4 Mr Kennedy said that he reported the breach to the ICO because the firm was becoming increasingly aware of the benefits of reporting and working with the ICO, and because the failure to self-report by a senior employee was of systemic concern and called for a report. In cross-examination he accepted that there was only an obligation to report serious breaches and he agreed that in his view this was a non-material breach. He was shown another document that was not disclosed until EJ Davies's recent order. That was an email from Ms Lockley to Mr Kennedy on 6 July 2016 saying that there was no legal obligation to report to the ICO. He said that he reported it nonetheless because it seemed that this was a serious breach. He was reminded that he had regarded it as a non-material breach and it was put to him that non-material meant not serious. He said that he "did not fully understand the difference." He agreed that he had reported to the SRA as non-material but insisted that he regarded it as serious. That evidence was unconvincing.

3.93.5 In response to EJ Davies's recent order, a log of data protection breaches had been produced. Mr Kennedy did not know how that had come about. The log referred to an incident in May 2015 when a bundle to an expert witness had been lost in the post. That was not reported to the ICO. Mr Kennedy said it was because the First Respondent had stopped using recorded delivery in such situations. The log also referred to an incident in December 2015 when a solicitor had taken a client's passport and visa out of the office, and had then left them unlocked in his car, from which they were stolen. That was not reported to the ICO. Mr Kennedy suggested that the reason was because this had been reported to him. He accepted that the ICO would see this breach as being as

serious as the Claimant's failure to report the breach in May 2016. Mr Kennedy did not know why he had not reported the solicitor to the SRA. The log referred to an incident in October 2016 when a fee earner had taken a client's care plan in her handbag to a conference and left it unattended. Someone had taken her bag home. Mr Kennedy accepted that this was a very serious breach. It had not been reported to the ICO or the SRA. He said that it was serious but his thinking was that it had been reported to him immediately. The Tribunal found this evidence entirely unconvincing.

3.93.6 Mr Kennedy accepted that the OS was not PS's litigation friend at the time of the breach and that by the time he reported to the OS he knew the enclosure had been destroyed.

3.93.7 Mr Kennedy's witness statement contained a number of more general criticisms of the Claimant. He said that he was concerned about the handling of Ms Coates's training. He was concerned about delays in transferring her to a new seat in mental health. He was conscious of the need to manage trainees in accordance with the standards set by the Law Society and was increasingly concerned that the Claimant seemed "entirely uninterested" in the duty to Ms Coates and the Law Society. In oral evidence he said that he thought this was relevant because the Claimant "didn't appear to appreciate the regulatory context." He was asked whether he was aware that since July 2014 the SRA had been responsible for training contracts, not the Law Society. He was not aware. When he accused the Claimant of failing to abide by the Law Society rules he had not checked. He did not know that the SRA focussed on core competencies rather than training seats.

3.93.8 Mr Kennedy's witness statement went on to say that when Ms Coates transferred to the mental health team it quickly became clear that she was being dragged back into dealing with CoP matters, which concerned him. They always liked to have a "straight edge" when a trainee moved seats. In cross-examination he accepted that *Ms Coates* had asked to remain involved in at least two York CoP cases and that he had agreed. It seemed to the Tribunal that his witness statement was misleading in failing to refer to that. Mr Kennedy was unable to explain why his minutes of the CoP department meeting on 28 April 2016, which referred to his releasing the Claimant to cover some urgent York CoP matters, had not been disclosed until EJ Davies's order. He said that he was not asked to look at his emails and did not do so. Mr Shore, the IT Director, had been responsible for disclosure.

3.93.9 Mr Kennedy's witness statement went on to describe a situation of "complete confusion" as to who was to sit behind counsel in court one day. He said that Ms Coates was trying to take the lead in sorting it, and expressed his "disappointment" (by clear implication with the Claimant). In cross-examination he accepted that he had never asked the Claimant about this. He accepted that he did not know who had appointed counsel or who had dealt with who should sit behind him. He accepted that it might have been Ms Coates who had made a mistake.

3.93.10 In respect of the Tribunal proceedings, the Claimant's solicitors had identified that sensitive personal data had been included in the draft Tribunal bundle in February 2017. That included names, addresses, telephone numbers and details of parties involved in the original data protection breach. The Claimant's solicitors wrote to the Respondents on 23 February 2017 to inform them. Mr Kennedy said that he was unaware

of that. He became aware in recent days, and he gave instructions for the material to be redacted. He did not check that it had been done. He was not aware that the material remained in the bundles that were delivered to the Tribunal. [The Tribunal took immediate steps to have the material redacted and/or shredded]. Mr Kennedy accepted that he had personally read the draft bundle on 30 January 2017. He had not spotted the sensitive personal data. He put that down to "not putting his COLP head on." He could not explain the First Respondent's complete failure to reply to the Claimant's letter of 23 February 2017. That account was inconsistent with the picture Mr Kennedy sought to paint of himself as being vigilant and meticulous about data protection breaches.

3.93.11 The Tribunal noted that both in his written statement and his oral evidence Mr Kennedy referred to employees as "young". He said that it was not pejorative and just meant inexperienced.

3.94 Mr Kennedy was asked expressly about the Claimant's allegation of discrimination in her statement of 4 July 2016. He could not remember if he had read that statement. There was no direct evidence that he had. It was suggested to him in view of his repeated references to being annoyed by the Claimant's failure to report the breach, and by what she said about him in her appeal letter, that he did not like being challenged. He disagreed. It was put to him that he would be extremely annoyed at an allegation of discrimination. He said that he had not thought about that. He agreed that none of the other people responsible for data protection breaches had complained of discrimination. It was put to him that he thought the Claimant would bring a claim and that he wanted to undermine her by reporting her. He disagreed.

3.95 The Tribunal found that Mr Kennedy had no hesitation in making serious but apparently unsubstantiated criticisms of the Claimant in a witness statement prepared for these proceedings. He had himself handled the data protection breach inadequately, both by failing to investigate at all until July, and by failing to investigate properly when he did. He wrote reports to two regulatory authorities and the OS that made unsubstantiated criticisms of the Claimant, and gave a misleading account of Mr Kennedy's own involvement. He wrote a witness statement for the purposes of the Claimant's appeal that was damning of the Claimant without any proper foundation. It was unfair and he acknowledged that it was driven by anger. He did not identify any rational or logical reason why other, extremely serious, breaches of data protection were not reported to the ICO or the SRA. In all those circumstances, the Tribunal had no hesitation in finding that Mr Kennedy's reports to the ICO, the SRA and the OS were vindictive.

3.96 But the question for the Tribunal was whether any part of the reason for making the reports was the fact that the Claimant had complained of discrimination on 4 July 2016. The Tribunal makes a clear finding on the evidence that this was not the reason for Mr Kennedy's actions. There was no direct evidence that Mr Kennedy saw the 4 July 2016 letter. He did not handle the disciplinary investigation or the disciplinary hearing. He could not recall reading it and the Tribunal was satisfied that, if he did, it was not something that he had any particular recollection of. Further, the allegation of discrimination against Mr Durkan was somewhat buried within the document. In addition, and crucially, the Tribunal had Mr Kennedy's frank admission, repeated more than once, that he was angry with the Claimant for not reporting the data protection breach to him,

and, it seemed to the Tribunal, particularly for what she wrote about him in her appeal letter. It was clear that the witness statement he wrote for the appeal hearing was not a measured consideration, but was more akin to retaliation for the personal criticisms the Claimant had made. The Tribunal was quite satisfied that the reason Mr Kennedy made reports to the ICO, the SRA and the OS was that he was angry about the Claimant's failure to report the data protection breach to him and about the fact that she made personal criticisms of him in her letter of appeal. It was not to any extent because she had made that complaint of discrimination in the 4 July 2016 letter.

3.97 The Claimant's victimisation complaints also relate to the handling of subject access requests (SAR) that she made to the First Respondent. The first request, addressed to the data controller, was made on 17 June 2016. It sought all personal data relating to the Claimant that had been or were being processed by the company. Mr Kennedy replied on 30 June 2016, acknowledging receipt and saying that he would be responsible for overseeing the response. On 22 July 2016 Mr Shore, Head of IT and Operations, wrote again, requesting the Claimant to limit the scope of her request. The Claimant replied to Mr Shore indicating that she expected full compliance with the request. Mr Shore wrote again on 26 July 2016. He explained that initial attempts to comply had revealed tens of thousands emails that might need reviewing and again asked the Claimant to limit her request. There was further correspondence between the Claimant, Mr Shore and Ms Paga. A response to the request was produced on 3 August 2016, which the Claimant regarded as unsatisfactory and she complained about it. She made a further request on 26 August 2016 sent by email to Ms Paga and Mr Kennedy. Ms Paga emailed a reply on 30 August 2016, which was a letter from Mr Kennedy. That letter said that the firm had liaised with the ICO and that Mr Kennedy was satisfied that the firm had provided the Claimant with all that it could.

3.98 In his witness statement, Mr Kennedy relied on a letter from the ICO suggesting that this made it clear that, "I have dealt with all the Claimant's requests appropriately." The witness statement did not suggest that somebody else had dealt with the SARs. In cross-examination, Mr Kennedy said that he did not think he was responsible for dealing with SARs. He said that he had replied as he did to the Claimant's original request because the Claimant had written to him. It was pointed out that she had written to the data controller. He said that he did not know who the data controller was, despite the fact that he regarded himself as being responsible for data protection breaches within the First Respondent. Mr Kennedy said that Mr Shore oversaw the response to the SAR, in liaison with the First Respondent's solicitors. Mr Kennedy said that he recalled thinking that he could not deal with it. He did not have capacity and did not understand what was involved. He felt that he could not cope. He had pressures at home and was overwhelmed at work. It was clear that Mr Kennedy must have had some involvement – for example the letter of 30 August 2016 was from him, and his witness statement made clear that he did. But it was equally clear that Mr Shore was also involved. Mr Shore is still employed by the First Respondent. He was not called to give evidence. The general impression from the evidence is that the SARs and the Tribunal disclosure exercise were regarded as being essentially IT exercises, involving suitable electronic search terms. The Tribunal was not asked to consider in detail the response to the SARs. It is clear that significant documentation was produced. It is equally clear that some relevant material was not.

3.99 Mr Kennedy accepted that he thought it was possible that the Claimant would bring a Tribunal claim. It was put to Mr Kennedy that he had instructed Mr Shore to ensure that as little was produced as possible in response to the SARs because a discrimination claim would be coming. He said, "Not at all." The Tribunal took into account its findings about Mr Kennedy more generally, our view that the reports to the ICO and others were made vindictively, and Mr Kennedy's somewhat inconsistent evidence about his level of involvement in the SARs. However, fundamentally, his description of not wanting to be involved in the SARs appeared to the Tribunal truthful. There was no evidence suggesting a hands on or detailed involvement on his part, and the Tribunal accepted that Mr Kennedy did not deal with the SARs at that level. It appeared more likely to the Tribunal, and consistent with his approach generally, that he simply accepted an assurance that the SARs had been properly handled and put his name to correspondence and Tribunal documentation to that effect. The Tribunal was satisfied that he had not instructed Mr Shore to deal with the SARs in a particular way, and had not influenced the approach to the SARs.

3.100 Although part of the Claimant's complaint of victimisation related to an allegation that the First and Third Respondents failed to report to her or the OS that the ICO and SRA had decided not to take further action, that was not explored in the evidence. The Claimant's evidence referred to the fact that Mr Kennedy had not told the OS that the ICO and SRA had decided not to take further action, but Mr Kennedy was not asked about that in evidence.

3.101 The Claimant gave evidence about why she had not brought Tribunal proceedings sooner. She accepted that she had taken legal advice in March 2016, but said that she thought she could resolve the matter. Events in June then superseded the Wednesday issue, and she was then "fighting for [her] survival."

4. The Law

Unfair dismissal

4.1 Unfair dismissal is governed by s 98 Employment Rights Act 1996. It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances: see *British Home Stores Ltd v Burchell* [1980] ICR 303. Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed: see *e.g. Sainsbury's Supermarkets v Hitt* [2003] IRLR 23. The gravity of the charges and the potential effect on the employee are relevant in considering what is required of a reasonable investigation: see *A v B* [2003] IRLR 405 EAT. It is not for the Tribunal to substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that she was, based on reasonable grounds and following a reasonable investigation.

4.2 By virtue of s 104 Employment Rights Act 1996, an employee who is dismissed is to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee alleged that the employer had infringed a relevant statutory right of hers. Rights under TUPE are included. The reason or principal reason for dismissal is a question of fact to be determined by a Tribunal as a matter of direct evidence or by inference from primary facts established by evidence. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge. Under the Employment Rights Act 1996, it is for the employer to show the reason or principal reason for the dismissal. If the employee disputes the reason put forward, there is no burden on her of disproving them, nor of positively proving a different reason. However, if an employee positively asserts that there was some different and inadmissible reason, she must produce some evidence supporting the positive case: see *Kuzel v Roche Products Ltd* [2008] ICR 799 CA.

Discrimination and victimisation

4.3 Claims of discrimination are governed by the Equality Act 2010. Section 39 prohibits discrimination and victimisation in employment. Direct and indirect discrimination and victimisation are governed respectively by s 13, s 19 and s 27. Time limits are governed by s 123 and s 140B.

4.4 Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period. A distinction is drawn between a continuing act and an act that has continuing consequences: see *Barclays Bank plc v Kapur* [1991] ICR 208, HL. The focus of the inquiry is on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the Claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA.

4.5 As regards extending time, the tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time and the exercise of discretion is the exception rather than the rule: see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA. The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 may provide a helpful checklist: see *Southwark London Borough Council v Afolabi* [2003] IRLR 220, CA.

4.6 The burden of proof in discrimination cases is dealt with by s 136 Equality Act 2010. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of the equivalent burden of proof provisions under the Sex Discrimination Act 1975. The Tribunal had that guidance well in mind, but we do not set it out here. In essence, it outlines a two-stage process. First, the complainant must prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA; nor, by itself, is unreasonable conduct. The second stage, which only applies when the first is satisfied, requires the Respondent to prove that it did not commit the unlawful act. The guidance in *Igen* and *Madarassy* was expressly approved by the

Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054. However, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage* at para 32.

4.7 Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason: see *Nagarajan v London Regional Transport* [1999] ICR 877, HL. Where the reason for the less favourable treatment is not inherently discriminatory, it is necessary to explore the mental processes of the employer, to discover what facts operated on his or her mind: see *R (E) v Governing Body of the Jewish Free School* [2010] IRLR 136, SC ("*JFS*"). It is important to note that the employer's motive is irrelevant: see e.g. the *JFS* case. It is not necessary for the protected characteristic to be the only or even the main cause of the less favourable treatment; it must be an effective cause: see e.g. *London Borough of Islington v Ladele* [2009] IRLR 154, EAT. The discriminatory "motivation" of one person cannot be amalgamated with the acts of another – the alleged discriminator must have the relevant state of mind: see *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439.

4.8 Under s 19, a PCP covers a broad range of conduct, including formal and informal policies and practices. Once it has been established that a PCP is applied to the Claimant and to persons with whom she does not share the protected characteristic, it is necessary to consider whether the PCP puts or would put both the Claimant and the group who share the protected characteristic at a particular disadvantage compared with persons who do not share the protected characteristic. It is not enough that the PCP leads to a disparity between the two groups. The concept of "putting" someone at a disadvantage connotes causation: see *Naeem v Secretary of State for Justice* [2015] EWCA Civ 1264 CA; and *Essop v Home Office* [2015] ICR 1063 CA.

4.9 Direct and indirect discrimination are mutually exclusive; the same conduct cannot amount to both at once: *JFS*.

4.10 Under s 27, victimisation occurs when the employee is subjected to a detriment because she has done a protected act (or it is believed she will). There must be a causative link between the protected act and the detriment, which means that person alleged to have victimised must know about the protected act. The protected act need not be the only reason, but it must be a material influence on the decision.

5. Application of the law to the facts

5.1 Against the background of the detailed findings of fact, the Tribunal applied those principles to the issues in these claims.

Unfair dismissal

5.2 The Tribunal started with the complaint of unfair dismissal. The first issue was: what was the reason for the Claimant's dismissal? Was it the automatically unfair reason that the Claimant had complained of a breach of her rights under TUPE to enjoy her existing contractual terms and provisions, was it misconduct or was it some other reason? As noted, the reason or principal reason for dismissal is a question of fact, and the Tribunal has dealt with it as such. For the reasons set out in the findings, the Tribunal was satisfied that Mr Durkan had not influenced Mr Uppal or steered him towards a dismissal. That was the basis on which the Claimant suggested that the reason for dismissal was that she had complained of a breach of her TUPE rights. Further, the Tribunal accepted that Mr Uppal genuinely believed that the Claimant was guilty of misconduct and that that was the reason he decided to dismiss her. The question whether that belief was reasonable is a separate one, but the Tribunal was satisfied that it was genuinely held.

5.3 It follows that the Claimant's dismissal was not automatically unfair. The Tribunal therefore turned to consider whether the First Respondent acted reasonably in all the circumstances in treating misconduct as a sufficient reason to dismiss. We had no hesitation in finding that it did not. For the reasons set out in more detail below, the Tribunal found that there were serious and fundamental shortcomings in the First Respondent's approach, none of which was corrected at the appeal stage. Dismissal was wholly outside the range of reasonable responses. The reasonableness of the investigation, grounds for belief in misconduct, procedure and sanction are interlinked and we deal with them in the round below.

5.4 In reaching that view, the Tribunal had particular regard to the following matters, which are referred to more fully in the findings of fact:

5.4.1 No notes were kept of Mr Kennedy's initial discussions with Ms Coates and others in May 2016. Some of those discussions took place with more than one complainant at a time. In turn, no notes were kept of Mr Durkan's initial discussions with the complainants. That was of relevance in circumstances where the Claimant later raised concerns about collusion and asked for the witnesses to attend the hearing or be made available for questioning.

5.4.2 The written complaints made by the complainants raised a range of concerns, some of which were plainly hearsay or opinion, some of which were extremely vague.

5.4.3 Mr Durkan did not understand that his role as investigator was to investigate. He thought it was just to ask questions of the complainants and document them. He did not carry out any adequate investigation. He failed to consider any documents, emails or other material. Such matters were plainly of relevance. To give just one example, there was an allegation of dishonesty or fraud in relation to costs or billing, yet Mr Durkan did not even look at the relevant file, the costs review or the sums billed. Given the seriousness of the allegation and the potential consequences for someone in the Claimant's position, that was wholly unreasonable. Apart from Ms Andrews-Wilson, Mr Durkan did not interview any other witness in addition to the original complainants. As he accepted, others had potentially relevant evidence to give. His questioning of the original complainants was to a large extent inappropriate, making extensive use of leading questions.

5.4.4 Mr Durkan's investigatory meeting with the Claimant was fundamentally flawed. He wrongly led her to believe that this would be an informal meeting. He accepted that he should have allowed her to be accompanied. He provided inadequate information about the allegations to be discussed, such that the Claimant could not have understood in advance of the meeting what the substance of the allegations was. In that context, he asked her questions relating to witness statements and accompanying documentation of which he had a copy, but she did not. He asked vague or non-specific questions, and failed to provide further detail when the Claimant asked for it to allow her to respond. He expected immediate answers, despite the Claimant saying that she needed access to other information to enable her to respond, or simply saying that she was shocked and needed time to process what was being said. He understood that the Claimant intended to prepare a written response after the meeting but nonetheless passed the file to Chadwick Lawrence to be passed over to Mr Uppal.

5.4.5 Mr Uppal formulated disciplinary allegations and requested the Claimant to attend a disciplinary hearing to answer them, despite his view that little weight could be attached to the Claimant's interview with Mr Durkan and despite knowing that the Claimant intended to put in a written response. The decision to proceed to a disciplinary hearing was reached without the Claimant having had a proper chance to give her version of events and without the allegations having been properly investigated, contrary to the First Respondent's policy and the ACAS Code of Practice. That is of particular concern where an allegation of fraud or dishonesty was made. Lawyers should be well aware of the seriousness of making such an allegation, and the corresponding need to have a proper evidential foundation for doing so. The Tribunal recognised that that particular allegation was not upheld, but the fact that it was proceeded with at all illustrates the First Respondent's approach to this matter.

5.4.6 It was not an answer to say that the Claimant had the chance to put her version of events at the disciplinary hearing. First, it was clear that the Claimant was angry and defensive at that hearing. As Mr Uppal accepted, employees might well react differently in a formal disciplinary context. Further, the Claimant still did not have a proper chance to put her version of events at the disciplinary hearing, because she was not allowed access to any of the documents, emails, diaries or other material that she identified as relevant. Plainly, much of that material was relevant, for example the Claimant's emails and documents relating to the data protection breach.

5.4.7 Despite the manifest shortcomings in the way Mr Durkan had interviewed the complainants and the vagueness and discrepancies in their accounts, as identified by the Claimant, Mr Uppal did not ensure that those complainants attended the disciplinary hearing to give evidence and be questioned. Nor did he question them himself after the hearing. Despite the Claimant identifying others with potentially relevant evidence, Mr Uppal did not question them.

5.4.8 Mr Uppal repeated the mantra that he did what he thought was proportionate, but appears wholly to have failed to appreciate that this meant that the more serious the allegations and the more serious the potential consequences, the more was required by way of investigation and procedure. The cursory investigation, failure to allow the Claimant

access to any documentary material and failure to probe the accounts given by the complainants in any meaningful way, fell far short of what proportionality required in this case.

5.4.9 Mr Uppal did not make clear factual findings about what the Claimant had said or done, for example what the derogatory and stereotypical remarks she had made were. It is difficult to understand Mr Uppal's statement that the fact of Ms Hurst's disability was irrelevant to that allegation, given the nature of the Claimant's explanation for what was said. He made clear that he upheld some allegations on the basis that he preferred the evidence of the complainants to the Claimant, but he did not explain how he had come to that view without himself having spoken to the complainants and in circumstances where their accounts were subject to the concerns identified. Where concerns about collusion and leading questions have been raised, it is not necessarily enough to say that there is more than one person saying something. Mr Uppal's repeated references to there being "enough" evidence to uphold allegations were suggestive of a failure to look for exculpatory material.

5.4.10 The Claimant was given no chance to offer any mitigation, or discuss what the appropriate sanction was. It is not clear that any thought was given to treating the Claimant consistently with others, for example those who had not reported the data protection breach to Mr Kennedy.

5.4.11 None of these shortcomings were corrected at the appeal stage. Ms Law did not conduct a re-hearing. No further, substantial investigation was carried out. The Claimant still was not provided with access to the emails, diaries and other documents she was seeking. She was still not given the chance to question the complainants or probe their evidence. Ms Law's discussions with them did not redress the balance. She did not see it as her role to probe their accounts. Her approach at the appeal hearing appears not to have been an inquisitive one. Despite the lack of clarity about what precisely Mr Uppal had found in some instances, Ms Law upheld his findings. It is difficult to understand the basis for her view that Ms Hurst's disability was irrelevant. She was not able to explain to the Tribunal what the discriminatory remarks were that she had found the Claimant made.

5.4.12 Further, Ms Law essentially deferred on the data protection allegation to what Mr Kennedy said in his witness statement for the appeal. That was based on an inadequate investigation, was unfair, and was motivated by Mr Kennedy's anger towards the Claimant.

5.4.13 No real consideration appears to have been given to the obligation under the disciplinary policy to hold the appeal hearing within 10 working days. No consideration was given to the disciplinary policy that had transferred under TUPE with the Claimant, in particular to the fact that under that policy (and in the absence of a senior partner) her appeal should have been heard by two partners.

5.5 Looking at those matters, it seemed to the Tribunal that there was a wholly inadequate investigation and a fundamentally unfair disciplinary hearing and appeal. The Claimant did not have a proper opportunity to answer the allegations, not least because she was never allowed access to relevant documents. No reasonable employer could conclude in the circumstances we have described that the untested written accounts and investigatory interviews, together with the minimal and incomplete documentation that accompanied them,

provided reasonable grounds for concluding that the Claimant was guilty of misconduct. No reasonable employer could have treated misconduct as a sufficient reason for dismissing the Claimant in the circumstances. The claim of ordinary unfair dismissal therefore succeeds.

Discrimination

5.6 We turn to the Claimant's discrimination claims. We deal with the question of time limits at the same time as addressing the substance of the claims.

5.7 The Tribunal dealt first with the complaint of indirect sex discrimination, starting with the question whether the First or Second Respondents applied to the Claimant a PCP that all full-time directors were required to work Monday to Friday. In the light of Mr Durkan's evidence, the Tribunal was quite satisfied that both Respondents did apply such a PCP to the Claimant. The Tribunal recognised that the Claimant was not physically required to work on a Wednesday prior to her dismissal (although she continued to do so voluntarily when required), but that does not mean that the PCP was not applied to her. We found that such a PCP was applied to her from 4 February 2016 onwards when Mr Durkan told her that she must, in broad terms, work on Wednesdays, either at home or in the office, and would be issued with a contract to that effect. He accepted that he could have come across as telling her that she would work five days per week. That was reiterated on 13 February 2016 and 17 March 2016, and again on 20 May 2016, when Mr Durkan's note of 4 February 2016 was provided to the Claimant. The Tribunal took the view that these actions amounted to the application of a PCP to the Claimant, that she was required to work Monday to Friday.

5.8 Further, the PCP applied to all full-time directors, male and female. Mr Durkan's evidence was clear: it was his belief across the firm that all directors were working five days per week. If they were contracted "five days" they should be working "five days." His fundamental fear was that if the Claimant were allowed to work compressed hours, others would want to. There was no doubt that the PCP applied to all full-time directors, male and female.

5.9 As indicated, the First and Second Respondents did not dispute that if there was such a PCP it put women generally, and the Claimant specifically, at a particular disadvantage. The Tribunal found, on the evidence before it, that this was so. The First and Second Respondents did not argue that the PCP was justifiable. Accordingly, subject to the question of time limits, the indirect discrimination is well-founded.

5.10 Mr Durkan did not alter his position and the Tribunal found that the PCP was applied to the Claimant from 4 February 2016 until the termination of her employment. The fact that she was suspended and not in fact required to work did not alter that. She was still subject to the expectation that she would work five days per week and on notice that she would be issued with a contract to that effect, which had been most recently reiterated on 20 May 2016. Accordingly, there was conduct over a period that ended after 9 June 2016, and the indirect discrimination claims against the First and Second Respondents were each brought within three months plus early conciliation extension of the end of the relevant period. The indirect discrimination claims against these two Respondents therefore succeed.

5.11 The Tribunal deals next with the direct discrimination claims. The Claimant's case was essentially that Mr Durkan, the Second Respondent, was responsible expressly or behind the scenes for all of the matters complained of; that his actions amounted to less favourable treatment of the Claimant because of sex; and that the whole course of conduct complained of was therefore such less favourable treatment by him and, through him, the First Respondent.

5.12 The findings of fact in relation to the course of conduct alleged are set out in detail above. In outline:

5.12.1 Mr Durkan did seek to impose on the Claimant a pattern of her working on Wednesdays, in particular on 4 February 2016, in emails in February 2016, on 17 March 2016 and in an email on 20 May 2016. Mr Durkan was not seeking a "compromise". The only acceptable "resolution" from his perspective was that the Claimant worked Wednesdays, and he made clear his intention to impose that.

5.12.2 Mr Durkan took the decision to suspend the Claimant. He did not give a clear explanation of why he thought that was appropriate. He apparently placed significant reliance on legal advice, and referred to the "volume" of allegations and the fact that they "all seemed quite serious."

5.12.3 Mr Durkan conducted a wholly unsatisfactory investigatory meeting. While it is difficult to make a qualitative finding about whether Mr Durkan's approach objectively amounted to bullying or was oppressive, there were serious shortcomings. Mr Durkan repeatedly pressed, inappropriately, for yes or no answers and expressed his incredulity that the Claimant was unable to provide them. There is no indication that he understood that the allegations had come as a shock to the Claimant, that she might need time to process them, or that it was reasonable for her to ask for more time or for the underlying documents.

5.12.4 It was Mr Uppal's decision to proceed to a disciplinary hearing without awaiting the Claimant's written response to the allegations. Mr Durkan did pass the file on to Chadwick Lawrence and did tell Mr Uppal to speak to them, without waiting for that response.

5.12.5 It was Mr Uppal's decision to dismiss the Claimant. Mr Durkan played no part in it.

5.13 The question for the Tribunal is whether Mr Durkan's actions were less favourable treatment of the Claimant because of her sex. The Claimant relied on a number of factors in support of her contention that they were. In particular, the Tribunal notes:

5.13.1 Mr Durkan was unaware of the flexible working policy. He did not involve the First Respondent's equality officer in his consideration of the Wednesday working issue, even when the Claimant raised concerns about discrimination that were reported to him. Mr Durkan was aware that the Claimant had childcare obligations on Wednesdays.

5.13.2 Mr Durkan's approach to the question of Wednesday working was in many ways surprising. He regarded it, from the very outset, as being something contentious. He made enquiries and raised concerns both internally and with Langleys, without taking the simple step of speaking to the Claimant about it for many months. Even when he did speak to her about it, he went about that in an underhand way, springing it on her at a meeting she believed was for another purpose. He was plainly

intent on proving that the Claimant did not have a contractual agreement at Langleys that allowed her not to work on Wednesdays. He pursued the issue of Wednesday working and maintained his insistence on it despite his view that the Claimant was performing phenomenally and the clear evidence that she was outperforming others who did work across five days.

5.13.3 On 4 February 2016, he told that Claimant that she could "have her nails painted" for all he cared.

5.13.4 There was no indication of any concern about Mr Williams working from home for most of the week (although the Tribunal did not have any evidence about his working pattern, in particular whether he worked on and billed for Wednesdays).

5.14 The Tribunal considered whether the Claimant had proved facts from which it could conclude, in the absence of an adequate explanation, that the reason for Mr Durkan's treatment of her was her sex. We found that she had not. We reminded ourselves that unreasonable conduct is not enough: there has to be something to point to discriminatory conduct. There was no direct comparator and the Tribunal found the evidence relating to Mr Williams of little assistance, because although Mr Durkan did not question his working arrangements, there was nothing in the evidence before the Tribunal to suggest that Mr Williams did not work five days per week. It was clear that Mr Durkan's focus was five day working, not home working. That left the apparent illogicality of Mr Durkan making such an issue about the working pattern of an employee who was performing so outstandingly; the way he approached both the question of Wednesday working and the investigation of disciplinary allegations; and the making of a comment about painting nails. Mr Durkan's approach was undoubtedly unreasonable, but the Tribunal did not consider that all the matters taken together amounted to facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the reason for Mr Durkan's treatment of the Claimant was her sex. The Tribunal did not consider that the comment about painting nails, by itself, was enough to shift the burden. It was a gender specific comment, but it was not enough by itself to enable the Tribunal to infer that the reason Mr Durkan took the approach he did to Wednesday working and the other matters was the Claimant's sex.

5.15 Even if the Claimant had shifted the burden of proof, the Tribunal would have found that the Second Respondent had proved that the Claimant's sex was not the reason for his treatment of her. As we have recorded, while he accepted with hindsight that he should have dealt with the Wednesday issue differently, he denied that he would have done so if the Claimant had been a man. His explanation for approaching the issue of Wednesday working as he did was his fear that the other directors would all want to work in a similar way. While that fear itself lacked logic, given that the working pattern evidently did not adversely affect the Claimant's performance, it did appear to the Tribunal that it was genuinely held. Mr Durkan plainly did lack any real understanding of compressed hours working. He appeared at times to regard it as part-time working. The evidence clearly demonstrated that he was very much focussed on the question of working across five days, whether that was at home or in the office. The Tribunal accepted that it was Mr Durkan's belief that the Claimant's working pattern was advantageous and that other directors would want to copy it and that that led him to approach the question of Wednesday working as he did. We were satisfied that, such was the force of his fear, he would have approached the

matter in the same way if the Claimant had been male. Our finding that he made the comment about painting nails does not lead us to a different view. While he no doubt would not have made that comment to a man, that does not necessarily mean that his approach to Wednesday working more generally would have been different if the Claimant were a man, and for the reasons we have explained, the Tribunal accepted Mr Durkan's explanation. The Tribunal kept in mind that the treatment must be in no sense whatsoever on the discriminatory ground and we were satisfied that the Second Respondent had met that standard.

5.16 The Tribunal was not persuaded by the Claimant's submission that because her wish for Wednesday working related to childcare obligations, which in turn arose because she is female, that meant Mr Durkan's treatment of her was, in part, because of sex. That seemed to us to elide the indirect and direct discrimination claims, contrary to what was made clear in *JFS*.

5.17 The Tribunal considered that Mr Durkan's concerns about the Claimant's working pattern, and his focus on getting his own way about that, no doubt played some part in his approach to the disciplinary allegations and the investigation of those. It was not in his interest for the Claimant to be exonerated, because that would still leave him with the question of Wednesday working to be resolved. But, having found that his approach to Wednesday working would have been the same if the Claimant had been a man, the Tribunal found that Mr Durkan's fear that others would want the same working pattern as the Claimant was the reason for his approach, not the Claimant's sex.

5.18 Accordingly, the Second Respondent (and therefore the First Respondent) did not treat the Claimant less favourably on the ground of sex in the manner alleged.

5.19 Mr Uppal was not named as a respondent to the direct discrimination complaint. The case against the First Respondent, so far as the decision to proceed to a disciplinary hearing without awaiting the Claimant's response and the decision to dismiss her were concerned, depended on the contention that it was Mr Durkan who lay behind those decisions. For the reasons set out in the findings of fact, the Tribunal did not accept that contention. It was not put to Mr Uppal that he would have acted differently if the Claimant had been a man and there were no facts from which the Tribunal could conclude, in the absence of an adequate explanation, that Mr Uppal acted as he did because of the Claimant's sex. That part of the direct discrimination claim therefore does not succeed either.

5.20 We come back to the question of time limits. In cases where a Claimant relies on conduct extending over a period, the Tribunal is always in the position of having to make substantive findings to some extent before dealing with this preliminary issue. In view of our findings, there was not a course of conduct of less favourable treatment extending over a period ending on or after 19 April 2016 or 9 June 2016. For any individual complaints about matters occurring before those dates, the Tribunal would have found that it was not just and equitable to extend time for bringing the claims. The Claimant, herself a lawyer, took specialist employment law advice in March 2016 and evidently was being assisted by lawyers thereafter. In that context, the Tribunal was not satisfied that there was a good reason for the failure to bring the claims in time. While she may have thought she could resolve the matter, or may have shifted her focus to the disciplinary allegations, her professional representatives were able to take a

more objective view. The impact on the cogency of the evidence was limited, but there is real prejudice to the Respondents in having to face additional claims and the Tribunal would have found that such prejudice outweighed the prejudice to the Claimant in not being permitted to advance those parts of her claim, particularly where she had professional advice at the time. Weighing all the relevant factors, the Tribunal would have found that it was not just and equitable to extend time. The Claimant did not advance a free-standing complaint (e.g. of harassment) relating to nail painting comment. Had she done so, the Tribunal would have found that the claim relating to that comment was not brought in time and that it was not just and equitable to extend time for bringing it.

Victimisation

5.21 The claim of victimisation was brought against the First and Third Respondents. There was no dispute that the Claimant did the protect act on which she relied, namely making a complaint of discrimination in her response to the disciplinary allegations on 4 July 2016.

5.22 The first detriment to which she alleged she was subject was being dismissed. The Tribunal was satisfied that the Claimant's dismissal was in no sense whatsoever because she had complained of discrimination on 4 July 2016. We repeat again our finding of fact that it was Mr Uppal alone who took the decision to dismiss the Claimant and that he did so because he genuinely believed that she was guilty of misconduct. It was not suggested to him that the Claimant's complaint of discrimination played a part in that, and there was no basis for inferring that it did so.

5.23 The next alleged detriment is the removal of the Claimant from her directorship. Mr Durkan was responsible for that, not Mr Kennedy. The Tribunal's factual findings make clear that this step was taken both prematurely and in breach of the statutory process. Mr Durkan admitted that he was responsible for this "not insignificant" mistake. His unchallenged evidence was that he issued the instruction because the Claimant had been dismissed, not because she had complained of discrimination. The Tribunal did not consider that the Claimant had proved facts from which it could infer, absent an explanation, that the reason for the Claimant's removal as a director was to any material extent her complaint of discrimination. Mr Durkan's conduct was unreasonable and incompetent, but there was nothing to suggest that it might be connected to that complaint. Mr Durkan's approach to the Claimant did not change after the making of that (or indeed any earlier) complaint of discrimination. Rather, it started with the concern about her compressed hours working pattern. In any event, the Tribunal was satisfied that the reason for removing the Claimant as a director was because she had been dismissed.

5.24 That brings us to the handling of the Claimant's two SARs. Again, the victimisation claim was to the effect that the First and Third Respondents failed or refused to respond to those requests because the Claimant had complained of discrimination on 4 July 2016. The Tribunal did not consider that the Claimant had proved facts from which it could infer, absent an explanation, that the handling of her SARs was materially influenced by the fact that in her response to disciplinary allegations on 4 July 2016 she complained of discrimination. As we have recorded, there was relevant material that was not provided to the Claimant pursuant to either request and we assume in her favour that that was because of a flawed approach by the Respondents. But the Claimant did not prove facts that

could give rise to an inference that any such flaws were connected to the discrimination complaint. The Tribunal did not see evidence suggesting that Mr Shore had any knowledge of that complaint. There was no direct evidence that Mr Kennedy did either and, as set out in the findings of fact, the Tribunal was satisfied that if he did see it he did not have any particular recollection of it. His focus was on the data protection issue, and in particular on the Claimant's failure to report that, and her criticisms of him personally. The Tribunal found on the evidence that Mr Kennedy did not instruct Mr Shore to minimise the material disclosed pursuant to the SARs and that his own involvement was limited.

5.25 The next part of the victimisation claim relates to the reports to the ICO, the SRA and the OS. On this part of the claim the Tribunal was in a position to make a clear finding on the evidence about Mr Kennedy's reason for making those reports. As set out in detail in the findings of fact, he did so vindictively, but because he was angry that the Claimant had not reported a data protection breach to him, which might have put him in a difficult position, and because she made personal criticisms of him in her appeal letter. His decision to make those reports was not influenced to any extent by the fact that the Claimant had made a complaint of discrimination in her letter of 4 July 2016 responding to the disciplinary allegations.

5.26 The last part of the victimisation claim relates to an allegation that the First and Third Respondents failed to inform the Claimant and the OS that the ICO and SRA had decided not to take further action. As set out in the findings of fact, that was not explored with Mr Kennedy in the evidence. The Claimant did not prove facts from which the Tribunal could infer that the reason for failing to inform the Claimant and the OS of those matters was connected to her complaint of discrimination in July 2016. In any event, it seems to the Tribunal highly likely that Mr Kennedy's approach on this would have been based on the same factors as his approach to the making of the reports in the first place.

5.27 For those reasons, none of the victimisation claims succeeds.

_____

Employment Judge Davies

Date: *23 March 2017*