Case No: 1402865/2019

EMPLOYMENT TRIBUNALS

Heard at: **Exeter (by hybrid video hearing)** **On: 1 to 8 March 2021**

Claimant: Ms Christine McCrorie

Respondent: Aspect Windows (western) Limited

Before: Employment Judge E Fowell

Mrs PJ Skillin

Ms R Hewitt-Gray

Representation:

Claimant: Mrs A Christie instructed by Thompsons LLP Solicitors

Respondent: Ms K Zakrzewska of Croner Group Ltd

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's dismissal was unfair.
2. The complaint of victimisation is upheld
3. The complaint of harassment on grounds of sex is upheld
4. The complaint of direct discrimination on grounds of sex is dismissed
5. The complaint of unlawful deduction from wages is dismissed.
6. The respondent is ordered to pay compensation to the claimant in the sum of **£86,496.81**
7. The recoupment provisions do not apply.

REASONS

Introduction

1. Our main task here is to decide why Ms McCrorie was dismissed. The company, Aspect Windows, says that it was on grounds of redundancy but she says that it was because she raised allegations about lewd and offensive comments by her male colleagues.

2. The complaints presented are therefore of unfair dismissal, harassment and direct discrimination on grounds of sex and also that her dismissal was an act of victimisation for raising the grievance. Little law is involved in deciding between the two rival versions of events and no legal points were raised by either side in their closing submissions, so the outcome depends on our assessment of the evidence heard.

3. For completeness, there is also a complaint of unlawful deduction from wages relating to her annual bonus. According to the claim form she was underpaid £1,080 in 2018 and should also have had some bonus paid at 0.5% on commission in 2019. We heard very little evidence on this aspect however.

4. The evidence we did hear, over the first four days of this hearing, came from Ms McCrorie and then a succession of witnesses for Aspect Windows:

    - Mr Steve Cooling, the Managing Director, who handled the grievance;
    - Mr Elliot Martin, the Sales Manager and hence Ms McCrorie's line manager, who dealt largely with the redundancy process;
    - Ms Emily MacLeod, the company's HR Manager, who works for them on a self-employed basis for 11 hours a week;
    - Mr Tom Robins, who was as a sales estimator throughout the events in question and who acted as a supervisor before Mr Martin arrived;
    - Mr Andrew Smerdon and Mr Steve Wesley, who were also there as sales estimators;
    - Mr Andrew Bromiley, a Survey Manager and Ms Teressa Lemon, an Accounts Assistant, who worked in different offices.

5. There was a bundle of about 450 pages plus Tribunal documentation. The hearing was a hybrid arrangement, with Ms Zakrzewska and the respondent's witnesses all taking part remotely, while Ms McCrorie and Mr Griffiths attended in person each day. No great difficulties were found in making sure that everyone participated.

Having heard that evidence and the submissions on each side we make the following findings.

Findings of Fact

Background

6. The company is a family concern employing about 30 people on the outskirts of Exeter. It makes and sells double glazing. The sales team are all described as sales estimators, and there seems to have been three or four of them throughout. Ms McCrorie, the Sales Support Assistant, shared the same office and provided administrative support.

7. She joined in 2016 and at that time the office was run by a Mr Andrew Sellers, the Sales Director. She described him as running things with a rod of iron. Ms McCrorie was generally the first point of contact for customers and would take their details, build some rapport with them and pass them on to the estimators. So, Mr Sellers policed the younger sales staff, and when he was not there Ms McCrorie had some licence, as his PA, to chivvy them along, reminding them to call back customers or attend to this and that. She was very happy with this arrangement; it gave her a certain status in the company and a varied and busy role. And like the sales estimators, she also received some commission on the sales.

8. Ms McCrorie is now 59 so is rather older than the others in that office. From what we could see on video even the Managing Director Mr Cooling is considerably younger. He made reference to organising his wife's 40th birthday in his evidence, which may well give a clue to his own age, and the other sales estimators we saw appeared to be in their 20s or 30s. So, when Mr Sellers left at around Christmas 2017 there was a change in the office dynamic. It was just her and three much younger men. No Sales Director came in to replace Mr Sellers, and so she was no longer the boss's right hand woman. In fact the whole basis of her authority, which was always informal, was now removed, and she was left in an admin support role. The group went from having a firm manager in charge to no real manager at all. Mr Cooling was nominally the Sales Director, in addition to his role as Managing Director, but he was not based in the sales office. The more senior of the sales estimators was Tom Robins, but he was not interested in managing staff and so he was given a title as sales supervisor, mentoring the other two and being on hand to deal with any of their queries. Since he was reluctant to manage people the behaviour in this group of young salesmen, freed of the previous constraint, became more boisterous and unruly.

9. No doubt their behaviour towards Ms McCrorie changed too. They may well have resented her chivvying in the past, and now had no obvious need to comply or defer to her in any way. She was all too aware of the change of status and how she was perceived. It is clear from her CV that she has long experience in administration, customer service and also in sales and marketing. From her redundancy

consultation meetings we also see that she has run her own business and been a town councillor. So to now find herself relegated in this way must have been a very unwelcome change.

Early signs

10. The first sign we detected of any unhappiness surfacing was in April 2018. Mr Sellers had left the previous Christmas but was around from time to time in a consultant role for the next few months, so this was shortly after his final departure. It is recorded on page 522 of the bundle, which is a page from the batch of handwritten notes provided by Ms McCrorie during the hearing. Before describing the contents, we should say a little more about those notes, which begin at page 513.

11. The Particulars of Claim detail six particular incidents of harassment, nine complaints or protected acts culminating in the formal grievance and ten further acts of victimisation, ending with the dismissal. Each gives the date or approximate date, and details of what was said and those present. This suggests that there must have been some earlier notes from which to reconstruct all these events. When I asked Ms McCrorie at the end of her evidence if that was the case she agreed without any hesitation, not realising that it laid her open to criticism for having failed to disclose highly relevant documents. She said they were just notes on various scraps of paper rather than in a diary and she would bring them in.

12. Mr Griffiths rightly said that these notes should at least be disclosed to the respondent. They might of course have been at odds with the allegations raised and give some support to the company's case. So, they were brought in on the third day. Some issue was taken over the fact that they were not produced the very next day, but we accept that Ms McCrorie was confused over what she was told to do. I had indicated that we may not be willing to allow *her* to make use of them in evidence, having failed to disclose them when she should, which she took to mean that she should not bring them in. That confusion was then resolved and they arrived. Ms Zakrzewska did not object to them being admitted in evidence, which was very realistic given their central role. And on examining them with care, we are entirely satisfied that they are genuine, that is to say that they are the authentic contemporaneous notes from which the Particulars of Claim were prepared. Many are simply jottings and have doodles on them. Others have lists of jobs to do or discussion points for meetings, and the complaint or conversation mentioned is inserted perfectly naturally. The possibility was also raised that Ms McCrorie might have manufactured them this week but we reject that as completely unrealistic. As we have already said, it is clear that there must have been some such original records, and there is no advantage to Ms McCrorie in leaving it so late to mention them. Her cross-examination was complete before they were even referred to. So, we accept them as an authentic record of her thoughts or events at the time, and that provides a firm support for what is already a clear, detailed and consistent

account, both in the Particulars of Claim and in her witness statement.

13. Continuing our digression, the witness statements for the respondent's witnesses are, by contrast, extremely brief. Not only that, but the position adopted in the response is that her account is simply invented and untrue. Ms McCrorie's cross-examination lasted only about an hour and twenty minutes and much of it was taken up with putting to her point by point that each of these allegations, disclosures or alleged detriments never happened. It was also put to her that there was an extensive redundancy process and a grievance procedure, but there was little engagement with her case, which is that the redundancy process was a sham and that the grievance simply ignored her concerns. This lack of a positive case for the respondent is very relevant in considering the respective merits of each version of events.

14. Returning to those events, as described in these handwritten notes, in April 2018 the sales estimators comprised Tom Robins, Luke Ebdon and Steve Wesley. The note record that she had a word with Tom and told him that the other two were messing around. Mr Robins, she noted, was aware of this but just kept his head down and ignored it. She told him that the language was not acceptable that there was too much swearing, 'f ing' and sex talk about customers, also taking about football, playing music and generally wasting time. We find therefore that standards of behaviour had deteriorated and that Mr Robins was reluctant to tackle it.

Further complaints

15. The next incident is also on that page. This is the first alleged protected disclosure, referred to at paragraph 9.1 of the Particulars of Claim. The date is given as '21 or 23 June", indicating some uncertainty and hence that the note was perhaps written a few weeks later. It records that she told Mr Cooling, the Managing Director, about the inappropriate language and bad behaviour in the office, but he did not pay much attention; he just took his food and then talked about how busy they were. Mr Cooling denied that that incident took place. It may be that he was not paying attention, but we accept that Ms McCrorie raised it with him as described.

16. Mr Cooling did agree however that he got wind of this at about the same time. Tom Robins told him about it in the car on the way back from a site visit. This must have been in June, he said, since Luke Ebdon left at the end of that month. Mr Robins told him that Ms McCrorie had complained about the bad language in the office, so he had spoken to Luke Ebdon and Steve Wesley about it. As far as Mr Cooling gathered it was now resolved.

17. Mr Robins described very much the same conversations to us. He said he raised it with the other two one Friday afternoon at a weekly sales meeting downstairs in the showroom.

18. The Particulars of Claim (paragraph 9.2) date this complaint to Mr Robins on 6 July

2018. It is mentioned in a handwritten note on page 518 but the note is too blurry to make out any date. It seems more likely to have been in June rather than July, as pleaded, but the date does not seem significant.

19. So, we find that by the end of June Ms McCrorie had again raised her concerns over bad language in the office with Mr Robins, that he had spoken to the team about it, and that the episode had been reported to Mr Cooling.

20. As became clear however, things were not resolved. On page 519 there is a handwritten note with a clear date, 17 August 2018, which records a second attempt to raise things directly with Mr Cooling (paragraph 9.3 of the Particulars of Claim). He responded that he was aware of it but thought that Tom Robins had dealt with it. That note also seems to us reliable evidence, and consistent with the unfolding events.

21. Tom Robins is the only one not included in any of the criticisms by Ms McCrorie, although she says he was present for some of the comments later on. With the departure of Luke Ebdon at the end of June, the only other sales estimator we know of is Steve Wesley. Andrew Smerdon did not join until 23 October, about four months later, so there may well have been someone else in the team on a short-term basis. The complaints continued during that period, even though they become less frequent.

22. The next record of such a complaint comes after a gap of nearly two months, on 8 October 2018. According to the notes at page 524 Ms McCrorie complained to Mr Robins about it again (This is the disclosure or protected act at paragraph 9.4 of the Particulars of Claim). She said she was not happy with the sex language, swearing and bad behaviour in the sales office. The note states: "Why has nothing been done? Why doesn't he say anything to them? It's not fair." Mr Robins replied that he has told Mr Cooling about and that it is out of his hands now, and to ignore it. That too seems to us reliable and consistent evidence of what occurred.

23. We bear in mind that swearing is not unknown in this environment. During the grievance appeal process both Mr Cooling and Ms Emily MacLeod gave evidence that the culture was very similar to that found in the construction industry. Mr Bromiley, the Survey Manager said much the same, and that a lot of swearing goes on. But these had become repeated complaints by Ms McCrorie, both to Mr Robins and Mr Cooling, and nothing was being done about it.

24. Four days later, on 12 October 2018, we find that she tried again with Mr Cooling. This is the incident at paragraph 9.5 of the Particulars of Claim and is recorded in her notes at page 525. According to this she told him not to swear and he apologised, then she asked him if he had done anything about things:

> "…. I was not comfortable about the foul and inappropriate sexual language, sexual innuendo and sexual behaviour in the sales office that was continuing, I asked Steve

> to do something about it, Steve told me that it was no good just coming in and telling him about it, he said he needed dates, times facts, he needed 'ink, ink, ink', otherwise not to bother him. Come back when I had lists not tittle tattle."

25. This verbatim account is all the more convincing because Mr Cooling agrees that he told her at a later stage to put any concerns in ink. It seems to reflect his view, shared to some extent by Ms MacLeod, that there was nothing the company could do about these complaints unless there were put in writing and raised as a formal grievance. Mr Cooling could of course have got the sales team together and made clear to them that sexualised language and other such bad behaviour would not be tolerated, but this was never done.

26. After Mr Smerdon arrived in late October things seem to have got worse. On 13 November she asked him and Steve Wesley directly to stop the swearing and sex talk and messing around. Mr Smerdon just laughed and Mr Wesley told her to fuck off. This is the incident mentioned at paragraph 9.6 of the Particulars of Claim and we also accept it as true. Mr Wesley denied this in his witness statement and said that Ms McCrorie also used swear words and never gave any indication that she was offended, but as we have already concluded, she did give repeated indications. And Mr Robins had already spoken to Mr Wesley about his language in the showroom. Mr Wesley also recalled that event. She has, we find, raised it repeatedly, and so we prefer her version of events.

Mr Martin joins

27. That was the state of affairs just before Mr Elliot Martin joined on 23 November, to manage the team. Ms McCrorie, we find, told him about her concerns on 11 December 2018, and that she found it offensive, stressful and upsetting, and that it needed to stop. As she described it in her witness statement, he just looked hard at her then told her she had to change her email signature. He said it should no longer be "Sales Administrator and PA to Director of Sales and Special Projects", because there was no Sales Director. This was, to say the least, a discouraging response.

28. The company's position is that no such conversation took place. It is not mentioned in Mr Martin's witness statement. In his oral evidence he said that he could not remember any such thing, adding that he thought they got on well and that their one-to-one meetings were full of laughter. That is difficult to reconcile with Ms McCrorie's account, with the abundant records of her raising these concerns and her subsequent absences with work-related stress. We prefer the view that she did raise it, and that by then it was a serious concern.

29. Mr Martin also seems not to have realised that changing her job title seemed to her like a demotion. Her handwritten record of this on page 515 shows that she said she was not happy and wanted to get some advice, presumably legal, and that she impressed on him that she felt this was really unfair and petty. He said that they

would speak again in January, presumably at their next monthly one-to-one.

Early January

30. The handwritten record of their January discussion is at page 516. This is referred to at paragraph 9.8 of the Particulars of Claim. It records that she told Mr Martin again that the "language and sex talk" was simply not acceptable. Again, we accept that this was raised, and Mr Martin cannot have been in any further doubt that she was unhappy about this.

31. None of the previous incidents are raised as allegations of harassment, merely as complaints or disclosures made about the existing state of affairs. From 2019 onwards the allegations were noted in more detail and are raised specifically. The first - paragraph 5.1 in the Particulars of Claim – was on 16 January 2019. It is first noted at page 513, and involved Andrew Smerdon telling her he had a "massive hard on" and wanted to "shag his client's' wife" and that "he would fuck anyone, even your granny Chrissy". When she told him to stop he just laughed at her.

32. He denied this absolutely and said he would never say such things to anyone. Against that, there is Ms McCrorie's' full and detailed account of events, the contemporaneous records and the findings at the appeal stage, which concluded that on at least one occasion she was the victim of an ageist diatribe from him, described below. He may have thought this was all amusing, but for these reasons we prefer Ms McCrorie's account of what was said.

33. Two days later there was a further incident, described at paragraph 5.2 of the Particulars of Claim. It is in the handwritten notes at page 517. Elliot Martin, Tom Robins, Andrew Bromiley and Andrew Smerdon were in the sales office. The allegation is that Mr Bromiley, the Survey Manager, came in and said "which one of you pricks is responsible for this then?" This does not seem to have been aimed to shock Ms McCrorie and there is no reason to think that Mr Bromiley intended any such thing, but the conversation then degenerated with terms like "cock sucker" being bandied about. Mr Bromiley could not remember the incident but the most likely explanation it seems to us is that he came in with some such expression, not unknown in the construction industry, and that the sales estimators or some of them took up the chance to shock Ms McCrorie with their language again. They may even have thought it was funny. Again she protested and again they laughed.

23 January 2019

34. Further evidence of a general desire to tease or shock comes in the next incident, early on 23 January 2019. Ms McCrorie was in the sales office when Mr Martin said that he had watched a television program the previous night and asked "did anyone see that massive rock hard cock on full show, – did you see it Chrissy"? The

conversation then developed, with others joining in, about who could get the 'biggest hard on'. She got up and left this time, feeling sick.

35. As before, we accept her version of events. It was put to her that none of this happened, and Mr Martin's witness statement simply denied all these allegations without going into any details of each alleged occasion. But in his oral evidence he said that he had had a chat with Ms McCrorie at the start of the day, before the phone lines opened, about the TV watershed and how it had changed. He made reference to the fact that had been a naked man on *Silent Witness* – a dead body. But any mention of "a rock hard cock", he said, was complete and utter fabrication.

36. The subsequent grievance investigation by Mr Cooling naturally investigated this incident and concluded that there was no evidence from any of the witnesses (i.e. the male witnesses) "that this event or anything similar ever occurred". So, Mr Martin must have given a different explanation, a plain denial, when interviewed about it. That also undermines the reliability of his account.

37. It is also an odd choice of conversational gambit at the beginning of a working day, when Ms McCrorie had been complaining about bad language in the office, as we find she had. The most likely explanation, we conclude, is that Mr Martin did raise it in some such context, and then made more of it, working it up into a something more colourful. We agree that erect penises are not shown on terrestrial TV, even after the watershed, but given this partial and late explanation by Mr Martin, we are not persuaded that the incident was invented.

38. As a footnote, this was recorded at the time by Ms McCrorie on page 513, and it says,

> "E/M [i.e. Elliot Martin] 8.40 Rock Hard Cock from Silent Witness TV Program shows them. I got up and left office to make coffee and felt sick."

39. These handwritten notes had not been produced when Mr Martin gave his evidence, so the reference in them to *Silent Witness* is telling.

40. That day was an eventful one for other reasons. As she described it in her statement:

> "On 23 January 2019 I attended my weekly sales catch up meeting. The meeting was arranged 2 weeks previously to start at 4pm but at 1.30pm Elliott suddenly changed it to be held at 2pm. Just 3 minutes before the start, Elliott suddenly advised out-loud to me, in front of all my direct colleagues that Emily Macleod (HR Manager) would now attend our Sales Catch-Up Meeting for discussions just relating to my email signature footer."

41. The meeting had in fact been arranged so that he and Ms MacLeod could raise some performance concerns with her. Her statement went on:

> "Elliott immediately started this meeting by telling me that I was accused of using the word "stupid" in a sentence to Andrew Smerdon, estimator reported to him by Nigel Tarrant Accounts & Admin Manager of the box event of 18th January 2019."

42. Her account of this incident is that Mr Smerdon had been messing around, refusing to help her, then as she was holding a broken carboard box for him to wrap tape round he deliberately wrapped it round her fingers, while Mr Tarrant made to film it on his phone. Ms Lemon was also a witness to this incident. She was the last witness to give evidence and her view was that Ms McCrorie was bossing Mr Smerdon around. She does not say that Ms McCrorie called him stupid, but she said that Ms McCrorie was talking to him as though he was stupid and Ms Lemon had to interrupt at one point to say "that that was a bit harsh".

43. This is not one of the pleaded allegations so it is not necessary for us to make detailed findings about it. Indeed, after the meeting on 23 January the company appears to have accepted her version of events and it was not pursued. But even if Ms McCrorie did become exasperated with Mr Smerdon, Ms Lemon would not be aware of the deterioration in their relationship or why. The grievance appeal report at page 424 found that Mr Smerdon had been guilty of taunting her on other occasions, mainly about her age. One of those episodes is recorded in the handwritten notes at page 517, with Mr Smerdon remarking on 17 January that TVs were not invented when she was born. (Similarly Mr Martin was asking her how old her children were and responding that that made her really old) On 9 January there had been a sustained episode from Mr Smerdon goading her about walking sticks, retirement, pensions, incontinence pads, stair lifts, bus passes and meals on wheels. All this was therefore in the run up to the meeting on 23 January 2019.

44. Mr Martin went on in that meeting to make more general complaints about her, in particular that the estimators told him that she made unnecessary interruptions in the sales office. Ms McCrorie stood her ground, and we note that throughout the succession of meetings which Ms McCrorie was subsequently required to attend, and despite her stress and ill health, she continued to set out fully and reasonably her side of the story. She did this now, challenging Mr Elliot as to why this was being raised against her, when nothing had been done about her complaints about sexual language in the office. (Ms MacLeod's statement confirms that she did so). Ms McCrorie's account is that Mr Martin then glared at her and said 'I hope you are not saying it has got worse since I have been here'? She told him it had, he said, 'I'm not paid to listen to any of this' and stormed out.

45. Again, he denied that description absolutely but Ms McCrorie was not challenged about it, and Ms MacLeod agreed that he left at one point and the meeting carried on after he left. This was, she said, while they discussed Ms McCrorie's job description. In those circumstances we prefer Ms McCrorie's account that there was some such incident and that Mr Elliot's account was not reliable about these events.

46. Ms McCrorie's witness statement goes on to say that she and Ms MacLeod stayed to talk about this "sexual stuff", which we note had not previously been raised with her. (Ms MacLeod only joined the company in September 2018). After that discussion Ms MacLeod said she was going to ask Mr Martin to hold a follow-on-meeting immediately afterwards to discuss this. She had the idea of giving everyone a flag to wave if they were unhappy about what was said.

47. Mr Martin then returned after 5 or 10 minutes, and in fact it was at this point that Ms McCrorie's job description was raised. Again, this was not a welcome subject from Ms McCrorie's point of view. Ms MacLeod was in the process of reviewing job descriptions generally and may not have appreciated, given her recent arrival, that Ms McCrorie's role has changed for the worse with the departure of Mr Sellers, and hence why she found the sudden need to document this upsetting.

48. It seems likely that the flag waving system had already been in Ms MacLeod's mind as a way of allowing the sales estimators to let Ms McCrorie know when she was interrupting them. That seems to have been the main concern that prompted this meeting, and indeed the main outcome. The allegations of sexual harassment were a new and unwelcome development from the company's point of view, hence the suggestion that the whole team have a meeting later that day.

49. No doubt this was intended to clear the air, but it did not go very well. Everyone was invited to the meeting and encouraged to raise any concerns they had about how things were working. Ms McCrorie felt that she was expected to spell out to everyone's face what they were doing and how it affected her. They in turn were to raise their criticisms of her. Ms McCrorie's evidence was that no one mentioned any complaint about interruptions to her, and that was the only evidence we had about the content of the meeting, so we accept it. She felt that she was put on the spot to raised her concerns about their language and behaviour, and was reluctant to spell it out in this relatively formal occasion. We accept however that Ms MacLeod's intentions were to help resolve things and the upshot was that the flag system was agreed, which Ms McCrorie welcomed. It was the first time she had been given any means of addressing this behaviour and she emailed the next day to thank Ms MacLeod.

50. The letter that was sent to Ms McCrorie following this meeting went through several drafts after objections from Ms McCrorie, but the main points documented were clearly the opening criticisms of her, i.e. interrupting / joining in with work discussions when she did not need to be involved, talking to colleagues as though she had authority over them, and generally talking out loud or repeating phone conversations. All of these points drove home the loss of status she had suffered following the departure of Andrew Sellers, and with the exception of Mr Robins all of the team had joined since then, and clearly saw her in a more junior position.

51. It did then refer to her allegations of "inappropriate language and innuendo in the

office" and noted that this was the first time they had been raised. A good deal of reliance was placed by the respondent on this reference, especially as Ms McCrorie had amended the letter in other respects but left this phrase untouched. However, that does not in our view persuade us that this was the first time anything was said, given the weight of earlier evidence. The letter is signed by Mr Martin but he agreed that Ms MacLeod had helped to draft it, as did she. When it was put to him that it was his letter he merely conceded that it had his signature at the bottom. We conclude that Ms MacLeod did indeed draft it, and that the reference to the first time reflects the fact that this was indeed the first time it had come to *her* attention.

52. The flag system did not prove very effective. Ms McCrorie used it several times, on the occasions mentioned below, but there is no evidence that her colleagues ever did, and no other steps were taken to ensure that the issue with bad language was brought to an end. It may be that the management still did not see this as much of an issue, and that construction industry language was simply to be expected. The rather coy references to innuendo and bad language support that view, and the flag system seems to equate it in seriousness to these interruptions. The subsequent letter certainly suggests that Mr Martin was more concerned about the interruptions. It is hard to avoid the impression that by this time Ms McCrorie had become something of a nuisance and the groundwork was being laid to remove her.

Flag Waving

53. The first incident after this meeting was on 28 January. This is the one referred to at paragraph 5.4 of the Particulars of Claim. Again the culprit was Andrew Smerdon who made comments about "how big and heavy his balls were", that he had the biggest bollocks and whilst cupping them asked if anyone "wanted a go". This is the only incident for which we can find no record in the contemporaneous handwritten notes. Although that gave us some pause, since all the other allegations are so well documented and this is set out in the Particulars of Claim in the same level of detail, it seems most likely that the source note has simply been lost or mislaid, and again we prefer Ms McCrorie's account.

54. On 14 February 2019 – see paragraph 5.5 of the Particulars of Claim – there were then remarks made by Steve Wesley that it was 'blow job Thursday' and he was off home on time as a result, with more besides. His witness statement however, having described it as a complete lie, said that he had seen a post on social media that referred to the day as 'steak & blowjob day', and that he had mentioned this at work, although the thought of it offending Ms McCrorie 'would not have entered his mind'. He also made the point that she too swore from time to time.

55. Mr Cooling's conclusions in the grievance investigation accepted Mr Wesley's denials. This is consistent with the general approach that unless something was admitted by the other staff, it did not happen. (Most of the conclusions are phrased in the form that "there is no evidence that …" regardless of Ms McCrorie's evidence

on the matter.)

56. It is surprising that no issue was taken with the apparently innocent explanation that Mr Wesley was only talking about 'steak and blow job night'. Against a background of complaints about language and behaviour in the office, this does not seem innocent at all, and as with the *Silent Witness* episode, it seems to be simply an attempt to explain away obviously inappropriate remarks. Given the weight of previous consistent evidence, we prefer the claimant's account that ther was an incident more or less as described, and that it was part of ongoing attempts to offend or humiliate her.

57. The last incident - paragraph 9.6 of the Particulars of Claim - was the very next day and also involved Mr Wesley, making a comment about Steve Cooling "having a wank". As usual Ms McCrorie told him to stop and he laughed, as did the others. The outcome of Mr Cooling's investigation of this point was as follows:

> "All witnesses say that Steve Wesley made reference to the act of 'planking' not 'wanking' as 'planking' had been a topic of discussion earlier in the day as AS used to do it. 'Planking', also known as 'the lying down game' is described on Wikipedia as an activity consisting of lying in prone position (face down), sometimes in an unusual or incongruous location. The palms of the hands are typically touching the sides of the body and the toes are typically touching the ground."

58. But the context set out by Ms McCrorie makes this an impossible explanation. She described it to Mr Cooling as follows:

> "Elliott asked Steve Wesley where Steve Cooling was, Chrissy advised Elliott, that Steve was in a meeting with Rob Millar, Martin the installer and Nigel Tarrant in Nigel's office. Steve Wesley said 'yeah having a wank' this was in-front of Elliott, Tom Robins and Andrew Smerdon who then all fell around laughing."

59. It is hard to see why Mr Wesley would have said, "having a plank" in this context, or why Mr Cooling would be 'planking' during a meeting, let alone why this would be amusing. In short, either the account is true or invented. The planking explanation makes no sense and is in our view bogus.

Off sick

60. That day Ms McCrorie went to see her doctor and was signed off for two weeks with stress, something which itself lends weight to her account. Given that she has been signed off since then, two years later, we accept her account that she found herself shaking uncontrollably and could not control her right hand which was banging up and down on the desk. (She was seen to be shaking significantly, though to a lesser extent, throughout this hearing). She also had trouble speaking and breathing. In a panic she got up from her desk and left, drove a little way down the road and then

parked before finally driving home. She never returned to work properly.

61. She sent in her sick note on 17th, and the next day had a text from Mr Cooling asking for her keys back. This was not disputed, nor the fact that no one got in touch with her to see how she was. The first to do so was Ms MacLeod on 26 February. She was understandably concerned to avoid this turning into a long-term absence, since the longer these things go on the more difficult it is to make a successful return to work, and suggested a home visit. But the sympathetic effect of this was perhaps blunted by the fact that she also wanted to come and get the keys.

62. Ms McCrorie was on statutory sick pay only during this period and so had every incentive to return if she could. On 12 March she contacted Ms MacLeod to say she would try to return on 14 March and was then told that the day would begin with a return to work meeting with her and Mr Cooling. While waiting in reception a customer came in and said she had an appointment with Beth, a new name to Ms McCrorie, and hence someone recruited in her absence. We never discovered who Beth was or her role but she seems to have joined the sales team, since they were the ones who dealt with customers.

63. We will come back to that meeting, but it did not go well and Ms McCrorie went home again. While off sick she put together a formal grievance about everything that had happened. This comprised a letter (page 138) invoking the grievance procedure and later a much more detailed document from pages 145 to 158. The covering letter led to a grievance meeting being arranged with Mr Cooling on 2 May, at which she was accompanied by her trade union representative. On arrival she produced the longer document, running to 52 points, and so the scope of the meeting was suddenly much greater than Mr Cooling had expected. It might have been better to put it off until he had had a chance to read it, and then to arrange a series of meetings, or focus one meeting on the main points, but they ploughed on, and the meeting took five and a half hours.

64. It is not necessary to go back over those 52 points since ones relevant to these proceedings have already been described. Some of the points were about age-related harassment or other, non-sexual, incidents of bullying, or about the changes to her job title and job description. Another complaint, for example, was that after the flag system had been introduced Ms MacLeod had pretended to swear and then corrected herself and apologised. Ms MacLeod insisted at this hearing that this was not true and that on one occasion she did say “shit” or some such phrase in the office and then genuinely apologised. We accept that. Ms McCrorie may well have been mistaken about her intentions. She was very stressed before her absence began, and this incident is of a very different kind to the others. We saw nothing to suggest that Ms MacLeod might lend herself to this sort of teasing behaviour, which would be extremely unprofessional and counter-productive.

65. During that meeting she asked Mr Cooling if the company had advertised her job,

which he denied. She had found an advert that matched, with Wise employment agency, for a Sales Support Assistant. He said it was for two other employees who were leaving, a Project Coordinator and a Purchasing Manager, naming the departing employees.

66. That advert appears at page 438 and is clearly Ms McCrorie's role. Ms MacLeod accepted as much but put forward a different explanation. She said she only contacted them about a temp for a day to cover the phones while the sales estimators were on a training course, and Ms McCrorie off sick. They had, she suggested, gone ahead on their own initiative to try to attract candidates.

67. A similar advert appears at 438, also clearly Ms McCrorie's role as Sales Support Assistant. Ms MacLeod said that it would be ridiculous to advertise the role if Ms McCrorie was being made redundant, but that only applies if the redundancy was genuine. We have to decide such points on the balance of probability. Ms MacLeod accepted that she has supplied the data for these adverts and that they were for the claimant's role. Whilst it is possible that both agencies exceeded their instructions, that possibility seems a remote one and the more obvious conclusion is that the respondent simply wanted to replace her, hoped to get away with it and then withdrew the adverts when this was pointed out.

68. That however is all a digression from the marathon grievance meeting. The last note from the minutes is an indication of some exasperation on Mr Cooling's part

> "SC said he will do his best to investigate as soon as he can but CM has raised an awful lot of allegations and he is also trying to run the business."

69. When it ended there was a further development. Ms McCrorie was asked to stay for a further meeting with Mr Martin, and in this meeting he dropped the bombshell that she was at risk of redundancy.

The case for redundancy

70. Ms MacLeod told us that she saw nothing wrong in the company running these processes in parallel, and it was done then for Ms McCrorie's benefit as she had her trade union representative with her, but that fails to appreciate the tiring effect of the first long meeting, and also the appearance at least that it was Ms McCrorie raising the grievance that led immediately to her redundancy selection.

71. Mr Martin seems to have worked from a script which was practically identical to the subsequent letter sent to Ms McCrorie, and no doubt again Ms MacLeod was the main author. It set out the company's case for redundancy, although little was said about it in the Grounds of Resistance or indeed in Mr Martin's witness statement. Paragraph 3 is the full extent of it:

> "After we undertook a review of our sales and marketing function, we identified several areas for improvement, cost cutting and streamlining by evolving the structure of our

sales function and investing in a more efficient IT infrastructure. This is why we took the decision to select the Claimant for redundancy."

72. But Ms McCrorie's position was the only one to be considered for redundancy. No evidence was produced as to how, when or by whom this review of the sales function took place, or what other areas for improvement etc were identified. Mr Cooling's statement shed no light on the redundancy at all. It is therefore necessary to trawl through the bundle to locate the rationale, and the relevant documents begin at page 251. They were divided into four main areas:

    - Developments in IT
    - New sales techniques
    - Changes in data protection legislation (GDPR) and
    - General evolution of the business.

73. The first of these seems to have been the main point, particularly the fact that all sales estimators had been given an iPad and that their IT consultant, Kevin Mullins, had done some work on the database, which could now automate the process better, including by sending out contracts and other documents automatically. There was also to be a live chat or messenger function for online queries.

74. As to sales techniques, the sales estimators, not her, were to be the first point of contact for customers and this was to try to build immediate rapport with them. The estimators were also to do their own admin and an administrator from elsewhere could come in on less pay to do basic shredding and filing.

75. GDPR meant that they were no longer able to send out letters and leaflets (though why is unclear) and the main other change was of long-standing – there was no longer a Sales Director and so no need for a PA.

76. Mr Griffiths, for the claimant, criticised all this as an *ex post facto* justification – once the decision was made to get rid of her certain changes had to result and this was how the situation was to be managed. It seems to us there is some force in that - without Ms McCrorie there would, for example, be no one else to go and meet the customers on arrival or take their calls. There was no analysis of how busy Ms McCrorie had been before her absence, and although the sales estimators would be doing their own admin from then on, clearly someone else would still have to come in and do the filing and shredding.

77. Mr Cooling also gave some evidence about the business case for this, in response to a question from Mr Griffiths about the timing of the decision. He was so anxious to set out the business case for it, that his answer became very long indeed, and I had to ask him several times to stop before eventually muting his microphone. I then asked him to address the timing.

78. In the course of that long answer however he described how he had been exploring new techniques for converting leads with a consultant called Paul Sandler. Mr Sandler was also mentioned in the redundancy consultation exercise. This had been going on for three years and the idea was to reduce the number of leads and work harder on those warmer leads to turn them into a sale. This emphasis on process was somewhat different however to Mr Martin's focus on technology, and the timing point was not really addressed, although he did say, perfectly fairly, that Ms McCrorie had been off for two months, which was a long period to work out if there were any genuine changes that could be made.

79. We also heard evidence that the IT consultant Mr Mullins came in once or twice a month. According to the very detailed chronology prepared by the respondent, he was in the business on 24 and 25 April, only a few working days before the 'at risk' meeting. That also lends some support to this being a subsequent rationalisation of a decision already taken.

80. There is also a reference in that chronology on 26 and 27 March to redundancy. The entries appear to have the wrong date. They are recorded as 26 and 27 July, i.e. '/7' but appear between 24 and 29 March. The first of these says, "EMc away so SC contacted croner about redundancy" and the second "EM phoned croner about redundancy". These cannot have taken place in July as the redundancy had happened by then, so it seems that preparations for the redundancy were put in place from 26 March onwards.

81. We will return to our conclusions on the redundancy exercise but the process involved six meetings in all. It is unnecessary to say much more about each one, and indeed the statement from Mr Martin, who held them all, did no more than supply the dates and page references. At one point, on 9 May 2019, Ms McCrorie contacted the company to say that she wanted to come back to work, which led to a hasty call from Mr Cooling to discourage her. She had seen her doctor before making contact and been signed fit to return, but it is clear from her sick notes that she contacted the GP again that day and was signed off sick again after this discouragement.

82. Ms McCrorie was clearly the one chasing the possibility of an alternative vacancy, and was at one point interviewed for the post of Purchasing Controller. (This is one of the posts which Mr Cooling had said was falling vacant and which was sufficiently similar to her role to explain the confusion in the job adverts). Ms McCrorie also gave evidence in her statement, which was unchallenged (as with most of the detail presented) that the two named individuals in these similar roles had not left and were there throughout.

83. She also gave evidence that she had relevant experience in purchasing management but was rejected, the reason being that she could not push or lift a 2 or 3 kg weight, following a recent arm injury. The assessment for that role involved

a ten minute test on the computer while Mr Cooling was nearby playing on his phone. He did not seem to remember this interview or test when asked, all of which strengthens our view that no real consideration was given to retaining her. Her dismissal was confirmed with effect from 20 June 2019.

The grievance process

84. As already mentioned, the grievance process went on long after Ms McCrorie was dismissed. It was handled by Mr Cooling throughout, although some of the complaints were against him, in particular for ignoring her earlier complaints of sexually offensive comments in the sales office. And as also noted, the only findings favourable to the claimant involved some admission on the part of the others.

85. It was a long and detailed exercise, with a 38 page report. This takes the form of him inserting his conclusions in blue at the end of each of her 52 points. There is then a concluding section which begins:

> "In depth investigation has led me to conclude that there was a certain level of swearing and 'banter' that everyone in the sales team (and wider company) engaged in, of which CM herself initiated and engaged in on a regular and equal level."

86. This does scant justice to the behaviour we accept took place and to the effect it had on Ms McCrorie. The process did not end there however and an independent consultant was engaged to carry out an appeal. The appeal is rather curious. At an early stage Ms McCrorie said that she was not going to engage in it any further, having had numerous further grievance meetings with Mr Cooling, and then subsequent pressure to agree and approve minutes in a short time-scale, all while the same pressures were applied over the redundancy process.

87. It seems to have been assumed on each side that the appeal outcome was largely favourable to the respondent but that is not the case. The points were grouped from 1 to 7 as they had been in the original grievance, and the first concerned her allegations of sexual harassment. Mr Roddin noted at paragraph 30 that this had been *partially* upheld by Mr Cooling on the basis that there was swearing and banter within the workplace at a level considered acceptable within the culture of the construction industry, but did not accept Mr Cooling's findings at page 7 of his report (point 15) about the 'planking incident', which he described as implausible and inconsistent with the claimed culture. We agree.

88. He went to say that Mr Cooling had applied the wrong test in concluding that it had not caused any harm to Ms McCrorie, which depended on her perception and was backed by her evidence that she was upset, stressed and offended. At paragraph 36 he states:

> "Subject to the exceptions set out in paragraph 37 below, RR prefers the evidence of

> CMC as this is detailed and consistent. Just because a witness has no recollection of something does not mean that it did not happen."

89. The exception referred to relates to point 10 only, about Ms MacLeod pretending to swear, and we agree with his conclusions on that point too. Mr Roddin could have set out his views more clearly, and it is necessary to reference back to Mr Cooling's report to follow them all, but it is clear from this that he accepted her account in general, very much for the same reasons we have given.

90. To be clear, that conclusion in her favour applied to Part 1 only, but this comprised all the allegations of harassment. Part 2 related to age-related harassment, and again he accepted her account and that it amounted to bullying. He did not accept her complaints about the handling of the grievance (Part 3) or that she was harassed during her sick leave (Part 4). This last point was mainly on the basis that there was nothing then to suggest that her absence was long-term so that she would meet the test of disability. Part 5 was about her privacy/GDPR, Part 6 about being isolated during the process and Part 7 about her bonus, and these were not upheld, but they are all very much subsidiary issues. The upshot is that her account of the main events was believed and her complaints upheld.

Conclusions

91. Usually the facts of a case are set out neutrally at first before attempting to draw conclusions from them but we have set out the inferences we draw from the relevant facts as we have gone along. It was clear to us that the findings would be favourable to the claimant so it was not necessary to do otherwise.

92. The key remaining issue and conclusion relates to the redundancy, and on this aspect it is for the employer to satisfy us that redundancy was the real reason for the dismissal. Without going over these points again, we are not so satisfied, mainly because of the timing. Her grievance letter is dated 16 April 2019. Before then there had been no mention of redundancy, although she had been threatened with performance or conduct issues in the meeting on 23 January. Croners were first contacted about redundancy on 26 March, even before the grievance, but it is clear from our findings that she had made repeated verbal complaints about each of the sales estimators by that time and was a completely isolated member of the team. All of them had apparently complained about her interruptions and the purpose of the flag waving scheme was to cut her off when she did so. In those circumstances the timing is more than suspicious.

93. There are also the defects in the process - the reluctance to have her back at work, to allow her to apply for other jobs, the fact that her job was advertised, that she was given bogus explanations about this, and that others were hired during the same period. Finally there is the somewhat contrasting business cases put forward by Mr Martin and Mr Cooling for this decision. Ms MacLeod may have become convinced that there was a respectable business case for this decision, but we prefer the view

that the decision was taken to dispense with Ms McCrorie's services first, and then her duties were divided up among other member of staff afterwards. The reason for doing so is clear, and related to the complaints she had been making, in particular at the 23 January meeting, and culminating in her grievance.

Footnote

94. One further incident to record is that there was a protected conversation in this case on 14 March 2019, the day that Ms McCrorie came in for her return to work meeting. By section 111A Employment Rights Act 1996 such conversations are permitted and may not be referred to in considering the fairness of a dismissal. But by extension they can be referred to in connection with other complaints, particularly discrimination. That is because employers should not be able to use such discussions as a cloak for discrimination.

95. Traditionally any exchanges between the parties about settlement, including leaving employment with a severance package, are 'without prejudice". They may not be referred to except in limited circumstances, such as when both sides waive their privilege. This doctrine only applies once a dispute has arisen which might result in litigation, and if an employer makes a sudden proposal of this sort they will jump the gun – hence the need for the further shield provided by protected conversations.

96. The without prejudice material in question is all in the bundle. Ms Zakrzewska submitted that the respondent had not waived privilege, but that is generally the result of putting it in the bundle without any qualification. In any event, she made no submission, despite invitation, that the parties were in dispute at the time, so there is no need under the without prejudice rule not to consider this material. On this point we note in **BNP Paribas v Mezzotero** 2004 IRLR 508, the Employment Appeal Tribunal held that even raising a formal grievance did not mean that the parties were in dispute, and here the protected conversation came first.

97. We may then look at that conversation on the question of harassment and victimisation. It was held with Mr Cooling and Ms MacLeod and it is clear that some pressure was applied. The offer itself was very modest - £2,000 plus her notice pay and accrued holiday pay. It was in this conversation that Ms McCrorie gave the first lurid example of the type of thing she was having to put up with, describing the 'blow-job Thursday" incident, to which Mr Cooling said that they were just going round and round in circles and if she was not going to report anything then it couldn't be investigated properly.

98. That much appears in the respondent's notes of the meeting. Ms McCrorie had her own, much longer notes. She was not seen to take any notes at the hearing and since her own minutes run to eight pages, rather than the company's three, it is obvious that she must have been recording it. That was not put to her and we were not asked to disregard her account, but it matches closely the respondent's version at points but also goes into more detail of the pressure. They are in the bundle at

page 124.

99. By way of example, Mr Cooling said that one of the sales estimators would leave if she came back so the company would continue to 'pursue issues', adding, "I don't know if I can work with you now". The "now" can only relates to the fact that she has raised allegations against her colleagues or had been off sick. We discount the latter alternative, which would seem too extreme, so it must relate to the allegations.

100. Further:

> SC said Elliott feels that CMC performance and communication is not satisfactory and in future Elliott will use normal company procedures to deal with that of which a formal disciplinary may be part of, but there would be no package and no reference at the end of it if you don't go down the alternative route.

101. One thing which was not threatened however was redundancy, which was therefore not in contemplation at the time. The notes go on to record a discussion about raising a formal grievance and Ms McCrorie said that she might do so. She also gave a lot of the detail in that meeting about what such a grievance would be about. The meeting was therefore left on the basis that she was unenthusiastic about the offer, would think about it and also think about raising a grievance.

Summary

102. Overall therefore, we find firmly in favour of Ms McCrorie. The language and behaviour which she endured amounts in our view to a serious and prolonged campaign of harassment. Initially it may not have been targeted at her, but in her last few months at work it clearly was, and had a understandably distressing effect on her, as it would on anyone in the workplace. This was compounded by the steps to remove her, the grievance process - when clearly no real consideration was given to the possibility that this might all be true - and which the company did not even conclude before her dismissal - and then the resulting and contrived redundancy process. The effects of all this are clearly still with her.

103. To summarise, we conclude that:

- Each of the allegations of harassment is made out and so that complaint succeeds. There is no question that the threshold test of violating her dignity etc was met.

- Each of these also amounted to less favourable treatment as a woman, since we are satisfied that these remarks were targeted at her as a woman to make her feel uncomfortable or worse.

- They were reported verbally, as alleged from June 2018 onwards, culminating in the formal grievance.

- The real or main reason for her dismissal was that grievance, or at least that succession of complaints.

104. The final complaint concerned the bonus but this was not made clear to us. We were not taken to the relevant contract of employment or to the bonus scheme, and on this element the burden of proof is on the claimant. She raised it in the grievance procedure and it was rejected both by Mr Cooling and Mr Reddin, who was otherwise supportive. Indeed, we can find no mention of a bonus in her contract of employment. There is a spreadsheet or record at page 136 showing bonus figures for her showing that she received £2,706.23 in 2018. This was not cross-referenced to her pay statements though to explain any shortfall, nor is it clear that she would be entitled to a pro-rata share on termination. The payments in the spreadsheet appear to be monthly in any event. Altogether there is too little information available to find in her favour on this point. Subject to that one point however, the claim succeeds.

Remedy

105. We heard further evidence from Ms McCrorie about the emotional and financial effect of these events on her, and further submissions from each side. Without wishing to go too far into the upsetting description given by Ms McCrorie of the effect of these events it is clear that they have had an overwhelming and disabling effect on her. She needed six alarms of different types to help to get her out of bed each day for this hearing, and her son and daughter also had to ring her to remind her to get up. She lives alone and when she does see her family she feels that she is a burden, moaning about all this. She has anger issues and has lost trust in everyone, even her family. Her personality has also changed; previously she was bubbly and the life and soul. One reason she attended every day in person was because she could not stand the thought of her abusers seeing into her home. She has refused medication for her mental health but, after a long wait, is receiving talking therapy from Talk Works, an NHS initiative. There is no indication yet of any recovery.

106. She also said that has been on benefits throughout, i.e. Universal Credit of £751 per month and a PIP – personal independence payment - of £238.80 per month. This appears to be the standard daily living component. Those figures were produced during the hearing but were accepted by the respondent.

Injury to feelings

107. The starting point in considering an award of damages for injury to feelings is the decision of the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police** [2003] ICR 318. This established three broad bands into which awards may be bracketed, a lower, middle and upper band, with the lower band from £500 to £5,000, the middle band from £5,000 to £15,000 and the upper band extending to £15,000.

108. Nearly twenty years has passed since that decision and the President of the Employment Tribunals has issued periodic guidance on the appropriate award in each *Vento* band. For claims submitted after 6 April 2019 the figures are as follows:

- awards in the lower band should fall between £900 to £8,800;
- awards in the middle band should fall between £8,800 to £26,300; and
- awards in the upper band should fall between £26,300 to £44,000, with the most exceptional cases capable of exceeding that upper limit.

109. Given that Ms McCrorie has been signed off sick for the whole period of two years since her dismissal we considered that this should fall either in the top half of the middle band or the bottom of the upper band. Some guidance on where exactly to place it can be derived from previous cases, helpfully set out in *Harveys on Industrial Relations and Employment Law.* This sets out guideline cases for discrimination on grounds of sex in each bracket but it is very difficult to find any sort of exact match here, and the same conduct may affect people in very different ways.

110. We were referred by Mr Griffiths to the case of **S v Britannia Hotels Ltd** (Leeds) (Case no: 1800507/14) (18 February 2015, unreported) There, the award for injury to feelings fell in the upper band, at £19,500, though only just. (It was rather lower then) According to the case report:

> "The claimant, a 22-year-old female with a history of mental ill-health, worked as a waitress / barmaid on a zero hours contract. Over a period of eight months her manager subjected her to sexual harassment – acts such as grinding against her simulating sexual intercourse, touching her bottom, kissing the back of her neck and asking about her sex life with her boyfriend. She reported the harassment and was effectively ignored. When she later told a more senior manager there was an inadequate investigation which, whilst finding there had been some inappropriate behaviour, did not consider it proper to discipline the perpetrator. Thereafter an HR officer undertook a second investigation which was fundamentally flawed, and did not uphold the claimant's complaints. An ineffective appeal followed and was dismissed."

111. This is similar in some respects in that there was sexual harassment, an ineffectual appeal and dismissal. The harassment there was rather worse as it was physical and the claimant was also vulnerable by reason of her poor mental health. However, unlike Ms McCrorie she did not suffer the same isolation and loss of position.

112. A better guide, we found, was the case of *Vento* itself. The award in that case had of course been considered by the Employment Appeal Tribunal and then the Court of Appeal and is intended to be a guideline case. The case report in *Harvey* reads:

> "The claimant was dismissed from her post as a probationary police constable by an act which constituted sex discrimination. There was no doubt that she had suffered severe distress, not least because it was established that it had been a life-long

> ambition of hers to serve as a policewoman, which her dismissal had ended. The tribunal had concluded that the claimant was put through four traumatic years by the conduct of the respondent's officers. The process started with bullying of her in January 1997. That contributed to her clinical depression diagnosed in May of that year. It reached its zenith with a tutorial in July, following which the claimant went off sick. When she returned to work in October, she faced two case conferences at the beginning and end of November. She then had the shock and disappointment of dismissal in December, followed by the tribunal proceedings which were started in February of 1998. She had to prepare herself for a hearing in June which was aborted after three days. It took another 13 months to get the case back for a hearing, at which her private life was subjected to minute scrutiny. The legal process attracted media attention, which exacerbated the blackening of her character. Having been vindicated by the tribunal's decision, the claimant then faced the uncertainty of an appeal. Even then, she was unable to put this matter behind her, having to wait until the decision on remedy with the prospect of having to give evidence yet again. Finally, she lost a satisfying and congenial career.

113. Looking at the decision itself, at paragraphs 8 and 9, the treatment in question appears to have been generalised bullying rather than any sexual misconduct. There were a series of incidents when other officers criticised her conduct, her personal life and her character in an unwanted, demoralising and aggressive manner. At first she coped well, but after the breakdown of her marriage she was diagnosed as clinically depressed and went off work for three months before a return, further instances and then dismissal for a lack of honesty as well as poor performance.

114. That provides some further parallels. The period of bullying there was much longer there. Against that, Ms McCrorie's experiences might be thought more offensive, personal and shocking. It was less the build up of hostility and more a series of shocks. There is also the similar fact that Ms McCrorie lost her job as a result. Ms Vento lost a congenial career, but Ms McCrorie has also had her career effectively ended by this. At 57 the loss of a satisfying, congenial busy role may be of the same order of magnitude. However, the comparison is not exact and given that Ms Vento had clinical depression we take the view that Ms McCrorie's case is a little less extreme, but not substantially.

115. At that time the upper band started at £15,000, and Ms Vento received £18,000 (plus £9,000 for personal injury and £5,000 for aggravated damages). So it was 30% of the way up the upper band – what would now be £31,610. That satisfies us that the case should go into the upper band, so between £26,300 and £31,610.

116. We did also look at cases in the middle band, focussing on cases in which employment was lost. The nearest we could find was **Lorking v Inheritance Tax Planning Matters Ltd** (London South) (Case No 2375332/2011) (*2 April 2012*, *[2012] EqLR 619*). There the award was £15,000:

> "The claimant, a client relations manager, received severely critical emails from the

owner/director of the respondent on two separate occasions in each instance prima facie accepting a version of events put forward by a male colleague, treating her as the guilty party and requiring her to apologise or grovel. The decision was taken to terminate her employment without her being given any real opportunity to put her version of events or argue her case on any of the major issues. She was ridden over completely roughshod without any of the usual disciplinary procedures. This amounted to unjustified sex discriminatory bias. The claimant was employed for less than 4 months but was very upset by the emails and by losing a job which she had given up steady employment at a bank to obtain. It was quite a serious case and fell well up into the middle *Vento* band.

117. Ms McCrorie's experiences were however more sustained and more serious. The treatment lasted much longer and was much more upsetting, so this reinforces our view that the upper band is appropriate. Taking all that into consideration we conclude that an award of **£30,000** is the appropriate figure in this case.

Financial Loss

118. The next main issue we had to decide was the length of her future loss. We are entirely satisfied that Ms McCrorie has suffered a sustained breakdown in her mental health and is still suffering from these events. She has declined to take medication for her symptoms but that is not enough to remove her entitlement to compensation. In our experience, talking therapies and medication are often regarded by doctors as alternatives and many people do decline to take long term medication, worried about becoming dependent. That is a plausible concern here. There may well be a positive effect from the outcome of this case but the figure of 12 months put forward in her schedule of loss seems to us perfectly reasonable, even modest. In the absence of any more definite medical evidence we will base our calculations on that period.

Calculations

119. We heard evidence from Ms McCrorie that her salary of £22,500 carried a bonus of at least £2,500. Although we found against her on the unlawful deduction from wages claim we accept that she did receive a bonus. The figures on page 136 show that it was over £2,700 in 2018 and so we accept her evidence that this would have been received and so her normal gross pay is assessed on the basis of a £25,000 net package. There was also a NEST contributory pension at 3%.

120. On that basis we calculate that the relevant net figure per month is **£1,753.92**

121. The period of time since the dismissal was 1 year, 8 months and 18 days, over which period the net loss amounts to **£37,406.27.**

122. From that we deducted the figure of £1,875, the gross monthly basic pay, which was paid to Ms McCrorie in her last pay statement. This was in lieu of notice, and no tax would have been paid on it in that tax year. The net loss is therefore **£35,531.27**

123. The total level of benefits Ms McCrorie is currently receiving is £989.83 per month. Backdating that to 1 November 2019, 1 year 4 months and 7 days ago, the total benefits received in that period would amount to £16,157.11. That reduces the net loss of earnings to £19,374.16

124. However, before 16 March 2019 the level of Universal Credit was £20 less per week, and so this figure should be altered to reflect the previous 19 weeks at the lower level, i.e. £380. The net loss is therefore **£19,754.16.**

125. As to future loss, there is the unavoidable fact that once Ms McCrorie is in receipt of a substantial sum in compensation from the respondent, she will lose her entitlement to Universal Credit. Her income will simply reduce to her PIP, £238.80 per month. (Although this is an in-work benefit we continue to take it into account as she did not have it while working at the respondent). On that basis, the net, continuing loss will be £1,515.12 per month, and over 12 months this will amount to **£18,181.44**

126. We also allow a figure for loss of statutory rights (i.e. having lost the right not to be unfairly dismissed for 2 years in new employment) at **£525**

127. Hence her total financial losses are:

- Loss to date £19,754.16
- Future loss £18,706.44

Total **£38,460.60**

128. Turning to her award for injury to feelings, we have already assessed this at **£30,000.**

129. Interest is due on the financial losses at 8% but only from the mid-point (30 April 2020). This was 315 days ago, and interest at that rate on £38,460.60 amounts to **£2,655.36**

130. Interest is also due on the non-financial losses at 8%, this time from the date of dismissal, 20 June 2019. This was 629 days ago, and on £30,000 amounts to **£4,135.89**

131. The overall totals are therefore

- Financial loss £38,460.60
- Injury to Feelings £30,000.00
- Interest on Financial Loss £2,655.36

- Other Interest £4,135.89

Total Loss £75,251.85

132. However, only the first £30,000 of any award is tax free, and so it is necessary to "gross up" this award to ensure that after tax the same figure of £75,251.85 is left in Ms McCrorie's hands. That calculation is not straightforward but amounts to a further **£11,244.96,** bringing the final figure to **£86,496.81**

133. It is easier work backwards and confirm the relevant figure. If £86,496.81 is paid to Ms McCrorie, the first £30,000 will be tax free and the balance of £56,496.81 will be taxable. She will also continue to receive her PIP over the next year, a further £2,865.60, amounting to £59,362.41 in taxable income in the next financial year.

134. Her personal allowance is £12,500, leaving tax to pay on the next £46,862.41. That will make her a higher rate tax payer.

135. She will then pay £7,500 at basic rate (20%) on the income up to £37,500. Above that, in the higher rate band (40%) there is still tax to pay on the remaining £9,362.41, amounting to £3,744.96.

136. Hence the total tax she will pay should be

- Basic rate £7,500
- Higher rate £3,744.96
- **Total £11,244.96**

137. This is the amount of the uplift added, leaving her with the original net figure. Since the damages are awarded for discrimination the recoupment provisions do not apply.

Employment Judge Fowell
Date: 10 March 2021

Judgment & Reasons sent to the parties: 22 March 2021

FOR THE TRIBUNAL OFFICE