EMPLOYMENT TRIBUNALS

Claimant:		Respondent:
Ms Joanne Millington	v	Forensic Access Limited

Heard at:	Reading	On: 2, 3, 4 March 2020 and 5 March 2020 (in chambers)

Before: Employment Judge Hawksworth
Mrs J Wood
Mr D E Palmer

Appearances
For the Claimant: Ms H Compton (counsel)
For the Respondent: Mr J Arend (director)

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is:

1. The claimant's complaint of unfair dismissal succeeds. The respondent constructively dismissed the claimant and the dismissal was unfair.

2. The claimant's complaints of direct sexual orientation discrimination succeed. The respondent contravened section 39(2)(c) and 39(2)(d) of the Equality Act 2010 in a question relating to her sexual orientation which the claimant was asked in a meeting on 7 December 2017 and in constructively dismissing her.

3. The claimant was dismissed without notice; her complaint of breach of contract/wrongful dismissal in respect of notice pay succeeds.

4. As the claimant was dismissed and did not resign in breach of the requirement to give notice, the respondent's employer's contract claim does not succeed.

5. For reasons explained below, a remedy hearing will be listed to decide remedy.

REASONS

Claims and parties

1. The claimant is a forensic scientist. She worked for the respondent from 10 September 2012 and resigned without notice on 11 December 2017. At the start of the claimant's employment the respondent was called Manlove Forensics Limited. From May 2015 it was called ArroGen Forensics Limited and, following a merger after the claimant's employment ended, it became Forensic Access Limited.

2. The claimant's claim form was presented on 26 April 2018 after a period of ACAS early conciliation from 5 March 2018 to 27 March 2018. The claimant complains of constructive unfair dismissal, direct sexual orientation discrimination and breach of contract/wrongful dismissal (nonpayment of notice).

3. The respondent defends the claim and pursues an employer's contract claim. The employer's contract claim is for profits lost as a result of the respondent not being able to provide a training course in Turkey during the claimant's notice period. The claimant's claim and the employer's contract claim are being heard together. For ease of reference, we have referred to Ms Millington as the claimant and Forensic Access Limited as the respondent, even in the context of the employer's contract claim.

Hearing and Evidence

4. The hearing took place on 2, 3, 4 and 5 March 2020. It was originally listed for 5 days but this was reduced to 4 days because of judicial resources.

    4.1. We took the first morning of the hearing as reading time; we read the witness statements and the documents referred to in the statements.

    4.2. On the afternoon of 2 March and the morning of 3 March we heard the evidence of the claimant and her witness Dr Alexander Stoll who was formerly employed by the respondent.

    4.3. On the afternoon of 3 March and the morning of 4 March we heard the evidence of the respondent's witnesses, Mr John Owen and Mr Joe Arend. Mr Owen was the managing director and Mr Arend the executive chairman of the respondent at the material times.

    4.4. The parties made submissions on the afternoon of 4 March 2020.

    4.5. The tribunal reserved judgment and deliberated in chambers on 5 March 2020.

5. There was an agreed bundle of 387 pages.

5.1. During the hearing, a copy of the respondent's employee handbook was added to the bundle, it was given page numbers 388 to 460.

5.2. The bundle contained transcripts of recordings made at two meetings. Part of a meeting on 26 October 2017 was recorded by the claimant on her phone, without the knowledge or consent of the other participants. In preliminary discussions about the bundle, Mr Arend for the respondent did not object to the transcript being included in the bundle; he said that the respondent thought the recording was to its advantage. We return to this below. The second transcript was of a meeting on 7 December 2017; this was recorded by the respondent with the consent of the claimant.

The Issues

6. The issues for determination were identified at a case management hearing on 6 March 2019 and included cross-references to paragraphs of the ET1 and ET3. The issues for determination (including the points in the ET1 and ET3) are:

A: First claim 3306797/2018 (Ms Millington's claim)

7. Unfair constructive dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

7.1. The events relied on as amounting, either individually or cumulatively, to a fundamental breach of contract involving a breach of the implied term of trust and confidence in response to which the claimant resigned are set out in paragraphs 10-13, 15, 17, 20, 21 and 25 of the claimant's ET1 Grounds of Complaint.

7.2. The events relied on as detailed in those paragraphs were summarised by the claimant's counsel in her skeleton argument as:

a. Unilaterally altering the claimant's role to remove her biology responsibilities thereby de-skilling her as a biologist (paragraph 10);
b. Mr Arend undermining the claimant by alleging that she was overpaid and by challenging her professional integrity (paragraph 10);
c. Mr Arend stating that he did not see the claimant as a Scientific Director and this should be transferred to Dr Stoll (paragraphs 10 and 11);
d. Mr Arend making covert approaches to Dr Stoll about the claimant including making critical and defamatory remarks (paragraph 12);

e. Mr Arend lying about such approaches to the claimant (paragraphs 12 and 21);
f. Mr Arend seeking to block the claimant from key meetings (paragraph 13);
g. Mr Owen failing to protect the claimant from Mr Arend and thereby failing to provide her with a safe place of work (paragraph 15);
h. The respondent failing to comply with any policy or Acas code regarding the claimant's formal grievance (paragraph 17);
i. Mr Arend further bullying the claimant in the formal grievance response meeting (paragraph 20);
j. Mr Arend making comments regarding the claimant's sexual orientation (paragraph 25).

8. Direct sexual orientation discrimination – section 13 Equality Act 2010

8.1. The events relied on as amounting to direct sexual orientation discrimination are set out in paragraph 25 of the claimant's ET1 and Grounds of Complaint.

8.2. Paragraph 25 describes comments made to the claimant by Mr Arend at a meeting on 7 December 2017 and describes the less favourable treatment as follows:

a. The decision to resign was also based on the aggravating factor of sexual orientation; and
b. The actual statements in themselves were also hostile and detrimental.

9. Breach of contract/wrongful dismissal – article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

9.1. This complaint is set out in paragraph 30 of the claimant's ET1 and Grounds of Complaint.

9.2. Paragraph 30 says that the claimant claims her notice period of three months' net salary.

B: Second claim 3331910/2018 (Forensic Access Limited's employer's contract claim)

10. Breach of contract/wrongful dismissal – article 3 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994

10.1. This claim is set out in paragraphs 25.1 and 29 of the respondent's ET3 Particulars of Response.

10.2. Paragraph 25.1 summarises the claim. It says that the claimant was due to provide a two week training course in Turkey during February 2018. This would have fallen within the claimant's notice period and she would have been obliged to carry that course out in her capacity as an employee of the respondent. The respondent was unable to find a suitably qualified person to take the course and as such had
to reject the work, causing a loss of profit as well as significant loss of reputation. The claimant subsequently carried out the proposed training course in her own right. The claim is further particularised in paragraph 29.

A: First claim

Findings of Fact

11. We heard a lot of evidence over the course of the hearing. We have not included all the evidence in these reasons. Where we do not mention something here, it is not because we have overlooked it; we have included here all those points which we found most helpful in determining the issues we have to decide.

12. We make the following findings of fact in Ms Millington's claim.

The parties

13. The claimant commenced employment with the respondent on 10 September 2012. At the start of the claimant's employment the respondent was called Manlove Forensics Limited. The claimant signed a contract of employment on 31 May 2012 (page 86). It said that her job title would be Senior Biologist and that she would work full time.

14. The claimant is forensic scientist with almost 25 years' experience. She is a renowned expert in bloodstain pattern analysis (BPA). The claimant was the only senior biologist on a full-time contract with the respondent, and she was the respondent's technical lead scientist in biology. The vast majority of her role for the respondent (around 80% of her work) was the management and delivery of forensic biology casework, mainly defence work (reviewing prosecution forensic evidence). Her work involves appearing as an expert witness in court, therefore her reputation and credibility underpin her career. The claimant also ran training courses in bloodstain pattern analysis for the respondent.

15. As the claimant is an expert in her field, during her time with the respondent she was regularly invited to contribute to national and international forums. She undertook a wide range of knowledge transfer and teaching activities, mostly pro-bono in her own time. The respondent benefited from the claimant's wider activities and from her professional network, both of which led to income generation for the respondent. The claimant's line manager Mr John Owen was

aware of all the work the claimant did outside her core activities, and had no issue with any of it.

16. In May 2015 the respondent was renamed ArroGen Forensics Limited. Mr Joe Arend became the owner of the respondent after the formation of ArroGen Forensics Limited. He worked part-time as the executive chairman. The claimant's line manager Mr Owen was the managing director, he undertook the day to day management of the company. Mr Owen also had responsibility within the respondent for human resources.

The development of a veterinary forensics service

17. In 2016 the claimant and a forensic veterinary pathologist from the University of Surrey, Dr Alexander Stoll, put a proposal to the respondent for a new business opportunity, a veterinary forensics service. It was a proposed joint venture between the respondent and the University of Surrey. Veterinary forensics was not a service which the respondent provided at that time. The claimant and Dr Stoll prepared a business plan and the respondent agreed to back the proposal. Substantial funding was invested to get the venture up and running.

18. A memorandum of understanding between the respondent and the University of Surrey was signed in March 2017. It was agreed that ArroGen Forensics and the University of Surrey would deliver veterinary forensic services in partnership under the name ArroGen Veterinary Forensics. The venture would be led jointly by the claimant and Dr Stoll.

19. It was intended that later the respondent and the university would enter into a full contract together and the veterinary forensic division would be set up as a separate subsidiary company of the respondent. The intention was that the claimant and Dr Stoll would be co-directors of that separate company and would be given shareholdings in it. (In the event the subsidiary company was not set up.)

20. On 20 March 2017 as part of the discussions, Mr Owen sent the claimant a draft particulars of employment document (page 96). The terms were broadly the same as her 2012 contract but there was a provision for the claimant to receive a 2.5% shareholding in the proposed subsidiary company after 12 months, and a further 2.5% shareholding after 24 months.

21. The draft particulars of employment also proposed an extension of the notice period to 3 months on both sides. The claimant's job title in the draft document was 'Senior Forensic Scientist'. The claimant said, and we accept, that this was the same role as 'Senior Biologist'. The draft particulars of employment were not signed by the claimant at this stage.

22. The claimant was issued with double-sided business cards which reflected her existing forensic biology role for the respondent on one side, and her role with the veterinary forensics division of the company on the other.

23. An updated business development report on ArroGen Veterinary Forensics dated March-July 2017 included a section on staff. It said (page 230):

> "Current allocation is as follows:
> Jo Millington – joint bio and vet responsibility (0.5:0.5)
> Alex Stoll – joint [University of Surrey] and vet (0.4:0.6)"

24. This meant that the claimant would split her time evenly between her biology and veterinary roles. Dr Stoll's time would be split 0.4 to his University of Surrey work and 0.6 to ArroGen veterinary work. There were two other staff working on the joint venture, a marketing manager and key account manager. Their allocation was said in this document to be 'joint arrogen and vet'.

25. On 15 May 2017 Mr Owen sent an email to staff about the respondent's monthly management meetings (page 241). It said that one representative from each work area would be required to attend the monthly management meetings. Mr Owen suggested that the representative for biology should normally be the claimant and for veterinary pathology it should be either the claimant or Dr Stoll.

26. In August 2017 Mr Owen contacted the claimant and Dr Stoll and asked them to sign their new particulars of employment. By this stage, the draft sent to the claimant in March 2017 had been amended. In the version which the claimant signed on 14 August 2017, her job title was said to be 'Scientific Director: ArroGen Veterinary Forensics encompassing the role of Lead Forensic Scientist' (the emphasis was included in the original).

27. Dr Stoll's job title in ArroGen Veterinary Forensics was Operations Director.

28. In their roles as directors of the veterinary forensics division, the claimant and Dr Stoll were directors in name only as the subsidiary company had not been set up.

29. The claimant understood the reference in her particulars of employment to 'Lead Forensic Scientist' to refer to her existing role in the respondent's biology division, in other words that she was taking on the new role in the veterinary forensics division while retaining her existing role. She said, and we accept, that she would not have accepted a role which required her to work wholly in the veterinary forensics division, as this would not have enabled her to retain her competency in human forensic biology and her specialism in bloodstain pattern analysis. She would have been de-skilled.

30. Before and after the claimant signed the contract in August 2017, the respondent's expectations of her in biology did not change. She still had to deliver biology casework and training, meet targets, and attend meetings as the representative of the biology division. She had dual responsibility.

31. On 24 August 2017 following an all staff meeting about a different share allocation (the allocation of shares in Forensis, another company owned by Mr Arend), the claimant was called to a meeting with Mr Arend and Mr Owen and told that in recognition of her contribution and performance, she would receive an enhanced allocation of shares in Forensis.

32. In September 2017 the ArroGen veterinary forensics service officially launched. It was a very successful launch.

33. There were three main elements to the service: a veterinary post-mortem service, a CPD training element and ancillary forensic biology work.

34. The claimant and Dr Stoll have different skills, which complemented each other, and different responsibilities within the new venture. As the veterinary pathologist, Dr Stoll had responsibility for the post-mortems. The joint venture business plan was based on an annual turnover of 100 postmortems. As the forensic scientist, the claimant had responsibility for any veterinary forensic biology work. The claimant and Dr Stoll had joint responsibility for the CPD training element (page 277).

35. The intended start date for the CPD training programme was January 2018 but towards the latter part of 2017 this date had to be put back to March/April 2018 as the course was not ready to start in January 2018.

36. Up to this point the respondent had no concerns with the claimant's performance. The veterinary forensics division had had a very successful launch, demonstrating the significant potential of the business. The biology division was doing well, meeting its targets, and the quality of work was very high.

<u>10 October 2017: Mr Arend's discussion with Dr Stoll</u>

37. In around October 2017 Mr Arend became concerned that the veterinary forensic division was tracking behind forecast in terms of post-mortems. Post-mortem sales were at 41% of the forecast for the year to date (page 233). This was because of a lack of resources, not because of a lack of business. There were more cases than Dr Stoll could carry out in the time he had available and so the team were having to turn cases away.

38. Mr Arend was also concerned about the delay to the start of the CPD training course, a key revenue provider for the division. Also, he had learned that the claimant had attended a market research meeting with the veterinary division's key account manager. Mr Arend felt that this indicated that the veterinary division's central resources were not being utilised in an efficient manner and there was a risk of duplication.

39. Mr Owen said that the claimant was not to blame for these things, it was a collective issue. He said that ideally the respondent would have taken on some

more pathology time to carry out more post-mortems, and would have generated more time for the claimant (about 8 weeks) so that the CPD training programme could get started. Unfortunately, that was not the approach taken.

40. On 10 October 2017 a meeting was due to take place at the University of Surrey at 12.30. The meeting was between Mr Arend, the claimant, Dr Stoll and the professor who was the university's lead for the joint venture (Dr Stoll's line manager at the university). An informal meeting had been arranged between Mr Arend, the claimant and Dr Stoll to take place beforehand, at 12.00 (page 251).

41. During the informal meeting the claimant left to buy a hot drink for Mr Arend. While she was away, Mr Arend said to Dr Stoll that he would be giving the claimant a 'talking to' because he was unimpressed that she had accompanied the key account manager to a market research meeting. Mr Arend said the claimant had gone 'off brief' and was wasting company time by attending. He said he thought her behaviour was not suitable for the company, and he needed to put his foot down to make her aware of how things were going to be, and to show her that he was in charge.

42. Dr Stoll explained to Mr Arend that the decision for the claimant to attend the meeting had been taken jointly by the claimant, Dr Stoll and the key account manager, and that they had made this decision because the key account manager was new to the work and had no experience in the field.

43. Dr Stoll later discussed Mr Arend's comments with the claimant, with Mr Owen and with his line manager at the university, because he thought that it was inappropriate for Mr Arend to make these comments to him.

44. The claimant had been an intended participant at the 12.30pm meeting. However, Mr Arend told her that she should not attend. The claimant sat outside the meeting while it was taking place.

Arrangements for the meeting on 26 October 2017

45. On 16 or 17 October 2017 Mr Arend left two voicemails on the claimant's phone requesting a meeting with her to discuss what he described as 'issues that he was not willing to accept'. The tone of his voice in his messages was angry.

46. The claimant did not know what issues Mr Arend was referring to. She was not given any agenda for the meeting and so she had no basis on which to prepare for it.

47. The claimant spoke to Mr Owen to say that she was worried about the meeting (page 259). She said she thought Mr Arend was planning to sack her and that she felt harassed. Mr Owen said that Mr Arend wanted to define how he intended to lead the company and to talk about ways of working, roles and actions. Mr Owen

told the claimant that there was a danger that 'this could turn into a big issue' and he said that the claimant should listen to what Mr Arend had to say. Mr Owen told Mr Arend that the claimant was worried about the meeting with him.

48. The meeting was arranged for 26 October 2017 at the University of Surrey. (It was to be immediately before a management meeting of the Veterinary Forensic Division and then a meeting of the steering group, also referred to as the steering committee. The management meeting was a meeting of

those at Arrogen leading the veterinary forensics division, and the steering group was the management meeting attendees together with participants from the university.)

49. The claimant asked Mr Owen to attend the first meeting with her. She did so because he was her line manager and because of his human resources role. The claimant asked Mr Owen to take a note of the meeting. Mr Owen agreed to attend and to take a note. The claimant understood from this discussion that Mr Owen was attending the meeting with her to support her and that he would take a note on her behalf.

50. On 25 October 2017, the day before the meeting, the claimant sent draft job descriptions for herself (page 273-274) and Dr Stoll to Mr Owen for discussion.

Mr Arend's first telephone call to Dr Stoll - 18 October 2017

51. On 18 October 2017, Mr Arend telephoned Dr Stoll. Mr Arend was bad tempered on the call. Mr Arend described the claimant as a director 'out of control'. He raised three points to explain this view. Mr Arend went on to say that the claimant was not suited to the role of Scientific Director and that this role should be passed to Dr Stoll. Mr Arend said that he did not think that the claimant was working efficiently and that she was not capable of working as part of a team.

52. Dr Stoll told Mr Arend his position on the three points which Mr Arend had raised. Mr Arend agreed to look at them further. Dr Stoll told Mr Arend that his position on these points was the same as the claimant's position on these points. Dr Stoll said that he and the claimant made all decisions together to make use of their combined skill set, and that this demonstrated the claimant's ability to work in a team.

53. After this call, Dr Stoll called the claimant to tell her what had been said. He also called Mr Owen to outline his profound disapproval of what had happened. Dr Stoll was very unhappy that Mr Arend, who was not his line manager, was complaining to him about a colleague who was his equal in the management structure of the veterinary forensics division. Dr Stoll said, and we accept, that what Mr Arend said about the claimant's work ethic and behaviour was untrue.

54. Dr Stoll asked Mr Owen to guarantee that Mr Arend would not call him again as he felt it was not acceptable practice and it made him very uncomfortable. Mr Owen agreed and said he would speak to Mr Arend.

The recording of the meeting on 26 October 2017

55. The claimant arrived early for her meeting with Mr Arend. It was taking place in an open-plan public area at the University of Surrey. As she walked towards the building, the claimant could see Mr Arend and Mr

Owen sitting together at a table near the window. It was apparent to her that they were preparing for the meeting with her.

56. When she saw them, the claimant realised that Mr Owen was not at the meeting to support her, but was there as Mr Arend's managing director. This heightened the pressure of what was already a stressful situation for the claimant. She was concerned that Mr Owen's note would not be impartial, and that she would not be able to take an accurate note herself. She made the decision to set her phone to record to use it to take an accurate record of the meeting. In the circumstances, although it would have been better to have asked the participants for consent to record the meeting, this was an understandable decision.

57. In his evidence, Mr Arend said that he did not think that the recording was made by the claimant with any intention of entrapment. We agree with this assessment.

58. A transcript was made of the recording. The transcript does not cover the whole meeting because the recording stopped before the end of the meeting. Mr Owen's notes of the meeting include notes of the discussions which took place after the end of the recording (page 132).

The purpose of the meeting with the claimant on 26 October 2017

59. In his evidence, Mr Arend said that the purpose of the meeting with the claimant on 26 October 2017 was to discuss ways of improving the performance of the veterinary forensics division. He said the areas of discussion were the non-delivery of the CPD training programme, personnel structure, individual staff responsibilities and the unit's financial shortfalls. He highlighted post-mortem sales and the delay to the CPD programme as particular concerns. Mr Owen's evidence was that the purpose of the meeting was to highlight the importance of delivering the CPD training packages and to address some aspects of the way in which the team was working.

60. We do not accept that these are accurate summaries of the reasons why the meeting was called. Dr Stoll led the team jointly with the claimant and he had responsibility for post-mortems. The claimant and Dr Stoll had joint responsibility for CPD. If the meeting had been to discuss the performance and operation of the veterinary forensic unit in general, and post-mortems and CPD in particular, we would have expected Dr Stoll to have been invited as well as the claimant.

61. Neither Mr Arend nor Mr Owen explained why Dr Stoll was not at the meeting. Mr Arend said that Dr Stoll was very busy and that if he could have made the meeting, he would have been included. However, there was no documentation to suggest that Dr Stoll had been invited. There was also no evidence to suggest that Dr Stoll could not attend, and he was present at the Steering Group meeting which took place at the university later the same day.

62. We find that Dr Stoll was not invited to the first meeting on 26 October 2017. We find that only the claimant was asked to the meeting because Mr Arend called the meeting to discuss 'issues he was not willing to accept', and those were issues he had with the claimant, not Dr Stoll. This is reflected in the transcript of the meeting, both in the points which Mr Arend said he wanted to discuss at the outset and in the scope of the discussion at the meeting.

63. The respondent also said that the meeting was a normal management meeting to assist the claimant with her transition from the role of scientist to a director role. However, from the transcript, this is not an accurate description of the meeting. During the meeting, there was no discussion about this sort of assistance. There was no suggestion of any mentoring or training being set up for the claimant.

The meeting with the claimant on 26 October 2017

64. At the time of the meeting, ArroGen Forensics Limited were in discussions about the merger which took place after the claimant left. Mr Arend, Mr Owen and the claimant were all aware of this.

65. Mr Arend opened the meeting by saying, 'Let's get this over with because it's something I'm not looking forward to, to be honest'. He said that there was a bit of friction between him and the claimant and that they had to resolve it, otherwise the business would suffer. He said he had three things to discuss. They were:

65.1. how the biology section had really been working in that financial year;
65.2. whether the claimant's outside influences were affecting the business;
65.3. why the claimant disagreed with a few of the things that he had tried to implement in the company.

66. The topics which Mr Arend raised with the claimant at the meeting included the following:

66.1. The claimant's pay: referring to the claimant's pay and overtime, Mr Arend said, "I'm pretty staggered at what it has cost to employ you over the last year". He described her pay position as 'crazy', 'crackers', 'rank amateurish'. The claimant was not responsible for setting her pay. There was no suggestion that the claimant had been paid other than in accordance with her contractual entitlement to pay and overtime pay.
66.2. The claimant's outside activities: Mr Arend asked the claimant to prepare a list of her professional commitments. He said 'I'm not going to hold back…if we think that is affecting the ability to run this company and the biology isn't making gains out of it you're going to have to make a decision'. At the time of the discussion Mr Arend had not spoken about the claimant's outside activities to Mr Owen (the claimant's line manager). Mr Owen was aware of all of the claimant's outside activities and did not have an issue with any of them.

66.3. Membership of the steering committee: Mr Arend said that Dr Stoll (not the claimant) should be on the steering committee for the veterinary forensics division, 'representing the science of the company'. Mr Owen said he also thought it should 'probably' be Dr Stoll on the committee not the claimant. The claimant said that as Scientific Director she would expect to be 'representing the science and the forensics of the partnership'. Mr Arend left the final decision as to who would attend to the claimant, Dr Stoll and Mr Owen.

66.4. The job titles of the claimant and Dr Stoll: Referring to the claimant's job title of Scientific Director and Dr Stoll's title of Operations Director, Mr Arend said 'I think that you two were going to start squabbling in the future for those titles'. When the claimant asked what he meant, Mr Arend said 'I think that quite possibly in terms of animal forensics [Dr Stoll] has got the greatest scientific skill' and 'I think [the titles] should be reversed'.

66.5. The claimant's role as a director: Mr Arend said that the board of the new company would have to be 'composed of people that are going to be accepted by financiers and their peer group scientists, and if you're going to become a director of that company …you've got to start thinking as a commercial director as well as a scientist…and I'm not seeing that at the moment….I'm not seeing you as a director'. When the claimant asked, 'What do you see my role as?' Mr Arend laughed and said 'Okay, the way I view you from a personal point of view… is that when I first met you…you were already getting glue on my feet because you had the rights to …training manuals and you were negotiating a royalty … and that was my first introduction to you'. In his evidence, Mr Arend said what he meant by 'glue on his feet' was getting unstuck and solving a problem. We find that by saying the claimant was 'getting' glue on his feet Mr Arend was saying that she was a problem or was causing a problem from which he wanted or needed to get unstuck. The royalty on the training manuals was, as Mr Arend accepted, nothing to do with the claimant's role as a director. The recording stopped shortly after this exchange. Mr Owen's notes record that Mr Arend went on to say to the claimant, 'I do not have a lot of confidence in you on developing a company' (page 132).

66.6. The claimant's role in biology: Mr Arend said the following about the forensic biology work:

> "So anyway what's going to happen is axiom will lead it and then if the merger doesn't go ahead then we will recruit an individual and we will be asking for your help in identifying those people to head up the biology side and we will do it in that way[. We're] a little bit confused in terms of what role you will have in biology beyond that because you've got training and what have you whether it's going to be 10% of the time all 20% of the time or whatever but that has to be defined over the next couple weeks."

67. On the issue of the claimant's role in biology, the notes prepared by Mr Owen say that towards the end of the meeting the claimant said, 'We have not had any resource. We have dual roles etc. Quite a lot of abstraction', and 'Biology has just

been me'. Mr Arend is noted as saying, 'We recognise that everybody is performing 2 or 3 functions and we are working towards improving this.'

68. In his evidence, Mr Arend said that the claimant signed on in August 2017 as a full-time employee of the vet unit. He said the expectation was that the claimant would work full time on the veterinary side of things and that she would no longer have a role in biology.

69. The claimant said that she was expected to retain (and she wanted to retain) her biology role when she took on the new role in the veterinary forensics division and that she had dual responsibility. She said that she worked and expected to work 50/50 on the two roles, as had been agreed in the business plan.

70. On this important factual dispute, we prefer the claimant's evidence. Neither the contract signed in August 2017 or the job description prepared by the claimant were clear on this point. The job description was only produced the day before this meeting. The claimant's evidence is consistent with what was said at the meeting on 26 October 2017 about the claimant's role in biology being defined over the next couple of weeks, after the merger and/or after recruitment of people to head up the biology side. Mr Arend's reference to the respondent being 'confused' was about the role in biology the claimant would have in the future. The discussion was about what was going to happen, not what had already happened.

71. The claimant's evidence reflected what the position had actually been since the veterinary forensics unit started up. The claimant did not stop performing her role in biology in March 2017 when the Memorandum of Understanding with the university was signed, or in August 2017 when she signed the new particulars of employment. She was still performing her role in biology on 26 October 2017 when the meeting took place. She was managing and delivering case work and training and attending meetings as the biology lead. She was the respondent's only full-time biologist and attended management meetings as the representative for biology. No-one had been recruited or appointed to replace her. Steps to identify additional resources for biology only began to be taken after the meeting of 26 October 2017 (pages 253 to 256 and 279); even then they were tentative and only abut 'the possibility of support' with casework, not about any immediate replacement to take over all the biology work the claimant was doing. At the time of the meeting on 26 October 2017 the claimant was clearly performing both roles.

72. We also accept the evidence of the claimant that she would not have agreed to leave her biology role, as that would have meant she would have been de-skilled in her area of expertise. This was not the basis on which she signed the contract in August 2017.

73. We find therefore that by 26 October 2017 the respondent had formed the view that it did not want the claimant to do both the biology and the veterinary division roles, but had not begun to implement this or agreed it with the claimant.

The steering group meeting later on 26 October 2017

74. The claimant was due to attend the steering group meeting which took place after the first meeting on 26 October 2017. Mr Arend suggested that the claimant should not attend. At the request of other participants at the meeting, the claimant attended the steering group as an 'invited contributor' rather than an attendee in her own right.

Complaint by the claimant and Dr Stoll

75. At the end of the day on 26 October 2017, after the Steering Group meeting, the claimant and Dr Stoll met with Mr Owen. They raised concerns about Mr Arend's discussions with Dr Stoll. They said it seemed Mr Arend intended to make the claimant's role untenable. Dr Stoll said that the removal of the claimant's position in the veterinary forensics unit would be met with his resignation.

76. Mr Owen assured the claimant and Dr Stoll that communication should only come through him and that Mr Arend should not be calling Dr Stoll directly to discuss other employees.

Mr Arend's second telephone call to Dr Stoll - 27 October 2017

77. Despite the assurance from Mr Owen, the next day, 27 October 2017, Mr Arend telephoned Dr Stoll again. Dr Stoll had numerous missed calls from Mr Arend while he was in the lab. When Dr Stoll answered a later call, Mr Arend was again bad-tempered. He accused Dr Stoll and the claimant of scheming to set up their own company and of wasting his time and money. He said he thought it crazy that Dr Stoll would leave if the claimant left. Mr Arend said that the claimant should work as part of a team, focus on vet work and stop being disruptive.

78. Dr Stoll said that he disagreed and that, contrary to Mr Arend's accusations, the claimant was not only part of the team but the very glue that held together the small vet team, those at the university, and a wide network of contacts she had built up. Her work ethic was collaborative and he (Dr Stoll) worked in the same way as the claimant.

79. Dr Stoll told the claimant about this call. He also raised it with Mr Owen and his line manager at the university.

80. On 29 October 2017 Dr Stoll emailed Mr Arend, Mr Owen and the claimant to suggest a meeting between them all, to resolve a few issues and identify how to move on. He said that it was 'glaringly apparent' that most of the problems arose from incomplete/incorrect information moving between them all. Mr Owen emailed Mr Arend to say that he would like to take this forward. He proposed that he would meet with the claimant and have discussions with Dr Stoll (page 275).

The claimant's letter of 26 November 2017

81. Mr Owen's note of the meeting of 26 October 2017 was sent first to Mr Arend then to the claimant.

82. On 23 November 2017 the claimant had a day's sick leave due to stress.

83. On 26 November 2017 the claimant sent Mr Owen a letter and a document setting out her formal response to the meeting of 26 October 2017 and the note of the meeting (page 146). The letter said, 'In addition to the points raised at the meeting, there are a number of other things that I would like to formally address that have recently affected my ability to work as effectively as I have and know that I can.' She included the comments made about her by Mr Arend to Dr Stoll.

84. The claimant went on to say that she believed Mr Arend had another agenda that had not been honestly expressed, that he had been harbouring a grievance with her and that she found Mr Arend's approach 'intimidating, threatening and professionally damaging'. She said that she was stressed. She said that she was concerned that she would not be able to maintain her professional reputation if her role as lead biologist was taken away. The letter included complaints which clearly amounted to complaints of bullying by Mr Arend.

85. In the letter and the accompanying document the claimant was obviously raising concerns, problems or complaints with the respondent.

86. Mr Owen replied to the claimant by email initially, confirming that all communication should be with him as agreed (page 145). He also agreed that the claimant could work from home the following week.

87. At around this time, on 28 November 2017, Mr Arend sent an email to Mr Owen about the claimant (page 189). In his evidence to us he said that it was a very positive email and that the whole email was to endorse the claimant. We do not agree with that assessment. The email referred to issues raised by the claimant as 'steam', described her overtime as 'not warranted', sought assurances that the company would be paid for a training course she had done and said clarification would be needed of what the claimant was doing while working from home the previous week. The email implied that the respondent needed to check up on the claimant, and gave the impression that Mr Arend did not trust the claimant.

88. The claimant and Mr Owen met on 5 December 2017. Mr Owen was trying to resolve the claimant's concerns informally. He said the respondent would not provide a formal response to the claimant's complaints, but that he would deal with Mr Arend and would shield the claimant against any further action by Mr Arend.

Arrangements for a meeting on 7 December 2017

89. Following the claimant's discussion with Mr Owen on 5 December 2017 in which Mr Owen said he would protect the claimant from further action by Mr Arend, the claimant was not expecting any contact from Mr Arend. However, on 6 December 2017 while she was in a meeting with clients, the claimant received two voicemails and a text from Mr Arend instructing her to attend a meeting with him at 9.00am the following morning. In the voicemails Mr Arend said that he was staying overnight to make the meeting happen and he made it clear that the claimant must attend. His tone of voice in the voicemails was abrupt and bad-tempered.

90. The meeting was arranged by Mr Arend to go through the claimant's letter of 26 November 2017. His evidence to us was that he found the claimant's letter non-conciliatory.

91. Mr Arend did not speak to Mr Owen or seek any HR advice before arranging or attending this meeting with the claimant. Neither Mr Arend nor Mr Owen knew what the Acas Code on disciplinary and grievance procedure said. Mr Owen was not aware that Mr Arend was intending to meet the claimant on 7 December 2017 to discuss her grievance. He would have advised against it if he had been made aware.

92. The respondent's company handbook included a bullying and harassment policy (page 428). The version of the policy in the bundle post-dated the claimant's employment with the respondent, but Mr Arend said, and we accept, that it was substantially the same as one in place at the time of the claimant's employment. The policy provided that every effort will be made to protect an employee who makes a complaint of harassment from further acts of harassment. In requiring the claimant to attend a meeting with the person against whom she had made complaints, and which was in large part a one-to-one meeting with him, the respondent failed to comply with its policy.

93. The claimant did not know what the purpose of the meeting was to be. She was not sent a written invitation, there was no agenda, and she was not told whether she had any right to be accompanied to the meeting. Mr Owen thought, and we agree, that the claimant should have been given notice of the meeting and that Mr Arend was the wrong person to deal with the meeting.

The meeting on 7 December 2017

94. The meeting took place at 9.00am on 7 December 2017. Mr Arend recorded the meeting with the claimant's consent. The meeting was around 2.5 hours long.

95. Mr Owen was not at the meeting at the start. The claimant asked if Mr Owen would be joining the meeting. Mr Arend said, 'Not from my side'. He asked

whether the claimant wanted him there. She first suggested that they make a decision as they go along, then said, 'No, it's OK'. Later, Mr Arend decided it would be helpful for Mr Owen to join them, and so Mr Owen came in part way through the meeting.

96. Mr Arend said that the purpose of the meeting was first to respond in a formal form to the claimant's letter of 26 November 2017 (contrary to what the claimant had been told by Mr Owen, that there would be no formal response) and second to discuss the claimant's job requirements and her job description. Mr Arend accepted that at the meeting he was giving a formal response to the claimant's formal grievance.

97. At the meeting Mr Arend went point by point through the concerns the claimant had raised in her letter of 26 November 2017. The meeting was not however an attempt by Mr Arend to investigate, understand or gather more information about the claimant's concerns or to resolve them. It was, rather, an opportunity for him to challenge the claimant on the points she had raised and to put across his views on them because he disagreed with what she was saying.

98. At one point in the meeting the claimant was talking about her work/life balance. She said she did not have enough time to spend with her family and her wife (page 157). A little while later, Mr Arend brought up the subject of the claimant's sexual orientation (page 164). He asked her whether she thought he had a problem with her because of her sexuality. He referred to the fact that he is big and used to be a rugby player.

99. The claimant found the question about her sexual orientation upsetting and unprofessional. She commented that she did not see the relevance of his question, and moved the discussion on to something else. In his evidence, Mr Arend said he understood that the claimant felt embarrassed about being asked this.

100. During cross-examination Mr Arend was asked whether he would have asked about sexual orientation in response to a comment about not having enough time to spend with 'my family and my husband'. Mr Arend said that he would not have done.

101. In the meeting on 7 December 2017 Mr Arend:

101.1. used swear words (pages 162, 163);
101.2. said the claimant was overreacting (page 165), that she should be robust (page 164), more robust (page 165) and 'get a harder skin' (page 170);
101.3. said to the claimant, 'I am the chairman and a major shareholder and you are complaining about my behaviour' (page 157). Mr Arend said in evidence that he said this because he found it strange that someone who was a junior director was querying his authority and challenging his behaviour when he considered his behaviour perfectly adequate. Later he said, 'You're talking about the chairman of the company' (page 171);

101.4. asked the claimant, when she became upset, 'Are you physically fit to continue doing this job?' (page 174). There had been no issue raised about the claimant's physical fitness. In his evidence Mr Arend told us that he asked this because the claimant seemed very fragile;
101.5. told the claimant that she didn't understand how a company works (page 178);
101.6. told the claimant that the new venture was not 'a lifestyle company' for you (page 178);
101.7. told the claimant that she was 'letting everybody down' and 'screwing it' (page 182);
101.8. asked the claimant, 'Come on is that the only argument?' (page 182);
101.9. told the claimant that she was destroying the vet business (page 184).

102. In the meeting, the claimant asked Mr Arend why he had discussed her with Dr Stoll. Mr Arend denied speaking to Dr Stoll about the claimant. He said 'categorically' he had 'never' spoken to him (page 161). When the claimant said that meant that Dr Stoll must be lying, Mr Arend accepted that he had spoken to Dr Stoll but said there was 'one conversation and one conversation alone' (page 182). This was not true, because by the time of the meeting, Mr Arend had spoken to Dr Stoll about the claimant on three occasions. Dr Stoll had told the claimant about it on each occasion.

103. Mr Arend had with him at the meeting a copy of his email to Mr Owen of 28 November 2017 about the claimant's role. He discussed this with the claimant, but refused to pass a copy to her or let her see a copy (page 172).

The claimant's resignation

104. The claimant was very distressed by the meeting. At the end of the meeting she said she thought she would take some annual leave. Mr Arend replied, 'Is that all you've got after all this?'. The claimant said, 'No, I would like to hand in my resignation'.

105. The claimant wrote to the respondent on 11 December 2017 (two working days after the meeting) to confirm her resignation without notice (page 185 to 186). In her letter she gave the reason for her resignation as the conduct of Mr Arend including his comment about her sexual orientation.

The law

Constructive unfair dismissal

106. The definition of dismissal in section 95(1)(c) of the Employment Rights Act includes constructive dismissal which is a dismissal where the employee terminates the contract of employment in circumstances where they are entitled to terminate it without notice by reason of the employer's conduct.

107. Weston Excavating v Sharpe sets out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

107.1. that there was a fundamental breach of contract on the part of the employer;
107.2. that the employer's breach caused the employee to resign; and
107.3. that the employee did not delay too long before resigning and thereby affirm the contract.

108. The breach may be of an express term or an implied term of the contract. The Claimant relies on breaches of the employer's contractual obligations, including as to pay. He also relies on a breach of the implied term of trust and confidence. This is a term implied into all contracts of employment that employers (and employees) will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

109. In cases where a breach of the implied term is alleged, 'the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it' - Woods v WM Car Services (Peterborough) Limited.

110. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 Underhill LJ set out a series of questions to be considered where an employee claims to have been constructively dismissed and where there are said to be a number of repudiatory breaches. Those questions are:

110.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
110.2. Has he or she affirmed the contract since that act?
110.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
110.4. If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence?
110.5. Did the employee resign in response (or partly in response) to that breach?

111. If a constructive dismissal is established, the tribunal must also consider whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98(4) of the Employment Rights Act 1996.

112. A constructive dismissal where the employee resigns without notice will also be a wrongful dismissal, ie a dismissal by the employer in breach of the contractual requirement to give notice.

Direct sexual orientation discrimination

113. Sexual orientation is a protected characteristic under section 4 of the Equality Act 2010.

114. Section 13 of the Equality Act provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

115. The Equality and Human Rights Commission's Employment Code explains less favourable treatment in direct discrimination case as follows:

> 'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person'

116. In Royal Bank of Scotland plc v Morris EAT 0436/10, the claimant, who was black, complained about his manager, who was white. With no basis whatsoever, the person to whom the claimant complained suggested that the claimant's complaint was racially motivated. The claimant said he was offended by the suggestion that he was 'playing the race card'. The tribunal found that the comment to the claimant was direct discrimination. This was upheld on appeal. The EAT found that the comment was based on a stereotypical assumption about a black employee complaining about a white colleague. It emphasised however that a single tactless remark of this nature should be dealt with by way of informal apology, or through the grievance procedure, rather than being the subject of a tribunal claim.

Burden of proof

117. Sections 136(2) and (3) provide for a reverse or shifting burden of proof: "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> (3) This does not apply if A shows that A did not contravene the provision."

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

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

120. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sexual orientation. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.

Conclusions

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

Constructive dismissal

122. We deal with points 7.1 and 7.2 of the list of issues by considering the questions set out in Kaur.

123. First, we identify the most recent act on the part of the employer which the employee says caused or triggered her resignation.

124. The most recent matter relied on by the claimant was the conduct of Mr Arend at the meeting on 7 December 2017 and other matters relating to that meeting. The claimant said that the following amounted to fundamental breaches of contract involving breaches of the implied term of trust and confidence in response to which she resigned (using the lettering from paragraph 7.2 of the list of issues as set out above):

e) Mr Arend lying to the claimant about making covert approaches to Dr Stoll about the claimant including making critical and defamatory remarks;
g) Mr Owen failing to protect the claimant from Mr Arend and thereby failing to provide her with a safe place of work;
h) The respondent failing to comply with any policy or Acas code regarding the claimant's formal grievance;
i) Mr Arend further bullying the claimant in the formal grievance response meeting;
j) Mr Arend making comments regarding the claimant's sexual orientation.

125. Next we consider whether the claimant affirmed the contract after the meeting on 7 December 2017. We find that she did not. She gave her verbal resignation at the end of the meeting and confirmed it in writing two working days later. Her resignation letter expressly included the meeting on 7 December 2017 and Mr Arend's conduct at that meeting in her reasons for resigning.

126. Next we consider whether the meeting and the respondent's conduct at the meeting on 7 December 2017 amounted to a repudiatory breach of contract. We have considered the points e, g, h, i and j above in turn.

127. In relation to point (e), we have found that the answers Mr Arend gave in this meeting when the claimant asked whether he had contacted Dr Stoll about her were not accurate. He first said categorically that he had never contacted Dr Stoll, and then said that had only contacted him once. In fact Mr Arend had contacted Dr Stoll three times, and the claimant knew this. This alone would have been damaging to the trust the claimant had in Mr Arend.

128. As to point (g), we have made no finding that Mr Owen failed to protect the claimant from Mr Arend or failed to provide her with a safe place of work. Mr Owen tried to ensure that all communications went through him, although that was not successful. He allowed the claimant to work from home when she was very stressed. He was not aware that the claimant had been asked to attend a meeting on 7 December 2017 with Mr Arend.

129. As to point (h), we have found that in requiring the claimant to attend a meeting with Mr Arend after she sent her grievance letter complaining about him, the respondent failed to comply with its harassment policy. The policy assured employees that after making a complaint every effort would be made to protect them from further treatment.

130. As to point (i), we conclude that the approach Mr Arend took in the meeting of 7 December 2017 was bullying, in particular the conduct we have highlighted at paragraph 101 above. Even if there had been cause to criticise the claimant, which we have found there was not, Mr Arend's conduct went well beyond robust constructive criticism. He had no reasonable and proper cause to act in that way.

131. Finally, on point (j), we have found that Mr Arend did initiate a discussion with the claimant about her sexual orientation, which she found upsetting.

132. We conclude that requiring the claimant to attend a lengthy meeting with Mr Arend which was contrary to the respondent's harassment policy and at which she was subjected to bullying conduct, given inaccurate responses and questioned about her sexual orientation, was conduct which was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent. There was no reasonable or proper cause for this conduct. We conclude that the meeting on 7 December 2017 breached the term of trust and confidence and was a repudiatory breach of contract.

133. In case we are wrong about that, we have gone on to consider whether the 7 December meeting was part of a course of conduct comprising several acts which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence. We conclude that it was. We conclude that Mr Arend's:

    133.1. conversation on 10 October 2017 and telephone calls on 18 and 27 October 2017 with Dr Stoll;
    133.2. requests that the claimant should not attend meetings on 10 and 26 October 2017; and

133.3. conduct at the meeting on 26 October 2017;

viewed together with the meeting on 7 December 2017, amounted to a breach of the implied term.

134. In his approaches to Dr Stoll about the claimant, Mr Arend was very critical of the claimant, her abilities and work ethic. He described her as off brief, out of control and disruptive. We agree with Dr Stoll that it was unprofessional to raise these issues with a peer, and that the criticisms were unjustified.

135. Mr Arend asked the claimant not to attend meetings on 10 and 26 October 2017 (although she did attend on 26 October 2017 at the request of the other participants). Also, on 26 October 2017 both Mr Arend and Mr Owen suggested that the claimant did not need to attend the steering group in future, although no final decision was made on this. As the claimant was one of the two people who had proposed, developed and set up the veterinary forensics division, excluding her or attempting to exclude her from meetings about it was conduct which was very likely to seriously damage the relationship of trust and confidence between the claimant and the respondent.

136. In relation to the meeting on 26 October 2017, Mr Arend told the claimant:

136.1. that her biology responsibilities would be removed. The claimant had not agreed to this and it would mean her being de-skilled in her area of expertise;
136.2. that her pay was staggering and that her external professional commitments may be affecting the respondent's ability to run the company. The claimant's line manager was aware of her pay and professional commitments and had no issue with any of them;
136.3. that Dr Stoll and not the claimant should be Scientific Director as he had 'the greatest scientific skill';
136.4. that he did not see her as a director and that he did not have a lot of confidence in her developing a company (ie in developing the veterinary forensics side of the business).

137. In saying that the claimant's biology responsibilities should be removed and that he did not have a lot of confidence in her developing the veterinary forensics side of the business, Mr Arend was calling into question both aspects of the claimant's role with the respondent.

138. The respondent did not have any reasonable and proper cause for taking these steps.

139. For these reasons, we have concluded that the meeting on 7 December 2017 was also part of a course of conduct comprising several acts which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence.

140. Lastly on the question of constructive dismissal, we have considered whether the claimant resigned in response (or partly in response) to the breach. We conclude that she did. The conduct at the meeting on 7 December 2017, as well as the other issues, were included in the reasons given by the claimant in her letter of 11 December 2017 for her decision to resign.

Unfair dismissal

141. Having found that the claimant was constructively dismissed, we need to consider whether the dismissal was unfair. This requires consideration of whether the respondent had a potentially fair reason for dismissal and whether the dismissal was fair in all the circumstances of the case.

142. The respondent did not advance any potentially fair reason for dismissal. In its ET3, the respondent said that it had not taken any steps against the claimant under its performance policy, and there is no suggestion that the claimant was dismissed for reasons relating to her capability. We have not found any misconduct on the part of the claimant. There was no suggestion that the claimant's biology position was redundant, rather the respondent was considering options for other people to do that work.

143. There was no potentially fair reason for the claimant's dismissal.

144. Even if there was a potentially fair reason for dismissal, we conclude that the dismissal was not fair in all the circumstances. In reaching this conclusion, we have taken into account in particular the failure to provide the claimant with notice of what was to be discussed at the meetings on 26 October and 7 December 2017, the failure to follow the harassment policy
and the conduct which formed the repudiatory breaches leading to the constructive dismissal.

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

Direct sexual orientation discrimination

146. The claimant made two complaints of direct discrimination because of sexual orientation contrary to section 13 of the Equality Act 2010:

    a. The decision to resign was also based on the aggravating factor of sexual orientation; and
    b. The actual statements in themselves were also hostile and detrimental.

147. In relation to (b), this was what might be described as a single tactless comment, and we have considered carefully whether it amounted to less favourable treatment.

148. Mr Arend's question to the claimant about whether she thought Mr Arend had a problem with her sexual orientation was followed by a comment referring to stereotypes, when Mr Arend referred to himself being a former rugby player. The question introduced the claimant's sexual orientation into the discussion without there being any basis to do so, and, although the claimant had said nothing to support this, it implied that the claimant's sexual orientation might be a factor in her decision to make a formal complaint about Mr Arend. The claimant regarded her sexual orientation as a private matter (as she was entitled to do), and the question to her about it was upsetting and embarrassing. She would have preferred it not to have been asked.

149. As to comparator, Mr Arend accepted that he would not have made the comment in response to another female who said that she wanted to spend more time with her husband. Mr Arend's motive or intention in asking his question is not part of the test we need to apply when considering direct discrimination.

150. We have concluded therefore that the question about the claimant's sexual orientation did amount to less favourable treatment and that it was made because of the claimant's sexual orientation. The complaint of direct sexual orientation discrimination in relation to this comment is made out.

151. In relation to the dismissal, the comment made by Mr Arend about the claimant's sexual orientation is a fact from which we could conclude that the constructive dismissal was discriminatory.

152. The burden of proof therefore shifts to the respondent to satisfy us that the constructive dismissal involved no discrimination whatsoever. The claimant referred to the question about her sexual orientation in her resignation letter; it was part of the treatment which led to her resignation which we have found to have been a constructive dismissal. It was not the only or perhaps even the main reason, but it was part of the picture. It is not therefore possible for us to say that the constructive dismissal of the claimant involved no discrimination whatsoever.

153. We therefore conclude that the claimant's dismissal was direct sexual orientation discrimination in addition to being unfair.

Breach of contract

154. The claimant resigned without notice in circumstances where, under the contract she signed in August 2017, she was entitled to 3 months' notice.

155. As the resignation was a constructive dismissal, this amounts to a breach of contract by the respondent in relation to notice.

B: Second claim (Forensic Access Limited's claim)

156. In light of our finding that the claimant was constructively dismissed, she did not resign in breach of contract, and the respondent's complaint of breach of contract therefore fails.

Remedy

157. We did not hear much evidence about remedy, and the parties did not address issues of remedy in detail in their submissions. The lack of evidence and submissions about remedy was understandable in light of the fact that the time allocation had been reduced from 5 days to 4 days.

158. Both parties asked us to take account of the schedules of loss and counter-schedules of loss which were in the bundle. We had not been taken through them in detail at the hearing. The schedules were detailed and there were significant discrepancies in the calculations put forward by the parties. We do not have sufficient information to enable us to make findings of fact on the issues relevant for us to determine remedy.

159. We conclude that it would be in line with the overriding objective for a further hearing to be listed for us to hear evidence and submissions on remedy (including submissions on the Acas Code of Practice on Disciplinary and Grievance Procedures) before reaching our decision on remedy.

160. The remedy hearing will be listed for one day. The parties should send their dates to avoid for the period December 2020 to June 2021.

Employment Judge Hawksworth

Date: 30 March 2020

Sent to the parties on: 14 March 2020

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For the Tribunals Office