Case Number: 2301235/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Miss R Woollard	and	Ambrosetti (UK) Ltd (now known as BCA Fleet Solutions 2 Ltd) (1) British Car Auctions (2)

Held at Ashford on 6, 7 and 8 November 2017, and in chambers 9 and 10 November 2017.

Representation		
	Claimant:	Mrs K Cheeney, Claimant's friend
	Respondents:	Mr P Crowe, solicitor

Employment Judge Wallis
Members Mr N Phillips
Mr C Wilby

RESERVED JUDGMENT

1. The Claimant was employed by the first Respondent;

2. The Claimant made two protected disclosures;

3. The Claimant was not subjected to detriments on the grounds that she made protected disclosures;

4. The reason for dismissal was not that the Claimant made protected disclosures, nor that she raised a health and safety matter;

5. The dismissal was not unfair;

6. There was no evidence of unwanted conduct related to disability;

7. The claims were accordingly unsuccessful and dismissed, for the reasons set out below.

REASONS

ISSUES

1. By a claim form presented on 29 June 2016 the Claimant claimed unfair dismissal; dismissal and detriments for making a public interest disclosure; and disability discrimination. The disabilities relied upon were COPD and depression. Initially the Respondents disputed that the Claimant was a disabled person, but following the production of an impact statement and medical information, it was conceded.

2. At a case management discussion on 20 October 2016 the Claimant confirmed that the discrimination claim was harassment, and subsequently she produced a schedule of incidents upon which she relied.

3. The issues were outlined as follows in the case management order (using the numbering in the order), and at the start of the hearing the issues were further clarified, as shown in italics. The original numbering in the order is used.

*

Disability Discrimination

1 The events the Claimant relies on for this aspect of her claim will be set out in the Schedule provided for in the above order.

Health & Safety and Public Interest Disclosure

2 It is the Claimant's case:-

2.1 She raised issues concerning health and safety relating to the paint booths on numerous occasions as set out in her claim form, including:-

2.1.1 On 27 October 2015, when she showed a video of the issue on her phone and when she also requested a referral to Occupational Health.

2.1.2 On 2 November 2015 when she made an entry in the Night Shift book.

2.1.3 On 3 November 2015 when she attended a return to work interview with HR.

2.1.4 On 18 December 2015 when interviewed by Health and Safety representatives.

2.1.5 On 13 January 2016 in a grievance.

2.1.6 In the course of grievance meetings.

2.2 Those concerns were public interest disclosures regarding a health and safety issue she reasonably believed to exist *and which she reasonably believed were in the public interest.*

2.3 She was subjected to detriments and dismissed because she raised those concerns and/or made those disclosures:-

2.3.1 Her grievance was not properly investigated and/or was not upheld.

2.3.2 She was subject to attendance procedures.

2.3.3 She was subject to disciplinary procedures.

2.3.4 She was suspended from her duties.

2.3.5 *In the alternative, pursuant to section 100 (c) (ii) of the Employment Rights Act 1996, was it not reasonably practicable for the Claimant to raise the matter with the health and safety representative or committee, and did she bring to her employer's attention by reasonable means circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health or safety;*

2.3.6 *If so, was this the reason or principal reason for the dismissal.*

Unfair Dismissal

3 It is the Claimant's case that the investigation was unreasonable in that it failed to take account of the evidence she adduced, the hearing was similarly flawed and there were no reasonable grounds on which an honest belief she was guilty of misconduct could be held;

4 *Was there a fair procedure;*

5 *Did the decision to dismiss fall within the band of reasonable responses;*

6 *If the dismissal was procedurally unfair, would a fair procedure have made a difference to the outcome (expressed as a percentage chance);*

7 *If the dismissal was unfair, was there any blameworthy conduct by the Claimant which would make it just and equitable to reduce any compensation.*

Disability Harassment claim – section 26 Equality Act 2010

8 *Did the incidents described in the Claimant's schedule take place (note: the claim was limited to incidents from 2013 when the Claimant began the relevant period of employment with the Respondent);*

9 *If so, did all or any of them amount to unwanted conduct;*

10 *If so, was such conduct related to disability;*

11 *If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect;*

Time limits – section 123 Equality Act 2010

12 *was the discrimination claim presented to the Tribunal outside the time limit;*

13 *if so, is there evidence of conduct extending over a period that would bring the claim in time; or would it be just and equitable to extend the time limit;*

Identity of employer

14 *who was the employer (the Respondents contend that it was the First Respondent, the Claimant contends it was the Second Respondent).*

*

DOCUMENTS & EVIDENCE

4. There was an agreed trial bundle prepared by the Respondent, and the Claimant produced copies of photographs that she had taken in the workplace. The Tribunal watched short videos taken by the Claimant in late 2015, demonstrating the operation of the paint booths.

5. There were written statements from the witnesses who gave evidence. The Claimant also produced a witness statement from Mr Luke Murphy who was unable to attend the hearing. We read his statement with the agreement of the Respondents.

6. On behalf of the Respondent the Tribunal heard from Ms Rebecca Herrin, HR and Health and Safety Co-ordinator at the relevant time; Mr Colin Brazier, bodyshop manager; Mr Arturs Smiltens, bodyshop operative; Mr Steve Martin, workshop manager; Mr Marc Vicary, southern regional general manager; Mr Lee Rudge, operations manager.

7. The Tribunal also heard from the Claimant Miss Rosemary Woollard.

FINDINGS OF FACT

8. The Respondent companies operate from several sites, preparing and selling cars and other vehicles. The Claimant worked at the Kingsnorth site. She prepared vehicles for the paint booths. She had a good disciplinary record and was praised for her work. She had been employed by the First Respondent in 2007; some time later became an agency worker, and then became an employee again on 2 September 2013. The claim relates to her concern that the paint booths were leaking and subjecting her and her colleagues to hazardous fumes or vapour.

9. The Claimant relied upon COPD and depression as disabilities.

10. The identity of the employer was an issue because the Claimant understood from a notice placed on the noticeboard that all staff had been transferred from the First Respondent to BCA Marketplace plc in February 2016. This was not surprising as the notice said in terms ‘There will be no change to your terms and conditions or your continuous service. But you will now be employed by BCA Marketplace PLC’.

11. The Claimant's payslips showed another company as employer, BCA Automotive.

12. However, neither of those companies was the company she named in her claim form as second Respondent. The Respondents contended that there was no TUPE transfer, that there had been a share transfer, and that all employees remained with the first Respondent, contrary to the notice. Later in the hearing, Mr Crowe told the Tribunal that the first Respondent has now changed its name to BCA Fleet Solutions 2 Ltd, and it was agreed by the parties that the title to the proceedings should reflect that change. The Tribunal was reassured by Mr Crowe that the first Respondent (or in any event the Group) would stand by its claim to be the employer and that if the claims were successful, they would be responsible for any compensation. The Tribunal found, on this basis, that the first Respondent was the employer, and references to the Respondent in this judgment are references to the first Respondent.

13. The Respondent's witnesses explained that the paint booths operate under negative pressure. The pressure is checked daily by reference to a gauge on the outside of the booth. The painter wears PPE including a breathing mask. Mr Vicary told the Tribunal that if the pressure drops, the spray gun and the air supply cease to work, alerting the painter to the problem. The Tribunal noted that the 'expert' called in by the Respondent, Mr Bowes, did not mention this factor in his minuted discussion with Ms Macey and Ms Herrin on 25 January 2016. He told them that it would not be possible to tell from inside the booth if it was not running at the correct pressure. The Tribunal found it strange that he did not mention what appeared to be a fundamental safety measure; it may mean that Mr Vicary was not entirely correct. It was also surprising that Mr Martin, the workshop manager, was not able to explain how the booths worked.

14. To continue with the description of the extraction process; the drops of paint, mist and vapour are drawn down by an extraction fan through a grating in the floor, where they are filtered and drawn into a chimney, to be dispersed into the open air.

15. On 8 October 2015 the Claimant fainted at work and was taken to hospital. She was absent from work for a few days, returning on 27 October 2015. The Tribunal accepted her evidence that at her return to work meeting on 28 October she told Mr Brazier that the paint booths were leaking. On 30 October 2015 she produced to Mr Brazier and Mr Ray, and to Ms Macey, three videos on her smartphone purporting to show a leak of spray or vapour from booth 2, taken on 27 and 30 October 2016. The Tribunal was able to view these videos at the hearing, together with the two later videos.

16. On 3 November 2015 there was a meeting between the Claimant and Ms Macey, at which Ms Herrin took notes. The Claimant made a number of detailed complaints about the way she was being treated by colleagues, and

she also referred to her belief that the paint booths were leaking and causing illness. The Tribunal found it worrying that despite the contents of the videos, which were not at that stage questioned, and the detailed allegations about conduct in the workshop, no immediate action was taken by the Respondent, except to refer the Claimant to the occupational health adviser. The Tribunal noted that work was carried out on the booths on 10 November 2015

17. The Tribunal was shown various records of tests of the paint booths. The Tribunal noted that Mr Brazier's evidence was not persuasive about the rigour with which he approached the task of regular checks. He said that he had a separate record in his diary, which had never been produced to the Claimant or the Tribunal. It appeared from the records that when he was on holiday, no checks were made. The Tribunal found that the Respondent's records did not inspire any confidence that regular checks of the booths were undertaken.

18. The Tribunal also noted the records in the trial bundle of various checks of the booths undertaken by a third party company on behalf of the Respondent, and photographs taken by the Claimant of engineers carrying out various works on paint booth door seals, catches and so on. The Tribunal found that this was an indication that occasionally remedial work was undertaken.

19. In the claim form the Claimant suggested that on 2 November 2015 she referred to the booth leak in the incident book. However, this was not in her witness statement and there was no documentary evidence of it. When giving evidence the Claimant referred to entries in the night shift book during 2013, and told the Tribunal that the book had then been taken away. Whilst the Tribunal accepted that entries had been made in 2013 about a leak, there was no supporting evidence about later entries in 2015. In addition, the Tribunal found that entries in the 2013 book demonstrated that when a leak was reported, the Respondent took remedial action.

20. On 2 November 2015 the Claimant took a further video of the booth, and on 8 December 2015 she took a video of an altercation in the workshop between Mr Smiltens and another worker.

21. The Claimant was referred to occupational health and a urine test on 17 November 2015 found 'normal result except one component shows a minor elevation of isocyanates range.' The Tribunal was told that this is a substance found in lacquer. A subsequent urine test carried out on 19 December 2015 was clear of isocyanates. In an occupational health report of 20 November 2015, a peak flow diary for four weeks was recommended, to test the Claimant's breathing, and she was given the appropriate equipment. The adviser stated 'High levels of anxiety, which she continues to report with issues at work, particularly alleged bullying at work may be impacting on her with some breathing difficulties when she is anxious. Equally, she has been a long term smoker, which could explain bouts of coughing that she has at times.' They also recommended communication about bullying, and a stress risk assessment, which was carried out.

22. The peak flow results were subsequently delayed, apparently by postal difficulties, but Ms Herrin, although giving evidence as the health and safety co-ordinator, was unable to explain the results to the Tribunal. However, the Tribunal noted that on 29 April 2016 an occupational health letter refers to the results. The first three weeks were not conclusive, and the fourth week showed 'some variation'. The Tribunal did not have the expertise to understand what this meant. The occupational health adviser recommended seeing the Claimant in clinic, but by then she had been dismissed.

23. The Tribunal also noted that an NHS consultant in respiratory medicine was also examining the Claimant during this period. His letter of 18 April 2016 says 'it is vaguely possible that the chemical exposure at work could have led to bronchiectasis although clinically and radiologically there is no evidence of that today'. On 2 June 2016 he wrote 'I am pleased to report that the CT scan …was normal with no evidence of lung cancer…This suggests that the blood that she coughed up will be simply due to a degree of bronchitis which should be appropriately treated, she does have a fair degree of emphysema and cigarettes should not be smoked in the future. I have not planned further investigations as this is most reassuring'.

24. In any event, in December 2015 the occupational health adviser considered that the Claimant was fit for work. The Tribunal noted that in a letter dated 31 August 2016, the Claimant's GP confirmed that the Claimant was diagnosed with emphysema on 11 May 2016; depression was diagnosed in April 2006.

25. In the response form the Respondent said that there was a test of the relevant booth on 17 December 2015. The Tribunal was unable to find any evidence to support that contention.

26. The Claimant was again absent from work from 30 December 2015 to 5 January 2016 with flu and on 11 January 2016 for one day when her lodger died.

27. The Claimant's case was that on 11 January 2016 she was called 'sick note' by Mr Brazier, who denied this. He initially said in evidence that he had not used that term 'on that day', but when pressed by Mrs Cheeney he said that he had 'not ever' used that term. The Claimant presented her grievance letter two days later and did not refer to that comment. The Tribunal found that the weight of evidence was against the Claimant in respect of this allegation.

28. On 13 January 2016 the Claimant presented a grievance which referred to a number of matters that she described as harassment, but did not mention the leak in the paint booth. She complained about a bumper being thrown close to her; personal belongings kept in the ladies' toilet urinated on; Mr Johnson saying he was to start a 'I hate Rose' club; and three occasions when Mr Smiltens had been aggressive towards her. She also complained about another colleague, Vlad, 'sometimes spitting on the floor where I am working'.

29. On 18 January 2016 the Claimant was invited to a number of investigation meetings, to be held on 22 January. The first meeting was to consider her grievance. The second meeting was to consider her attendance, because her last three absences had triggered the Respondent's attendance policy. The third meeting was to investigate an allegation that she had videoed an altercation in the workplace. The Claimant received five letters about these matters on the same day; two each for each of the disciplinary investigations (which could have been contained in one letter), and one in respect of the grievance. The Tribunal found that it was not surprising that she felt 'bombarded'.

30. The first two meetings took place with Mr Martin and Ms Macey from HR. The third appears not to have taken place; Mr Martin told the Tribunal that he could not remember the reason for this. The Tribunal found it inexplicable that the Respondent had sent two letters about an investigation and then nothing further happened.

31. During the grievance investigation meeting, the Claimant described the leak allegation, having been invited to do so by Ms Macey. It was not clear why this issue was not mentioned in her grievance letter, nor why she did not raise it at the meeting herself.

32. Ms Macey interviewed Mr Bowes, a supervisor from the Sandwich site, on 25 January 2016 in order to gain some understanding of the way the paint booths operated.

33. On 26 and 27 January 2016 Mr Martin with Ms Macey, who has since left the employment of the Respondent, and did not give evidence, interviewed various employees about the Claimant's grievance allegations, on several occasions. On 26 January they interviewed Mr Mills at 2.30pm, and Mr Pegollo at 2.44pm, about Mr Smiltens' conduct towards the Claimant. On 27 January they interviewed Mr Mills again at 9.30am, about the Claimant being knocked over. Mr Brazier was interviewed at 9.40am and again at 2pm on 28 January 2016.

34. Mr Taffs the cleaner was interviewed at 9.47am; he confirmed that about three years ago he had cleaned the toilets at the request of the Claimant, and that he was aware of spitting in the workshop, although he did not know who had done so. His second interview was on 27 January 2016 at 9.42am, about Mr Smiltens pushing or knocking the Claimant over; he had not seen it. Mr Pegollo was interviewed again at 10am about his knowledge of spitting.

35. It was not clear to the Tribunal why there were separate interviews of each person for each matter; it made the investigation unwieldy. Once Mr Smiltens had made his allegation, however, it was clear that it was necessary to re-interview the individuals that he named as witnesses.

36. Mr Smiltens was interviewed on 27 January 2016 at 2.12pm, and he made allegations about being asked to spray at the top of the door of the booth. Mr Hinckley was interviewed at 9.10am, 11.04am, and again at 2.35pm, on that occasion about Mr Smiltens' allegations. Mr Wilsher was interviewed at 9.35am and then again at 2.24pm, that time about Mr Smiltens' allegations.

37. Mr Smiltens told Ms Macey that his supervisor Mr Gorski, and the Claimant, had told him to spray paint towards a gap between the booth doors so that the Claimant could video it. The other witnesses did not mention this at their initial interviews, but when Mr Smiltens' allegation was put to them, Mr Wilsher recalled that he had overheard the Claimant and Mr Gorski arranging the 'leak' with Mr Smiltens. Mr Hinckley said that he was not there, but he 'knew what was going on'. He named the Claimant and Mr Gorski, once the allegations had been put to him.

38. As a result of this investigation, the Claimant was suspended on 1 February 2016. Mr Gorski had left the employment of the Respondent, although none of the witnesses could recall the date of that. The Tribunal noted that in the grievance meeting the Claimant said that he had given notice in November 2015.

39. On 2 February 2016 the Claimant received a number of written invitations to meetings on 5 February 2016. The first was an invitation to a disciplinary hearing, to be held at 3pm. The allegation was that she had staged a leak from a paint booth. The letter set out her right to be accompanied, and explained that the outcome could be dismissal. The letter enclosed copies of the witness statements obtained by the Respondent. She also received an invitation to a meeting to discuss her absences at 1.30pm.

40. In addition, she was invited to a meeting to discuss her grievance at 2.30pm. The Tribunal found it unreasonable for the Respondent to expect the Claimant to be able to prepare for three meetings on the same afternoon, with such short notice, particularly when they knew that she was suffering from stress, as set out in the risk assessment carried out on 17 December 2015. The Tribunal considered it unrealistic to expect that all three meetings, about separate and serious matters, could be contained within an afternoon.

41. The Claimant sought legal advice and her solicitor sent a letter to the Respondent pointing out the lack of preparation time. The original date for the meetings was altered as the Respondent accepted that the Claimant was not given sufficient time to prepare. By letter of 11 February 2016, the Respondent confirmed that the disciplinary hearing about the alleged leak would not take place 'at the present time, but rather focus on the issues you have raised in your grievance'.

42. On 12 February 2016 meetings were held with the Claimant and Mr Martin in respect of the grievance and the attendance. The outcome of those matters was given to the Claimant at a meeting on 19 February 2016 and by letter.

She was given an improvement notice in respect of her attendance. The letter setting out the decision was so vague, the Tribunal considered it to be ineffective. It referred to 'three instances of absence…in a rolling three month period' without giving the dates. It required the Claimant 'not to repeat this type of incident', although what 'type of incident' was unclear. Mr Martin's evidence was that he did not know whether the Respondent's policy made allowances for disability, neither was he aware that the Claimant was a disabled person. There was no evidence to suggest that the Claimant had told the Respondent that she was disabled at that point. Nevertheless, it appeared to the Tribunal that the Respondent should review this procedure, and ensure that officers tasked with implementing it were familiar with it.

43. The grievance was partly upheld. The bumper throwing incident was in 2011, the person had left, and the Respondent felt, not unreasonably, that this could not be pursued. The treatment of the Claimant's personal belongings was in 2014, the person(s) had left, and again not unreasonably the Respondent felt unable to pursue this.

44. One of the incidents involving Mr Smiltens being rude to the Claimant had been corroborated and was to be dealt with informally. The others were not upheld as the witnesses could not recall them.

45. The complaint about spitting by Vlad was upheld and informal action was taken, by way of a memo to all staff banning this practice. The 'hate club' complaint was also upheld and was to be dealt with by informal action.

46. The Tribunal found that the Respondent had dealt with the grievance in a fair manner.

47. The disciplinary hearing in respect of the allegation that a leak had been staged was held on 11 March 2016 before Mr Vicary. The letter of invitation differed in its wording from the first letter, for no apparent reason. The allegation remained the same. The Tribunal was satisfied that the Claimant was aware of the case to answer.

48. The Claimant attended unaccompanied. Having read the minutes of the meeting, the Tribunal was satisfied that Mr Vicary gave the Claimant every opportunity to put her case. He decided to adjourn to speak to three of the witnesses himself. He interviewed Mr Wilsher, Mr Hinckley and Mr Smiltens on 21 March 2016. They confirmed their previous allegations. Copies of those statements were sent to the Claimant on 1 April. It appeared from the minutes of the next meeting, although not referred to in evidence, that the Claimant telephoned Ms Herrin about the contents of those statements, because it is recorded that Mr Vicary referred to that call and gave the Claimant the opportunity to raise those points.

49. The next meeting with Mr Vicary took place on 8 April 2016. The Tribunal noted that the letter of 1 April inviting the Claimant to the meeting explained

that a decision had been made and that this was to be an outcome meeting, and enclosed the notes of the recent interviews with that letter. Arguably therefore, the decision had been made before she had the opportunity to comment on the new statements. However, the Tribunal was satisfied that the statements did not add anything new to what Mr Vicary already knew, and that in any event he gave the Claimant the opportunity at the meeting to comment on them, and he then adjourned to consider his decision.

50. The Claimant had asked for a colleague at the Sandwich site, Mr Moore, to accompany her to the outcome meeting. He did not arrive. Enquiries were made and he was still at the Sandwich site, apparently because he did not know that he was required, or had not sought permission to attend. Mr Vicary's evidence was that he asked the Claimant whether she wanted to postpone or proceed, and she decided to proceed. This exchange is not recorded in the minutes, despite the question of representation and/or accompaniment being an important part of any disciplinary meeting. The Tribunal noted that the Claimant had not said in evidence that she had declined to proceed or was in some way persuaded to proceed against her will. The Tribunal found, in the absence of any complaint, that she decided to proceed without Mr Moore.

51. Following the adjournment, Mr Vicary announced his decision to dismiss the Claimant for gross misconduct. He decided that the Claimant had staged the booth leak incident; that she had presented videos as evidence of normal operation in the booth, 'thereby misrepresenting what the video was showing' and that doing so 'endangered or potentially endangered the health and safety of others on the shop floor'. This was confirmed in a letter of 12 April 2016, which set out the decision in detail and explained that 'the only way the leak could have occurred, as captured by your footage, would have been if the paint gun was positioned at the top of the booth, which was not normal use'.

52. The Claimant appealed and an appeal hearing before Mr Rudge took place on 5 May 2016. The minutes record that she had a full opportunity to put her points. Mr Rudge sent his decision to Ms Herrin, and she prepared a decision letter which he signed. The Tribunal noted that in his note Mr Rudge suggested that 'others involved' should also be disciplined, and he wrote this on 6 May 2016, before the Claimant began the early conciliation process on 20 May 2016.

53. The appeal was dismissed by letter of 12 May 2016, which set out in some detail how the decision had been reached. The Claimant was correct when she pointed out at the Tribunal hearing that the letter was wrong to say that the only witness statements were made in March 2016. As set out above, it was clear that the original investigation resulted in a number of statements in January 2016. When asked about this, Mr Rudge said that he could not remember which statements he had read. It was disappointing that an important witness had not prepared properly for the hearing, but in any event

the Tribunal considered that it was not possible to agree with the Claimant that the statements given in March had been altered in any substantive way from those given in January.

54. Mr Smiltens attended a disciplinary hearing on 2 June 2016 in respect of his part in the incident. Mr Rudge accepted that he was placed 'under duress' by Mr Gorski, who was more senior than Mr Smiltens, and that he had 'shown remorse.' He was not dismissed but given a written warning, to remain on his file for 12 months.

SUBMISSIONS

55. On behalf of the Respondent, Mr Crowe reminded the Tribunal of the evidence and submitted that the dismissal was not unfair. He conceded that the video was a disclosure, but submitted that it was not protected because the Claimant could have had no reasonable belief that it disclosed a health and safety breach, because it was staged.

56. He submitted that none of the alleged detriments was connected to the disclosures, and neither was the dismissal.

57. Mr Crowe submitted that the Claimant was not dismissed because she had made a health and safety report. He said that all of the harassment claims were out of time, except the last one, and there was no evidence to suggest that time should be extended, nor that the incidents were connected with the disability.

58. On behalf of the Claimant, Mrs Cheeney submitted that the Claimant had a clear disciplinary record. The test on the booth should be ignored as it was not dated. Mr Brazier had called the Claimant 'sick note'. The Respondent had not carried out proper air quality tests, or risk assessments.

59. She submitted that Mr Smiltens had been treated differently from the Claimant, which was unfair. The Claimant did not want any financial gain, but an opportunity for justice.

BRIEF SUMMARY OF RELEVANT LAW

Protected Disclosure

60. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure means a qualifying disclosure as defined by Section 43B which is made by a worker in accordance with any of the Sections 43C to 43H.

61. Section 43B defines a qualifying disclosure as a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following.

    a) That a criminal offence has been committed, is being committed or is likely to be committed.

    b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

    c) That the health or safety of any individual has been, is being or is likely to be endangered.

    d) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

62. Section 43C covers disclosure to an employer or other responsible person.

63. A qualifying disclosure is made in accordance with Section 43C if the worker makes the disclosure to his employer or to another person where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer or any other matter for which a person other than his employer has legal responsibility.

64. Section 103A of the Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

65. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR38, the Employment Appeal Tribunal decided that to be a protected disclosure, there must be a disclosure of information. There is a distinction between “information” and an “allegation” for the purposes of the Act.

66. In Kilraine v London Borough of Wandsworth UKEAT/0260/15 sounded a note of caution when considering the Cavendish Munro test. Tribunals were asked to note that ‘reality and experience suggest that very often information and allegation are intertwined’.

Unfair dismissal claim

67. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.

68. In this case, the reason relied upon by the Respondent is conduct. In the case of British Home Stores v Burchell [1978] IRLR 379 it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see Post Office v Foley; Boys and Girls Welfare Society v McDonald). As far as the other two limbs of the test are concerned, these go to the question of reasonableness under section 98(4) of the Act (see Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09). So, the burden of proof is neutral in respect of the second and third questions laid down in Burchell namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.

69. In Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 it was held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss.

70. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

Harassment claim

71. Section 26 of the Equality Act 2010 provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating etc environment for B.

72. Subsection (4) provides that in considering the effect, regard should be had to the perception of the Claimant, other circumstances of the case, and whether it was reasonable for the conduct to have that effect.

Burden of Proof

73. The burden of proof in respect of a section 26 harassment claim is contained in Section 136. It provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that A contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for a Claimant to prove facts from which the Tribunal could, apart from the relevant section, conclude in the absence of an adequate explanation that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that they did not commit that act.

74. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246; Laing v Manchester City Council [2006] IRLR 748; and in Hewage v Grampian Health Board [2012] UKSC 37.

CONCLUSIONS

75. Having made the findings of fact set out above, and having considered the relevant law, the Tribunal returned to the issues in order to draw these conclusions.

76. The first issue was whether the Claimant had made protected disclosures on the dates that she relied upon. The first date was 27 October 2015 when she said she showed a video to the Respondent. In fact it was 30 October, according to her evidence, that she showed the video to HR. The next question was whether the Claimant reasonably believed that the video tended to disclose information that health and safety was being endangered, and that it was in the public interest to do so. This in turn raised the question of whether the Claimant was involved in staging a leak from the booth so that she could video it; if she was involved, there could be no reasonable belief that the information disclosed such a breach.

77. The Tribunal acknowledged that the Claimant had at all times denied any involvement in the alleged fabrication. The evidence showed that she had been ill, and she was concerned that her respiratory health problems were connected with leaks from the paint booths, in particular booth 2. There was evidence that in the past the booth had leaked on occasions; the night shift book entries and the witnesses interviewed in respect of the grievance had confirmed that. The work schedules for the booths, including replacement of seals, re-fitting doors and so on, also indicated a possibility of leaks being fixed.

78. In addition, the evidence showed that on occasions there would be a smell of hot metal and lacquer, particularly when a vehicle left the oven, which might be perceived as a leak. The Claimant said in evidence that there was often a smell, and sometimes a mist, although it had been worse in the past. She explained in evidence that her brother-in-law, a retired health and safety officer, had suggested that she obtain videos of any matters that concerned her. She therefore took her phone onto the shop floor that day; normally phones were not allowed there.

79. The Tribunal has weighed up all of those matters and balanced them against the evidence obtained by the Respondent during the grievance investigation. Mr Smiltens was quite clear that he had been told by Mr Gorski, while the Claimant was present, to spray into a hole at the top of the door. The Tribunal accepted that spraying upwards in such a way was not the normal operation of the booth. When re-interviewed, Mr Wilsher and Mr Hinckley confirmed the events. The Respondent carried out a test of the booth, on an unknown date, the results of which the Claimant confirmed in evidence she had at the disciplinary hearing. The test did not show a leak when the booth was operated normally.

80. The Tribunal concluded that the Claimant had reasonably believed that from time to time the booth leaked. However, in her desperation to ensure that the Respondent took some action, she colluded with Mr Gorski in order to ensure that there was a leak that was capable of being recorded on her phone. The video was therefore tainted by this.

81. The Tribunal concluded that in those circumstances the video was not a protected disclosure.

82. The second disclosure was said to be 2 November 2015, an entry in the night shift book, but there was no evidence of any entry in the night shift book on that date, and the Claimant had said that the book had previously been taken away. The Tribunal concluded that there was no disclosure on that date.

83. The next date relied upon was the conversation at the return to work meeting on 3 November 2015. There was no dispute that the Claimant had raised concerns about the leak at that meeting. The Tribunal was satisfied that that was a protected disclosure, in that it was a disclosure of information that the

Claimant did reasonably believe showed that health and safety was being endangered. The Tribunal was satisfied that it was not unreasonable to believe that this was in the public interest.

84. The next date relied upon was 18 December 2015 and the interview with a health and safety officer about the Claimant's stress, followed by a risk assessment. The minutes of that meeting, which was on 17 December, show that the video being discussed there was the one that the Claimant had taken of an altercation on the shop floor between two colleagues. The Tribunal found it difficult to see how that amounted to a protected disclosure.

85. The next date relied upon was 13 January 2016, the grievance letter. However, there is no mention of the paint booths in that letter. There was no protected disclosure on that date.

86. The final disclosure was said to be at the grievance meeting. The Claimant did refer to the leaks from the booth in that meeting, although only when prompted by Ms Macey. The details that she provided amounted to a protected disclosure.

87. The next issue is, accordingly, whether the Claimant was subjected to any detriments as a result of the two disclosures that the Tribunal had identified.

88. The first detriment was said to be that her grievance was not properly investigated and/or not upheld. The Tribunal was satisfied that the grievance was properly investigated. Witnesses were interviewed about all of the Claimant's concerns, where that was possible; some had already left the employment of the Respondent. The grievance was partly upheld and the Respondent took action in respect of those matters; for example, a memo was sent about spitting in the workplace. The Tribunal concluded that there was no detriment here.

89. The second detriment was said to be that the Claimant was subjected to the attendance procedure. The Tribunal concluded that she was subjected to that procedure, but the reason for that action was her attendance record, and not any protected disclosure that she had made. The Tribunal concluded that the Respondent did not handle this well. There were no trigger points set out in the Attendance Procedure and the outcome letter was vague. However, the Claimant had a poor record of attendance and the investigation began, according to the Attendance Investigation Form, on 27 October 2015, before any disclosure was made. The Tribunal concluded that any detriment here was not connected to any disclosure.

90. The third detriment was said to be subjecting the Claimant to the disciplinary procedure. The Tribunal concluded that the reason she was subjected to that procedure was that the Respondent had concerns about the veracity of the videos that she had produced; those concerns had nothing to do with the protected disclosures identified by the Tribunal.

91. The fourth detriment was said to be that the Claimant was suspended. Again, the Tribunal concluded that the reason for the suspension was that the Respondent had concerns that there had been an act of gross misconduct. It was not connected with any protected disclosure identified by the Tribunal.

92. Finally, the question arose as to whether the reason or principal reason for the dismissal of the Claimant was the protected disclosures. The Tribunal concluded that the evidence showed that the reason for the dismissal was gross misconduct, namely the production of a video purporting to show a leak from the booth, when in fact it did not show the booth in normal operation, and the consequent potential endangerment of health and safety.

93. For all of those reasons the protected disclosure claim was unsuccessful.

94. The next claim was made pursuant to section 100 (c) (ii). It was not clear to the Tribunal why the Claimant could not have raised her concerns with the health and safety representative. In any event, she did not use reasonable means to bring the matter to the attention of the Respondent by way of the video, because that video did not show the normal operation of the booth. She did use reasonable means by raising her concern in the meeting on 3 November 2015. The Tribunal concluded that doing so did not lead to the Claimant's dismissal. The reason for the dismissal was gross misconduct.

95. That claim was unsuccessful.

96. The Tribunal then considered the claim of unfair dismissal pursuant to section 98. The Claimant suggested that the investigation was unreasonable as it failed to take account of the evidence that she adduced. The Tribunal concluded that the Respondent carried out a reasonable investigation. It began with the investigation into the grievance, but once Mr Smiltens made his allegation, not unreasonably further enquiries were made. The Claimant's evidence was considered by the Respondent, and she was given the opportunity to review all of the statements and put her case. The Tribunal was satisfied that a fair procedure was followed and that it could not be said that the hearing was flawed.

97. The Tribunal concluded that Mr Vicary had a genuine belief that there had been misconduct, and that his belief was based on reasonable grounds following a reasonable investigation. The decision to dismiss was a decision that a reasonable employer could have made, given the circumstances. Once there had been an investigation that found evidence that pointed to a fabricated demonstration of a leak, caused by the abnormal operation of the booth, then there could be no doubt that trust had been damaged. The fact that Mr Smiltens was disciplined, albeit somewhat tardily, showed that the conduct was taken seriously.

98. The Tribunal cannot substitute its view of what should have happened. We have to consider what was known to the Respondent at the time of dismissal. The Tribunal could not say that no reasonable employer would have dismissed; a reasonable employer could reasonably have dismissed in those circumstances, with the evidence that was available to the Respondent.

99. The claim was unsuccessful.

100. The Tribunal considered the claim of harassment. The Claimant had referred to 15 matters in her schedule. The Respondent had accepted that the Claimant was a disabled person. The Tribunal noted the Claimant's evidence that she 'did not know that she was ill, because she had not been diagnosed'. Presumably she was referring to COPD, as depression had been diagnosed in 2006. It was difficult to see how the incidents in her schedule could be said to be related to disability. Most of them were presented outside the time limit. They were disparate acts, not related to each other, mostly by different people. Nevertheless, we considered each one.

101. The first matter was that she received 'improper attention from Mr Thrift' between 2011 and 2015. This was amended to read from 2013 to 2015, having regard to her dates of employment. The Claimant gave no evidence about this. There was no basis for finding that it was unwanted conduct related to disability.

102. The second matter was that between late 2011 and early 2013 Mr Kwaitek had thrown a bumper at her. He had left the employment of the Respondent. This was referred to in the Claimant's grievance letter, but there was no other evidence about it, and nothing to link it to disability.

103. The third matter was that her belongings were urinated on in 2014. This was in the grievance, and the Respondent was unable to take any action as the perpetrator was unknown. There was no other evidence before the Tribunal, and nothing to connect it to disability.

104. The fourth matter was that she was spat at by Mr Smiltens and Vlad in November 2015. The grievance referred to Vlad only. The grievance investigation found that it had occurred, in general terms. There was nothing to connect this to disability.

105. The fifth matter was that Mr Smiltens had been aggressive to the Claimant in November 2015. This was in the grievance and the Respondent said that informal action was taken. The evidence showed that the Claimant and Mr Smiltens had a hostile work relationship, but there was no evidence to suggest that this was connected with disability.

106. The sixth matter was that on 11 November 2015 Mr Johnson started an 'I hate Rose club'. In fact, he had said that he would, there was no evidence that he had done so. This was in the grievance and the Respondent

said that they dealt with this informally. There was no evidence to suggest that it was connected with disability.

107. The seventh matter was that Mr Smiltens called her 'bitch' in November 2015. Again, there was no evidence to suggest that it was connected with disability.

108. The eighth matter was that Mr Smiltens had pushed the Claimant in December 2015. Again, this was in the grievance and upon investigation the Respondent was not able to find any corroboration. There was no evidence that it was connected to disability.

109. The ninth matter was that Mr Brazier called the Claimant 'sick note' on 11 January 2016. As set out above, the weight of evidence was against the Claimant in respect of this allegation.

110. The tenth matter was that Mr Smiltens called the Claimant 'stupid' on 27 January 2016. There was no evidence about this in the Claimant's witness statement or at the hearing. The only similar incident was that during the grievance investigation Mr Pegallo reported that Mr Smiltens had told the Claimant that he was not stupid. There was no evidence to connect this with disability.

111. The eleventh matter was that the Claimant was 'bombarded' with letters on 18 January 2016. The Tribunal accepted that the number of letters sent to the Claimant on that day felt like a bombardment, and that the Respondent had handled the matter in an insensitive and unreasonable fashion; they sent two letters for each disciplinary investigation and one for the grievance investigation, on the same day.

112. However, there was no evidence to suggest that the Respondent's conduct related to disability.

113. The twelfth matter was that on 18 January 2016 the Claimant's attendance was questioned, whereas others with worse records were not. The Tribunal was shown no evidence about the attendance records of others to support the Claimant's contention. The Claimant had a poor record of attendance, for a variety of reasons not only related to respiratory problems or problems associated with depression. From the manner in which the Respondent conducted its administration, it appeared likely that any other employee in the Claimant's position would have received the same number of letters in respect of the attendance procedure. There was no evidence to connect this with disability.

114. The thirteenth matter was in respect of the delay in getting the peak flow test outcome to the occupation health adviser. The correspondence in the bundle shows that there were some administrative and/or postal delays. The outcome documents were said to have been sent on a number of

occasions and were finally received on 20 April 2016. Occupational health confirmed the results on 29 April 2016. Although there was a delay, there was no evidence to suggest that it was related to disability.

115. The fourteenth matter was that the Claimant was accused of staging a leak, but others were not. In fact, Mr Smiltens was disciplined after the Claimant was dismissed. There was no evidence to suggest that the disciplinary proceedings were related to disability.

116. The final matter was that witness statements were amended and there were leading questions and anomalies, on 1 April 2016. The Tribunal noted that that was the date that Mr Vicary (and not Mr Rudge, as the Claimant suggested) sent the Claimant copies of the notes of the interviews that he had undertaken. The Claimant did not specify any alleged amendments and the Tribunal could not see that the witnesses' evidence had altered. Their evidence was expanded, because different follow-up questions were asked. Those questions were not entirely neutral, but they were not unreasonable.

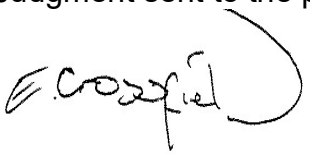
117. The claim of harassment was unsuccessful, partly because most of the claims were presented outside the time limit, and no reason was put forward for extending time, but principally because there was no evidence to show, or from which we could infer, that the conduct complained of related to disability.

SUMMARY

118. The claims were unsuccessful and accordingly dismissed. In coming to this conclusion, the Tribunal recognised that the Claimant had suffered unpleasant conduct from her work colleagues. This may have been, as she suggested, because she was the only woman working on the shop floor. It may also have been because, as she said, she carried out her work to a high standard and often did much more than was required. The Tribunal was aware that this can sometimes lead to friction in a workplace. In addition to the unpleasant conduct that she described, the Tribunal accepted that the Claimant was convinced that the paint booths were leaking, and there was some evidence that she was correct about that, in respect of various occasions in the past. In order to convince the Respondent to take the action that she believed should be taken, she took a step too far and tried to demonstrate a leak by the misuse of the paint booth. By doing so, this conduct gave the Respondent the material to dismiss her.

Employment Judge Wallis
13 November 2017

Judgment sent to the parties and entered in the Register on: 4th December 2017



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