RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss J L Smith**

Respondent: **Tesco Stores Limited**

Heard at: **East London Hearing Centre**

On: **15-17 January 2019**
(In Chambers) 12 February 2019

Before: **Employment Judge Ferguson**

Members: **Mr L Purewal**
Mrs G A Everett

Representation

Claimant: **Ms S Belgrave (counsel)**

Respondent: **Mr S Naughton (counsel)**

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The Claimant's complaint of automatic unfair dismissal fails and is dismissed.**

2. **The Claimant's complaint of ordinary unfair dismissal fails and is dismissed.**

3. **The Claimant's complaints of detriments on grounds of making protected disclosures fail and are dismissed.**

REASONS

INTRODUCTION

1. By a claim form presented on 7 March 2018, following a period of early

conciliation from 11 January to 9 February 2018, the Claimant brought complaints of unfair dismissal, automatic unfair dismissal (protected disclosure(s)) and detriments on grounds of making protected disclosure(s). The Respondent defended the claim.

2. The issues to be determined were agreed at the start of the hearing as follows:

CONSTRUCTIVE DISMISSAL

1. Was there a repudiatory breach of contract on the part of R? C asserts that R breached the implied term of trust and confidence (to include implied term to offer reasonable support).

2. C relies on the following allegations, whether taken individually or cumulatively:

a. C was bullied and undermined by her line manager, Leonie Harvey;

b. "Sending C to Coventry" (i.e. to behave as if C no longer existed) by:

i. on 15 August 2016 Miss Offord did not speak to C for several days;

ii. on 8 May 2017 Miss Offord refused to speak to the C;

iii. on 26 July 2017 C reported speaking to Charlotte Penny that Ms Offord was "being off with her again";

c. R's failure (by Leonie Harvey) to support C during her return to work ("RTW") meeting on 6 June 2017:

1. at a RTW meeting the C reported diarrhoea / stress / anxiety due to the "Maddie" situation, but no action was taken to move C to new duties;

2. referred to C's concern that Ms Harvey was "out to get her";

3. "heated" conduct reflecting a lack of support;

d. Not listening to C's concerns about health and safety;

e. Subjecting C to a disciplinary process in May 2017 in respect of allegedly reducing the cost of food for personal gain;

f. Issuing C with a first written warning on 11 May 2017;

g. Subjecting C to a disciplinary process in May 2017 in respect of alleged bullying and intimidating behaviour;

h. Issuing C with a verbal warning on 9 June 2017;

i. R's failure to support C during her sickness absence between October and December 2017 by:

i. *not contacting C regarding her welfare from 18 October 2017 to 16 November 2017;*

ii. *after having notified Lisa Bartle that she could not attend a Wellness meeting not making any enquiry as to the source of the C's ill health and anxiety;*

iii. *expected C to attend a meeting with her line manager whom R knew was part of the cause of her ill health;*

iv. *not attempting to obtain a medical report;*

v. *not offering to investigate C's complaints about Ms Harvey on 5 December 2017;*

3. *If there was a breach of contract, was such breach "fundamental"?*

4. *If so, did C waive the breach and / or affirm her contract of employment?*

5. *If not, did C resign in response to the breach or for some other reason?*

PROTECTED DISCLOSURE (s43B ERA)

6. *Did C disclose information which, in her reasonable belief, tended to show that a criminal offence (breach of health and safety rules) had been committed, was being committed, or was likely to be committed; that a person had failed, was failing or was likely to fail to comply with any legal obligation (duties under the Health and Safety Act) to which she was subject; and / or that the health or safety of any individual had been, was being, or was likely to be endangered? C relies on the following:*

   a. *6 February 2017 (photograph to LH);*

   b. *22 March 2017 (photograph to LH);*

   c. *25 April 2017 (photograph to LH);*

   d. *8 June 2017 (photograph to LH);*

   e. *8 June 2017 (conversation with "Chris" (?));*

   f. *15 June 2017 (conversation with James Kelly);*

   g. *27 July 2017 (photograph to LH);*

   h. *27 July 2017 (conversation with Kraig Weeks);*

   i. *3 August 2017 (photograph to LH);*

   j. *9 August 2017 (photograph to LH);*

k. 10 August 2017 (photograph to LH);

l. 30 August 2017 (photograph to LH);

m. 31 August 2017 (photograph to LH);

n. 5 September 2017 (photograph to LH);

o. 6 September 2017 (photograph to LH);

p. 6 September 2017 (photograph to LH);

q. 7 September 2017 (photograph to LH);

r. 13 September 2017 (photograph to LH);

s. 14 September 2017 (photograph to LH);

t. 15 September 2017 (conversation to Lisa Bartle);

u. 21 September 2017 (photograph to LH);

v. 21 September 2017 (conversation with James Kelly);

w. 26 September 2017 (photograph to LH);

x. 27 September 2017 (conversation with James Kelly);

y. 13 October 2017 (photograph to Mark Smaldon);

z. 13 October 2017 (photograph to LH)

aa. 7 September 2017;

bb. the Claimant says on other dates she has shown photographs of dirty counters and lack of cleaning to managers on the early shift:

i. Tudor Petergell (former manager);

ii. Lisa Bartle (HR Manager);

iii. Gareth Robinson (Manager);

iv. Mark Smaldon (Store Manager);

v. Charlotte Penny (Manager);

vi. Kraig Weeks (Night Manager).

7. If qualifying disclosures were made, were these made in the public interest?

8. *If so, did C make the disclosure(s) to her employer or another responsible person within the meaning of s43C ERA?*

UNLAWFUL DETRIMENT – S47B(1) ERA

9. *If C made a protected disclosure, was she subjected to any detriment by any act or deliberate failure to act by R (or by another worker of R's in the course of that other worker's employment or by an agent of R's with R's authority) on the ground that C had made a protected disclosure? C relies on the following allegations:*

    a. *Subjecting C to a disciplinary process in May 2017 in respect of allegedly reducing the cost of food for personal gain;*

    b. *Issuing C with a first written warning on 11 May 2017;*

    c. *Subjecting C to a disciplinary process in May 2017 in respect of alleged bullying and intimidating behaviour;*

    d. *Issuing C with a verbal warning on 9 June 2017;*

    e. *R's failure to support C during her sickness absence between October and December 2017 by (as above):*

        i. *not contacting C regarding her welfare from 18 October 2017 to 16 November 2017;*

        ii. *after having notified Lisa Bartle that she could not attend a Wellness meeting not making any enquiry as to the source of the C's ill health and anxiety;*

        iii. *expected C to attend a meeting with her line manager whom R knew was part of the cause of her ill health;*

        iv. *not attempting to obtain a medical report;*

        v. *not offering to investigate C's complaints about Ms Harvey on 5 December 2017;*

UNFAIR DISMISSAL

'Automatic' – s103A ERA

10. *If C was constructively dismissed and made a protected disclosure, was the reason (or, if more than one, the principal reason) for R's conduct leading to C's resignation that she had made a protected disclosure?*

'Ordinary'

11. *If not, and if C was constructively dismissed, was there a potentially fair reason for the conduct of R that led to her constructive dismissal?*

12. If so, was that conduct reasonable or unreasonable?

JURISDICTION

Protected disclosure (s48(3) ERA)

13. Was the claim (which was presented on 7 March 2018) presented within three months of the act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them?

14. If not, was it reasonably practicable for the complaint to be presented before the end of that period of three months?

15. If not, was the claim presented within such further period as the Tribunal considers reasonable?

3. We heard evidence from the Claimant. On behalf of the Respondent we heard from Charlotte Penney, Alison Wealls, James Kelly, Mark Smaldon and Leonie Harvey.

THE LAW

4. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
>
> …
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

5. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

5.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

5.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

5.3 The employee must leave in response to the breach.

5.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221; *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823)

6. An employer owes an implied duty of trust and confidence to its employees. The

terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

7. Where an alleged breach of the implied obligation of trust and confidence consists of a series of acts on the part of the employer, the tribunal should consider whether the final act which led the employee to resign is capable of amounting to a "last straw". It might not always be unreasonable, still less blameworthy, but its essential quality is that it is an act in a series whose cumulative effect was to amount to a breach of the implied term. It must not be utterly trivial and an entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. (*Omilaju v Waltham Forest LBC* [2005] ICR 481).

8. *Omilaju* was affirmed in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. In the latter case Underhill LJ held at paragraph 55:

> "I am concerned that the foregoing paragraphs [summarising the authorities on 'last straw'] may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (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?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)
>
> (5) Did the employee resign in response (or partly in response) to that breach?

9. As regards protected disclosures, the ERA provides, so far as relevant:

> **43A Meaning of "protected disclosure"**
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by

section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

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

…

43C Disclosure to employer or other responsible person

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

47B Protected disclosures

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

…

103A Protected disclosure

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

10. As to s.43B, the definition has both a subjective and an objective element: the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1), and that belief must be reasonable. A belief may be reasonable even if it is wrong (*Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026).

11. Pursuant to s.48(2) ERA, on a complaint under s.47B it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The employer

must prove on the balance of probabilities that the protected act did not materially influence the employer's treatment of the employee (*Fecitt v NHS Manchester* [2012] ICR 372).

12. Under s.103A ERA the burden of proving the reason or principal reason for dismissal is on the employer.

13. The time limit for presenting a complaint to the Employment Tribunal, in respect of each of the causes of action above, is three months less one day from the date of dismissal or the act complained of, as extended by the early conciliation provisions. As to detriment on grounds of making protected disclosures, if the act or failure is part of a series of similar acts or failures, time runs from the last act (s.48(3)(a) ERA). S.48(4) ERA further provides that where the act extends over a period, time runs from the last day of that period.

14. The EAT confirmed in *Royal Mail Group Ltd v Jhuti* UKEAT/0020/16 that in order for a detriment claim to be in time, the act from which time begins to run must be actionable under s.47B, i.e. the act or deliberate failure must be proved to have been done on the ground that the worker made a protected disclosure. Simler J stated (at para 43):

> "In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s 48(3)(a) ERA. Acts relied on but on which the claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes."

In *Jhuti*, as the latest proven act or failure occurred over six months prior to the last date that could be relied upon as giving rise to a detriment under s.47B, the claim was held to be out of time.

15. In respect of unfair dismissal and detriment on grounds of protected disclosures, the Tribunal has a discretion to extend the time limit where the Claimant can show that it was not reasonably practicable to present the claim in time and the claim was presented within a further reasonable period.

FACTS

16. The Claimant commenced employment with the Respondent at its Sudbury store on 31 March 2007. In around 2013 she began working on the "counters", which includes the delicatessen counter and the hot chicken counter. Initially her job title was Team Leader, but the role was made redundant in 2015 and she continued to work on the counters as a Customer Assistant thereafter. For a period in 2016 the counter staff did not have a direct manager.

17. In December 2016 Leonie Harvey was appointed as Counters Manager. The Claimant was concerned about being managed by Ms Harvey because they had worked together previously and the Claimant felt they had a difficult relationship. The Claimant's evidence to the Tribunal was that she had found being managed by Ms Harvey difficult because she is "erratic, suffers from mood swings and can be difficult to speak to if she is not in the mood to speak". The Claimant said she felt she was being

bullied and undermined by Ms Harvey, but also said that they had become close at one point. The relationship "fluctuated over the years".

18. It is not in dispute that the Claimant expressed her concerns to Mark Smaldon, the Store Manager, and that she was visibly upset in the store when she heard about Ms Harvey's appointment. The Claimant's evidence was that she felt "shocked and dismayed" by the news, and that after Ms Harvey took over the role she was "even more difficult and resentful" towards the Claimant than she had been previously.

19. After Ms Harvey had taken over, The Claimant complained that she was having to clean up after a colleague, Maddie Offord, who had joined the team during 2016. The complaint was that Ms Offord was not following the proper processes for shutting down the chicken counter, so it was dirty when the Claimant arrived for her shift and she had to do extra cleaning. She had raised this with the previous manager, Tudor Pettengal, and the Fresh Food Lead Manager, James Kelly, in the period when there was no manager. Mr Kelly accepted in his evidence to the Tribunal that the Claimant had raised legitimate issues about hygiene in the counters. He said it was a training issue and he suggested the Claimant "buddy up" with Ms Offord. He also asked Ms Harvey to deal with it as a priority when she took over in Dec 2016. He could not specifically remember whether he followed this up with Ms Harvey.

20. It is not in dispute that the Claimant sent photographs to Ms Harvey's mobile phone on 16 February 2017 and 22 March 2017. The first showed greasy smears on the trays where the cooked chicken is kept. The second showed the "probe" used to cook the chickens, which appeared not to have been cleaned. There were numerous other photographs in the bundle of allegedly unhygienic practices, but in light of our conclusions below it is unnecessary to make factual findings about each of them.

21. Ms Harvey's evidence to the Tribunal was that after receiving the photographs in February she discovered that Ms Offord had attempted to clean the area but had not changed the water or used enough cleaning product. She spoke to Ms Offord about this and retrained her in cleaning, as well as "buddying" her with another Customer Assistant. Ms Harvey said that Ms Offord's error was not a food safety issue and that it was corrected quickly.

22. It is convenient to explain at this juncture that Ms Harvey gave her evidence to the Tribunal by video link. The Respondent had applied in advance of the final hearing for arrangements to be made on the basis that Ms Harvey was suffering from anxiety and it would be detrimental to her health to attend the Tribunal. Medical evidence was supplied and the duty Employment Judge granted the application. The video link was set up and Ms Harvey started her evidence at the start of the third day of the hearing. The Respondent's solicitor, Ms Hennessey, was present in the room with Ms Harvey and was responsible for the connection at their end. Unfortunately, there were some problems with the equipment which meant that the connection was not sufficiently reliable to complete Ms Harvey's evidence by that means. When the Tribunal was discussing the matter with the parties, at one point Ms Harvey offered to come to the Tribunal to complete her evidence. After a short adjournment, however, the Respondent's representative confirmed that that would not be possible and instead a "Face Time" connection was established using the Respondent's own equipment to complete Ms Harvey's evidence. During this second portion of the evidence the video connection was lost for a time, but the audio was unaffected and all agreed to continue

with audio only. When the video connection resumed the Tribunal asked Ms Hennessey to confirm who else was in the room. She said that, in addition to herself, her trainee and two members of the Respondent's HR department were present. Since it was only Ms Harvey who could be seen on the Face Time call, it was agreed that the non-lawyers should leave the room. Ms Harvey then completed her evidence.

23. On 22 April 2017 Ms Offord contacted Ms Harvey by text asking to speak to her. They had a meeting at which Ms Offord raised complaints about the Claimant, specifically that the Claimant had patted her on the shoulder from behind, which Ms Offord was upset about because she does not like physical contact and had previously mentioned this to the Claimant. Ms Harvey suggested a "clear the air" meeting with the Claimant, but Ms Offord did not want to attend such a meeting and asked for the matter to be investigated formally. She provided a statement to Ms Harvey which described a number of occasions on which Ms Offord and the Claimant had come into conflict at work, including two occasions when the Claimant had allegedly "had a go" at Ms Offord about her shut-downs. On another occasion the Claimant had allegedly undone Ms Offord's apron without her noticing. Describing the incident which had led to the complaint, she said that on 19 April 2017 the Claimant "had a go" at her in front of a customer and patted her on the back "very hard".

24. Ms Harvey decided that because she was the line manager for both Ms Offord and the Claimant it was not appropriate for her to conduct the investigation. She asked another manager, Jamie Nicholls, to investigate the matter.

25. On 2 May Ms Harvey wrote to the Claimant inviting her to an investigation meeting on 4 May, to be conducted by Mr Nicholls. The letter said the purpose of the meeting was to discuss allegations of "Dignity at work". The Claimant's evidence was that initially she had no idea what this was about. Ms Harvey met the Claimant on 3 May and, having obtained Ms Offord's consent, gave her a copy of Ms Offord's complaint. The Claimant responded that it was "made up".

26. The Claimant attended the investigation meeting on 4 May, accompanied by a union representative, Mel Edwards. The Claimant said that she and Ms Offord only see each other when Ms Offord is working overtime because they do not work the same shifts. She said she felt like she was walking on egg-shells around Ms Offord, and mentioned that she had raised issues about Ms Offord's shut-downs. She did not recall the apron incident, but said this was something she does "to joke around". She did not mean to make Ms Offord feel bad. She admitted leaving a "squiggle" on the counter to see if it was cleaned after Ms Offord's shut-down. As to the shoulder/back incident, the Claimant denied "having a go" at Ms Offord in front of a customer, but said there had been a discussion about the Claimant's "whites" (uniform) and the Claimant "tapped her on the shoulder like a see you later". The Claimant said she understood how Ms Offord may feel and she was sorry she felt that way. She never wanted to make her feel uncomfortable or singled out.

27. In the meantime, on 28 April, Ms Harvey heard from another Customer Assistant that on 20 April the Claimant had reduced the price of two items and reserved them for herself in the "serve-over" counter. This was potentially contrary to the Respondent's procedures because staff are not allowed to reserve items intended for customer sale to themselves. There was also a possibility that the Claimant had reduced the items

wrongly and for her own personal gain. Standard procedure is for hot chicken to be reduced four hours after first being put out for sale.

28. Ms Harvey's evidence was that when she heard about this incident she was unsure about pursuing it because the Claimant was already facing an investigation in relation to Ms Offord's complaint. Having discussed the matter with Mr Kelly, however, she decided that she had to investigate.

29. By letter dated 5 May 2017 Ms Harvey invited the Claimant to an investigation meeting on 9 May. The letter said that the purpose was to discuss allegations of "Reducing items for your own purchase".

30. The Claimant attended the investigation meeting on 9 May, which was chaired by Ms Harvey. The Claimant was again accompanied by her union representative, Mel Edwards. By this time Ms Harvey had obtained a receipt showing that the Claimant had purchased two reduced price chickens at 2.08pm and a counter log showing that the standard chickens had been cooked at 10am. The Claimant's shift ended at 2pm. The Claimant said that she reduced the chickens at 2pm as she was finishing her shift and put them in the "grab and go" section (accessible to customers). She then decided to buy two, so she put them into the "serve-over" (requiring a customer assistant to hand them over). She claimed they were still on show to the public. She went to clock out and then came back to pick them up. At the end of the meeting the Claimant said,

> "I didn't reduce the produce for my own gain. I did it as it's my job to do so. The mistake was to then think to myself I'll have 2 of those and put them by till I'd clocked out and I'm sorry for that."

31. Ms Harvey accepted in her evidence that by the end of the investigation meeting it was clear that the Claimant had reduced the price of the chickens at the correct time.

32. By letter dated 10 May Ms Harvey wrote to the Claimant inviting her to attend a disciplinary hearing the following day. The letter said that the purpose of the hearing was to discuss allegations of:

> "Reducing items for personal gain.
> Items purchased by yourself placed in an inaccessible area to the customer then retrieved by yourself, after [end of shift? *(illegible)*]"

33. Ms Harvey was cross-examined at some length about why she had kept the "personal gain" charge, despite the fact that it was clear after the investigatory hearing that the Claimant had followed the correct procedure for reducing the price of the chickens. Initially she maintained that there could have been a personal gain element, but eventually she agreed that the personal gain charge should not have been pursued. The only live issue was the Claimant's alleged breach of procedure in reserving items intended for customer sale.

34. The disciplinary hearing took place on 11 May, chaired by Alison Wealls. The Claimant was represented by Ms Edwards. The Claimant was very emotional at the start of the hearing and said that she had been suffering from panic attacks, but confirmed she was happy to continue with the hearing. The Claimant suggested that Ms Harvey had pressured the person who reported the Claimant's conduct to make a

statement. Ms Wealls said that was a separate issue that the Claimant could take up outside the hearing. As to the conduct alleged, the Claimant said she understood that putting the chickens in the serve-over was a "rash wrong decision" and she was extremely sorry. She maintained there was no reduction for personal gain. Ms Wealls concluded that the Claimant should be given a first written warning for failure to follow company policy. She expressly confirmed that there was no finding the Claimant had acted for her own gain. A letter confirming the outcome was sent the same day, stating that the warning would expire after 13 weeks and informing the Claimant of her right to appeal. She did not appeal. The Claimant said in her evidence to the Tribunal that she was advised by her union representative that the penalty could be increased if she appealed.

35. On 17 May the Claimant was invited to a reconvened investigation meeting into the complaint by Ms Offord. The meeting took place on 18 May 2017, again conducted by Mr Nicholls. Ms Edwards said at the start of the meeting that the Claimant was very drained and had not slept properly for two weeks, but agreed to continue with the meeting. Mr Nicholls explained that he had spoken to a number of other staff members about the Claimant's behaviour and reported that one had described the Claimant as being "quite loud" and "can be quite passive aggressive". The Claimant became very upset at this point. After a short break she confirmed she was happy to continue. The Claimant said she did not realise there had been a problem with Ms Offord, but if there was a problem she was willing to work on it, and sit down and talk with her. She said they had worked together since the complaint and everything was okay. The Claimant did not admit to hitting or shouting, but said she took on board that her "personality needs adjustment at work so as not to get in this position again". Mr Nicholls concluded that the Claimant's behaviour "goes against dignity at work" and therefore the matter would proceed to a disciplinary hearing.

36. A few days after the meeting the Claimant wrote a long letter to Mark Smaldon, the Store Manager, complaining about the way the investigation into Ms Offord's complaint had been handled. In particular she alleged that Ms Harvey could have been behind it and complained generally about the difficulty of working with Ms Harvey. She said it was an insult to be accused of bullying and that she had been suffering from panic attacks as a result. The Claimant gave Mr Smaldon the letter together with a folder containing all the paperwork relating to the disciplinary process.

37. On 23 May 2017 Mr Smaldon sent a text message to the Claimant, saying that he had read the covering letter, but that was as far as he could go because he was not part of the investigatory or disciplinary team so could not advise on the best course of action. He said he had to remain impartial.

38. The disciplinary hearing was due to take place on 26 May, but had to be adjourned because Ms Edwards was not available. It was rescheduled for 9 June 2017.

39. In the meantime, on 30 May, the Claimant was off sick for one day. Due to previous absences Ms Harvey convened an attendance review meeting on 6 June. The Claimant claims that Ms Harvey's demeanour was extremely hostile in this meeting. The Claimant said in the meeting that she believed her illness (stomach problems) was stress related because of the investigation into Ms Offord's complaint. She complained of lack of support from Ms Harvey. Ms Harvey said that she could not take sides, and

that she felt wary of the Claimant, noting that the "notes" say that the Claimant alleged Ms Harvey had orchestrated this. The Claimant denied saying that. The Claimant declined an offer to be referred to occupational health. Ms Harvey also asked if the Claimant wanted her to "get her off counters", but the Claimant said no. Ms Harvey denied the accusation of failing to support the Claimant and said that the Claimant should talk to her if there was anything else she needed.

40. The disciplinary hearing took place on 9 June 2017, conducted by Charlotte Penney. Ms Edwards, representing the Claimant, asked Ms Penney to take into account clashes of personality and the fact that the Claimant had been with the company for 10 years without this kind of issue. She said the Claimant's "intentions around ways of working, routines and passion in job role are totally genuine, but unfortunately have run away with her somewhat where this person is concerned". Any upset caused because of it was not intentional. Ms Penney concluded as follows:

> "Based on probabilities more likely your behaviours have been perceived as intimidating and I do feel that there should be a consequence for that, I do feel as well you are aware of it (that's a good thing). So I feel a verbal warning is appropriate in this case. I do also feel this is enough for you as a live warning on your file."

The Claimant thanked Ms Penney "for listening and being fair".

41. Ms Penney accepted in her oral evidence that she did not reach any conclusions as to specific alleged conduct on the part of the Claimant, but said that she believed on balance that the back/shoulder incident had occurred and it was unwanted contact, and that the Claimant had raised her voice on one occasion. She said she did not consider it relevant how the tension between the Claimant and Ms Offord had arisen.

42. The outcome was confirmed in writing and the Claimant was informed that the warning would expire after 8 weeks. She was informed of her right to appeal. The Claimant did not appeal.

43. It is not in dispute that on 27 July 2017 the Claimant showed or sent to Ms Harvey further photographs appearing to show poor cleaning of the chicken counter.

44. On 18 August 2017 the Claimant had a discussion with Mr Smaldon in "Costa", a coffee shop inside the store. The Claimant said she was unhappy about the way the disciplinary processes had been conducted and again complained about Ms Harvey. The Claimant's evidence was that Mr Smaldon said he would "look into it" and after the meeting she believed he was going to investigate the matter "on the quiet". Mr Smaldon denied offering to investigate and said that the Claimant had not raised anything specific that was capable of investigation. After the meeting the Claimant sent Mr Smaldon a text message as follows:

> "Hey thanks for the costa ☺ about time you bought me one!! ;) and thank you for listening. Your photos are lovely, I'm glad you had a nice time away in a fab place with your special lady ☺ see you after my hols xx
> Ps… please be 'Mark SUBTLE Smaldon' with what I've said, I don't wanna return to a lynch mob!! [weapons emojis] ha ha!!"

45. We consider that that text message gives some support to the Claimant's evidence that Mr Smaldon said he would investigate the matter, but given the informal nature of the meeting, the lack of any response to the text message from Mr Smaldon and the fact that the Claimant had complained to him about Ms Harvey before, we do not consider there was a reasonable basis for the Claimant to believe that any action was likely to result. Our impression of Mr Smaldon was that he was liable to say what the Claimant wanted to hear, but avoided any actual involvement in the matters she raised with him.

46. It is not in dispute that the Claimant never raised any formal grievance about Ms Harvey.

47. The Respondent accepts that the Claimant raised further issues about her colleagues' standards of cleaning with Ms Harvey in the early part of September 2017. The Claimant sent further photographs and mentioned both Ms Offord and another colleague.

48. In early October 2017 the Claimant had a performance review with Ms Harvey. Ms Harvey's report states that the Claimant "has expertise across all four counters and that is very much valued". Under the heading "my coaching for you", it states:

> "You and I are very similar as when want to communicate something I'm brimming. I have taken the feedback, to stop, think, watch the persons body language and take into account how my words will be taken. I value your feedback on shut downs just ask that you do it constructively. If too many people get involved it can lead to a very negative vibe."

49. The Claimant wrote the following on the report:

> "I feel that I am an honest efficient character that has had passion for her job for 10 years. As from May 2017 I was accused of intimidation etc by a member of staff. I don't think anyone realises how much this has affected me as I will still say to this day that I didn't do it and it has affected my passion and my spark for my job and Tesco's. I really feel like Tesco's let me down on this occasion. I was referred to as being dominant which in their opinion is fare enough!! but I see it as efficient, doing things properly and in the correct manor… getting the job done!!
>
> Within Tesco, I just want everyone to be nice to each other, respect each other, not have favourites and treat people fair across the board. I'm 46 years old now and I'm fed up with gossip, back stabbing and such alike.. I feel like I'm just getting my head down and doing my job (as I should). I'm not very happy at the moment, because of what has happened in May. That's me being really honest!!"

50. On or around 14 October 2017 the Claimant commenced a period of sick leave. On that date she had a text message exchange with Ms Harvey as follows:

> "C: Hi, got Doctors at 11:30 xxx thank you
>
> H: Excellent x hope you feel better soon x

C: Thank you xx I'll let you know outcome

H: [14:33] How did you get on, you ok?

C: Health all ok, I had 4 panic attacks in the 6 weeks of the "Maddy" [Ms Offord] investigation, (with the chicken thing thrown in the middle of that too) these attacks have carried on since, things trigger them.. I talked to the doctor about it all weeks ago and again today to this doctor, I've had quite a few at work that I have talked to a member of staff about, dealt with them and gone back on the shop floor.
The doctor today done lots of tests, then listened to me about previous panic attacks and what started them off and why, she was a great doctor, she said something triggered it this morning and being tired, didn't help. She's referred me to a councillor to talk about it all and make sense of the injustice of it all… as I DID NOT DO IT. It's caused me so much grief and pain since, like I said in the review, I don't think any of you realise how it's affected me. Such untruths and exaggerations.
Thank you for helping this morning, I'll be back Tuesday, will I have to ring in? I didn't have any break, don't wanna lose more money xx

H: Am glad there isn't anything underlying and the doctor sounds like she /he has the right course of action for you. Rest up sweetie and see you Tuesday, will take this as your call.x

C: Ok thank you x"

51. The Claimant did not return to work the following Tuesday and remained signed off by her doctor with stress/ anxiety at work for the remainder of her employment with the Respondent.

52. On 16 November Ms Harvey wrote to the Claimant inviting her to a wellness meeting with herself and Lisa Bartle (HR) on 21 November. The letter said that the aim of the meeting was

> "for us to understand what impact your health condition is having or could have on your ability to work and whether it would be appropriate to make a referral to Fit for Work or Occupational Health (with your verbal consent). We would also like to understand whether there are any reasonable adjustments or support we can consider to help you return to work.
>
> This is an informal meeting, however if you prefer you're able to have someone with you for moral support. This can be a family member, work colleague or authorised Trade Union Representative."

53. On 20 November the Claimant contacted Ms Bartle by Facebook Messenger saying that she could not attend the meeting because she had a meeting with a counsellor at the same time. She also said that the letter caused her "major anxiety all day, to the point where I had to take a tablet that I've been prescribed". Ms Bartle replied saying,

> "Sorry to hear you are still not well. The letter is a process so Lou [Ms Harvey] has done the right thing in sending it, however if you can't make tomorrow that is ok. Just let me know when you can come in so we can have a catch up to understand how we can support you."

54. In the ensuing message exchange the Claimant asked for the meeting to be only with Ms Bartle, or with Ms Bartle and Mr Smaldon. Ms Bartle then arranged a meeting between the Claimant, herself and Mr Smaldon on 5 December 2017. There was some lack of clarity as to the purpose of the meeting. Mr Smaldon's evidence was that he did not know what the meeting was going to be about.

55. The meeting between the Claimant, Ms Bartle and Mr Smaldon took place on 5 December 2017. During the meeting the Claimant handed over a resignation letter. It read:

> "Dear Lisa
>
> This is a letter to hand in my weeks notice as of 6/12/17.
>
> My reasons for leaving are –
>
> I feel that I have been let down majorly and totally betrayed because of the investigation and outcome of the Maddie Offord situation.
>
> I also find it very difficult to work with my present manager Leonie Harvey for various reasons that I am happy to discuss if need be.
>
> Thank you."

56. The Claimant then told Ms Bartle and Mr Smaldon about various things that she had been unhappy about, mainly relating to her relationship with Ms Harvey. In her oral evidence the Claimant said that she told Mr Smaldon about Ms Harvey's moods and that she felt intimidated by her. She mentioned the state of the chicken counters and how she felt that the investigation into Ms Offord's complaint was "a complete sham". She also mentioned another occasion from long before when Ms Harvey had been very angry with her. The Claimant said she was very emotional in the meeting.

CONCLUSIONS

57. On 22 January 2019, during the period between the final hearing and the Tribunal's deliberation day, the Claimant's solicitors wrote to the Tribunal to register the Claimant's concern that two members of the Respondent's HR department were present in the room with Ms Harvey while she was giving her evidence. The letter states:

> "The Tribunal panel may recall that when Miss Harvey initially began to give her evidence, she appeared to be somewhat faltering and broke down in tears on several occasions. After the adjournment, once it because clear that there were other people present in the room, the Tribunal rightly asked for them to leave the room when she was giving evidence. Thereafter, we noticed a marked improvement in Miss Harvey's ability to give evidence in an assertive

> manner. The Claimant considers that this hindered counsel's attempt to cross examine Miss Harvey. The Claimant also noted that despite the Respondent's representative advising the Tribunal that Miss Harvey was unfit to attend the tribunal and required a video link, Miss Harvey volunteered to attend at the Tribunal, when the video link was not operating at an optimum level once the Respondent's HR Managers left the room.
>
> The Claimant is concerned that the presence of Tesco's HR personnel may have had an influence on the manner in which Miss Harvey presented her evidence, and thought it only right for this concern to be brought to the Employment Tribunal's attention…"

58. We are unsure what the Claimant's representatives are suggesting. We note that they have not alleged that anyone interfered with Ms Harvey's evidence, and they have not asked the Tribunal to take any particular action in response to the "concern". When the application to give evidence by video link was granted, no specific instructions were given as to the manner in which it should take place and nothing was said about other people being present. It occurred to us after the video link had switched to Face Time and the visual connection was lost for a time that we could not know whether anyone else was in the room, hence the matter being raised and everyone agreeing that it would be better if only Ms Harvey and her solicitor (and, presumably, her trainee) were in the room. No suggestion was made by the Claimant at the time that there had been any interference with the evidence. We had no concerns about that and we remain unconcerned about it. There are many reasons why Ms Harvey might have given her evidence in a more "assertive manner" later in cross-examination. There is no basis to suspect that anything improper occurred, or to give Ms Harvey's evidence any less weight than we would if it had been given in person, in the normal way.

59. As for the suggestion that Ms Harvey could have given evidence in person, we do not consider it necessary or appropriate to explore that issue. The application was granted on the basis of medical evidence and in any event we do not see that any tactical advantage could have been gained by the Respondent making the application on a false basis (if that is what is suggested). It was not put to Ms Harvey in cross-examination that the application had been made on a false basis.

<u>Unfair dismissal</u>

60. The first issue to consider is whether the Claimant was constructively dismissed. In closing submissions Ms Belgrave on behalf of the Claimant said that she relied on the all of the matters in paragraph 2 of the agreed list of issues as constituting a breach of the implied term of trust and confidence, culminating in the "last straw" of Ms Harvey inviting the Claimant to the wellness meeting. That act is described in the agreed list of issues as follows: "[the Respondent] expected C to attend a meeting with her line manager whom R knew was part of the cause of her ill health".

61. In accordance with the guidance in *Kaur*, we must consider the following in respect of the alleged "last straw":

61.1 Has the Claimant affirmed the contract since that act?

61.2 If not, was that act (or omission) by itself a repudiatory breach of contract?

61.3 If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)

61.4 Did the Claimant resign in response (or partly in response) to that breach?

62. The Respondent did not argue that the Claimant affirmed the contract after the invitation to the wellness meeting and there would no basis for any such argument. The invitation was on 16 November. The Claimant was off sick at the time and resigned only three weeks later. As to the nature of Ms Harvey's act in sending the letter, it would be absurd to argue that it constituted a repudiatory breach of contract by itself and Ms Belgrave did not advance such an argument.

63. It was explained in *Omilaju* that a last straw need not, viewed in isolation, be unreasonable or blameworthy, but if it is "utterly trivial" or "entirely innocuous", then it is not capable of contributing to a series of acts that cumulatively amounts to a breach of the implied term. We consider that Ms Harvey's letter is properly described as "entirely innocuous". The Claimant had not submitted any grievance against Ms Harvey and there is no contemporaneous evidence of any animosity between them. On the contrary, the text message exchange of 14 October is friendly and, on the part of Ms Harvey, supportive. There is nothing to suggest that Ms Harvey or anyone else knew or believed that Ms Harvey was "part of the cause" of the Claimant's ill-health. The highest the Claimant can put it is that she had made an informal complaint about Ms Harvey to Mr Smaldon in Costa in August and she believed he was looking into it "on the quiet". We have already found that we do not accept the Claimant had any reasonable basis to conclude that anything was likely to come of that discussion, but even if she did, there is certainly nothing to suggest that Ms Harvey knew of the complaint.

64. Ms Harvey was obviously aware, from the performance review in October and the text exchange, that the Claimant still felt a deep sense of injustice about the disciplinary process relating to Ms Offord's complaint, but Ms Harvey's evidence, which we accept on the basis that it is consistent with the contemporaneous documents, was that she did not realise the Claimant was so upset that she might resign. Nor was it evident that the Claimant was particularly upset with Ms Harvey, as opposed to Ms Offord or those who had conducted the disciplinary process. We accept that the Claimant's sense of injustice was genuinely and strongly felt, but it placed Ms Harvey and the Respondent generally in a difficult position. The Claimant had been given the lowest sanction available, a verbal warning, which had long since expired. She did not appeal and did not submit any grievance in relation to any other member of staff. The Claimant had previously declined an offer to be moved to a different department, and Ms Harvey's evidence was that that was something that could have been discussed at the wellness meeting if it had gone ahead. As to the personal relationship between the Claimant and Ms Harvey, we accept that it had its ups and downs. Ms Harvey said during cross-examination that she always had the impression that the Claimant "hated"

her, partly because of rumours she heard about what the Claimant had said she was told by a "medium" she visits. That is strong language, which we fully acknowledge does not suggest a healthy working relationship, but we note that despite this they managed to work together for nearly a year after Ms Harvey took over the management of the counters. The Claimant has given no specific examples of any poor treatment she received from Ms Harvey. We accept Ms Harvey's evidence that she was sad to see the Claimant go because she was very experienced and good at her job.

65. Against that background, we are satisfied that the act that is said to have prompted the Claimant's resignation, the alleged lack of support while she was off sick from 14 October and in particular the invitation to the wellness meeting on 16 November, was not capable of contributing to a breach of the implied term. There was no reason for Ms Harvey not to follow normal procedure when a member of her team has been off sick for a substantial period of time, and that is what she did. The content of the letter was measured and supportive. We also note that in the subsequent correspondence between the Claimant and Ms Bartle the Claimant said that she did not want a meeting with Ms Harvey, but did not explain why and it was not evident that she felt it was inappropriate for Ms Harvey even to have suggested it.

66. Following the guidance in *Kaur*, it is therefore unnecessary to examine the earlier conduct relied upon by the Claimant. For completeness, however, and noting that the Claimant specifically referred to the Offord investigation in her resignation letter, we have also considered whether the Respondent's conduct in relation to either of the disciplinary proceedings could be said to have breached the implied term. While we accept that there were some flaws, for example failing to specify the conduct alleged or found in relation to Ms Offord, other than by reference to Ms Offord's written complaint, and wrongly maintaining the "personal gain" charge after the investigation meeting in the "chicken" case, we consider that these were down to the inexperience of the managers concerned, and their failure to take advice from HR. There is no evidence of any conspiracy or deliberate attempt to target the Claimant. It was not unreasonable for the Respondent to investigate both matters, and its conduct could not be said to be "calculated or likely to destroy" the relationship of confidence and trust between the Claimant and the Respondent. Even if the finding of a breach of the dignity at work policy in the Offord case was unreasonable, there is no basis to suggest that it was not Ms Penney's genuinely held belief, and in circumstances where the Claimant was given the lowest possible penalty and did not appeal, it does not come close to the threshold for breach of the implied term. Further any in any event the Claimant must be said to have affirmed the contract, having continued in work for a further six months after the second disciplinary hearing.

67. The Claimant was not constructively dismissed and her claim for unfair dismissal, whether ordinary or automatic, therefore fails.

<u>Detriments on grounds of making protected disclosure(s)</u>

68. The alleged detriments relied upon by the Claimant are set out at paragraph 9 of the agreed list of issues. The Claimant having commenced early conciliation on 11 January 2018, the claim is in principle out of time in respect of any act that took place before 12 October 2017. The only complaint that is in time is that of the Respondent's alleged "failure to support C during her sickness absence between October and

December 2017". Pursuant to the guidance in *Jhuti*, the Claimant can only rely on a series of similar acts or failures if the act from which time begins to run is an unlawful detriment, done on the ground that the worker made a protected disclosure. It is therefore appropriate to consider the only in-time allegation first.

69. The specific failings are set out in the agreed list of issues as follows:

i. not contacting C regarding her welfare from 18 October 2017 to 16 November 2017;

ii. after having notified Lisa Bartle that she could not attend a Wellness meeting not making any enquiry as to the source of the C's ill health and anxiety;

iii. expected C to attend a meeting with her line manager whom R knew was part of the cause of her ill health;

iv. not attempting to obtain a medical report;

v. not offering to investigate C's complaints about Ms Harvey on 5 December 2017;

70. As to the alleged lack of contact, we do not accept that this constituted a detriment to the Claimant. It can be difficult for an employer in this situation to know how much contact is wanted or needed. The text exchange with Ms Harvey shows that general sympathy and support had been offered to the Claimant. The Claimant continued to send fit notes from her GP, and when her sickness absence had lasted a month she was invited to a wellness meeting. The Respondent did not act contrary to its absence policy and there is no basis to find that the Claimant suffered a detriment.

71. The allegation at (ii) implies that it should have been obvious from the correspondence with Ms Bartle that Ms Harvey was "the source of the Claimant's ill health and anxiety", or at least that there was a need to ask further questions before the meeting took place. That is not supported by the evidence. The Claimant initially said that she could not attend the meeting because it clashed with another appointment. There would have been no basis for Ms Bartle to make any further enquiry at that stage. It is true that the Claimant later said she did not want to have a meeting with Ms Harvey, but Ms Bartle simply agreed for the meeting to take place with Mr Smaldon instead and any enquiry as to the Claimant's reasons for not having a meeting with Ms Harvey could have taken place, and indeed did so, at the meeting. Again, we do not consider that the Claimant suffered any detriment in this respect.

72. We have addressed (iii) at some length above. There was no reason for Ms Harvey not to follow the normal procedure and simply inviting the Claimant to a wellness meeting did not amount to a detriment.

73. As to (iv), we are not clear what the Claimant says the Respondent should have done. It was expressly said in the letter of 16 November that a referral to Occupational Health was one of the matters that would be considered at a wellness meeting. The Claimant never asked for a medical report. There is no basis to find that the Respondent should have taken that course, contrary to its ordinary procedures, before the meeting took place. The Claimant suffered no detriment in this respect.

74. Finally, the Claimant alleges a failure to offer to investigate her complaints against Ms Harvey made during the meeting on 5 December. The Claimant had already handed over her resignation letter and the context of her complaints appears to have been that she was seeking to explain the reasons for resigning. She did not ask for an investigation or submit a grievance, and it is unclear how such an investigation could have benefitted her after she had left the Respondent. We consider this allegation to be unclear and do not accept that it amounted to a detriment.

75. Looking at the Respondent's conduct in general during the Claimant's period of sickness absence from 14 October onwards, it took no decisions that were adverse to the Claimant and the only action it did take, inviting her to the wellness meeting, was supportive and pursuant to its normal procedures.

76. Further, we find that there was nothing to suggest the Respondent's actions at this stage were motivated to any degree by the alleged protected disclosures.

77. The only in-time detriment complaint therefore fails, so the earlier complaints are out of time. The Claimant did not argue for an extension and in any event we do not consider there would be any basis to find it was not reasonably practicable to bring a claim within three months of 9 June, the latest of the alleged detriments. The Claimant was at work during that time and had access to the advice of her union. We consider it significant that the Claimant never alleged that any of the Respondent's actions were motivated by the "protected disclosures" until these proceedings.

78. Furthermore, we would not have accepted that either of the disciplinary procedures – the commencement of them or the outcomes – were motivated by protected disclosures. Arguably Ms Harvey did not need to treat the complaint from Ms Offord as a formal matter under the dignity at work policy, but she did attempt to set up a "clear the air" meeting and once Ms Offord said she wanted the matter dealt with formally it was not unreasonable to refer it for an investigation. There is simply no evidence that she formed any negative view of the Claimant, or bore any grudge against her, based on the hygiene issues that the Claimant had raised. The decision to pursue the chicken investigation and the outcome of it do not give rise to any concerns about an ulterior motive given that the Claimant admitted breaching the Respondent's procedures by reserving the chickens for herself.

79. The detriment complaints therefore also fail and are dismissed.

Employment Judge Ferguson

5 March 2019