



EMPLOYMENT TRIBUNALS

Claimant: Miss Tracey Kimberley

Respondent: Centre for Alternative Technology Charity Limited

Heard at: Aberystwyth **On:** 16, 17 and 18 July 2018

Before: Employment Judge S J Williams
Members:
L Bishop
C Peel

Representation:
Claimant: In person
Respondent: Mr B Frew (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:

- (i) The claimant was not dismissed for an impermissible, automatically unfair reason;
- (ii) The claimant did not make protected disclosures; further the claimant's claim in respect of the alleged protective disclosure made in March 2016 was presented out of time;
- (iii) The claimant did not suffer a detriment on any of the bases alleged;
- (iv) The claimant's claims are therefore dismissed.

REASONS

1. By a claim form presented on 26 May 2017 the Claimant made five claims arising out of the termination of her employment by the Respondent, one

claim of detriment and a claim of sex discrimination. On the 12 September 2017 Employment Judge Davies granted the Claimant's application to amend her claim so as to add two further claims of detriment, and dismissed her claim of sex discrimination on withdrawal. The amendments to the Claimant's claim are set out on pages 36 to 37 of the bundle before the Tribunal and the Respondent's response, amended by leave of Employment Judge Davies, is set out at pages 41 to 47 of the bundle.

2. In summary, the claims now before the Tribunal are as follows:

Dismissal

- (i) Dismissal for making a protected disclosure;
- (ii) Automatic unfair dismissal for reasons connected with asserting a statutory right;
- (iii) Dismissal for reasons connected with rights under the Working Time Regulations 1998;
- (iv) Automatic unfair dismissal for a health and safety reason;
- (v) Dismissal contrary to Regulation 7 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000;

Detriment

- (vi) Being subjected to a detriment on the grounds that she alleged that the Respondent had infringed the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000;
- (vii) Being subjected to a detriment on the grounds that she refused to comply with a requirement imposed by the Respondent in contravention of the Working Time Regulations 1998 and refused to forego her rights to annual leave under those Regulations.;
- (viii) Being subjected to a detriment for making a protected disclosure regarding a breach of her rights to annual leave pursuant to the 1998 Regulations.

3. In her response to the Respondent's request for further information (page 32) the Claimant set out her belief that she had made two protected disclosures. Firstly, on a date in or around mid-March 2016 the Claimant complained to Gemma King that she had been unable to take her holidays during the holiday year and that she had been told by Mr Ramsay, the respondent's CEO, that she could only take holiday on her non-working days. She also complained that she had been told that these days should be "written off". The Claimant further states that she made a second protected disclosure on 2 February 2017 to Denise Taylor, the

Respondent's HR Manager. On that occasion the Claimant's complaints were in identical terms to the detriments set out at paragraph 4 (i-iv) below.

4. Following the first disclosure, the claimant alleges that she was made subject to the detriment of not being allowed to take her annual leave in the year ending March 2016, being paid in lieu of those holidays and being subjected to more stringent requirements regarding the taking of annual leave, namely
 - (i) Not to take any more holidays to the end of that holiday year on 31 March 2017
 - (ii) Any annual leave that I wished to take for the 12 months from 1 April [year not specified] would have to be agreed in advance at the beginning of the holiday year
 - (iii) Not to take more than a week's holiday at any time apart from Christmas, and
 - (iv) Give one month's notice for any holiday, even one day.

Following the second disclosure the claimant alleges that she was subjected to detriments in identical terms to those at (i) to (iv) above. The detriments alleged under the Regulations of 1998 and 2000 are expressed in like terms.

5. The Respondent contends that the Claimant was dismissed for reasons relating to her conduct, more particularly set out in a letter to the Claimant dated 8 March 2017 (page 149). The Respondent denies that the reasons put forward by the Claimant form any part of the reasons for her dismissal, and further denies the Claimant's claims of detriment.
6. The Claimant adduced the evidence of Susan Bayliss and tendered the statements of Professor Valentine, Gemma King, Lucinda Sewel and John Whitelegg. The Claimant did not produce a witness statement but elected to rely on the contents of her claim form and the other documents referred to above. For the Respondent Mr Frew adduced the evidence of Adrian Ramsay, Michael Taylor and Denise Taylor. The Tribunal received an agreed bundle of documents containing pages 1 to 280. Mr Frew submitted written closing submissions to which he added orally. The Claimant made oral closing submissions.

The Facts

7. The Respondent is a charity primarily devoted to sustainable technologies and development. It has a board of trustees who meet approximately four

- times annually and the day-to-day running of the organisation is in the hands of the Chief Executive, Mr Ramsay. It employs of the order of 29 full-time and 59 part-time employees as well as some on zero-hours contracts. The Claimant was employed on 3 March 2015 as personal assistant to the Chief Executive and the Board. She was given a statement of terms and conditions which she signed on 4 March 2015 and a job description.
8. The Claimant was engaged to work 24 hours per week spread, initially, over five days and latterly over three days, Tuesday to Thursday. For a period from approximately July 2015 to January 2016 the Claimant worked full-time hours in order to assist in covering the work of two members of staff who had left.
 9. The Claimant was entitled to six weeks' annual holiday which, in her case, equated to 18 days. The Respondent's holiday year runs from 1 April to 31 March.
 10. In the early months of the Claimant's employment the Respondent was going through considerable organisational change and the Claimant had to get up to speed with unfamiliar systems. In that period Mr Ramsay agreed that the Claimant might work additional hours which she would recover by taking time off in lieu of payment (TOIL) later on. Because the Claimant had commenced employment near the end of a holiday year, Mr Ramsay also agreed that she could carry forward those additional hours and take TOIL in the following year.
 11. By the time of the Claimant's review on the 10 June 2015 it was noted that substantial TOIL had built up in the first 3 months as a result of the Claimant's learning the role and dealing with backlogs of work. It was agreed that TOIL accumulated from March to May 2015 should be taken gradually during the rest of the holiday year and that, from June onwards, it should be managed within month by taking days off as appropriate. The question of the Claimant's need to accommodate her communication style to the Respondent's culture was also touched on; she had worked in the commercial sector before taking employment with the respondent.
 12. The Claimant continued to work additional hours and, accordingly, the amount of TOIL owing to her continued to increase. Her time sheets each month were signed off by Mr Ramsay who was therefore fully aware that the Claimant's TOIL was increasing, and not decreasing as planned. Whilst the Claimant was not proactive in managing her hours so as to reduce her TOIL efficiently, the greater fault for this continuing build-up of TOIL must lie with Mr Ramsay. He was the Claimant's line manager and routinely signed off her time sheets so as to authorise payment. He could

- see perfectly well that with very few exceptions the Claimant worked well in excess of her contracted hours each month during the period June 2015 to March 2016. He was the person who allocated duties to the Claimant. Mr Ramsay acknowledged in evidence that he too was guilty of not managing the Claimant's hours efficiently. We accept entirely that during this period Mr Ramsay had a challenging task and was concentrating, as he put it, on the bigger picture. That, however, does not justify the shifting of blame entirely onto the Claimant for the continued failure to manage downwards her outstanding TOIL.
13. The practice of the Respondent's payroll department was to treat any time off taken by the Claimant in the first instance as TOIL; only when TOIL had been exhausted would time off be treated as annual leave. It follows therefore that the time off taken by the Claimant in that first full year to March 2016 was all treated as TOIL. Accordingly she took none of her 6 weeks' annual leave.
 14. At the Claimant's six-monthly review – which actually took place on 10 February 2016, some 11 months after she had started – Mr Ramsay expressed himself very happy with the Claimant's work and both felt that the Claimant's job fitted into the 3 day week to which she had by then reverted. Mr Ramsay said that as a one-off the Claimant's outstanding TOIL would be paid for by year end with further TOIL to be taken by the end of the following month. He said that the Claimant's TOIL and holiday was to be discussed separately soon.
 15. Mr Ramsay's statement in evidence that he “made it clear to the Claimant during a number of discussions that she should manage her holiday and time off in lieu entitlement properly to avoid a similar situation arising at the end of the 2016-2017 holiday year”, and Mr Frew's submission that “regrettably, the Claimant continued to accumulate time off in lieu days and when she did take time off she sought to have those days as time off in lieu rather than as annual leave”, do not adequately acknowledge the fact that the problem was one in which Mr Ramsay, as the Claimant's line manager, was entirely complicit. It was in his power and prerogative to authorise the Claimant's extra hours, or not.
 16. Gemma King, who was the respondent's HR manager at the time, recalls the Claimant talking informally to her about her accrual of TOIL and her inability to take annual leave. Ms King recalls the Claimant coming back to her office in tears following a dispute with Mr Ramsay regarding the treatment of her TOIL. She recalls the Claimant telling her that it had been suggested that the Claimant write off both her TOIL and annual leave. Importantly, the Claimant alleges that Mr Ramsay in that meeting told her that she could take annual leave only on non-working days. If true, that would be a startling proposition, especially to the ears of an HR manager.

It is noteworthy, however, that Gemma King does not mention that this suggestion was relayed to her by the Claimant.

17. The Claimant's evidence was that she understood that Gemma King had raised her complaint with Mr Ramsay. However, Gemma King's statement records "the matter was not formally discussed with me and I am unaware of the arrangement that followed". Mr Ramsay denies that Gemma King raised any issues with him in relation to the Claimant.
18. There is therefore no direct evidence upon which we can find that Gemma King relayed to Mr Ramsay the Claimant's concerns about her TOIL and annual leave. Gemma King does not say that she did, and refers to an informal discussion with her being unaware of any follow-up. Mr Ramsay denies that she did. Our finding is that the Claimant's understanding is incorrect and that Gemma King did not relay the Claimant's concerns to Mr Ramsay.
19. In the result, the problem was resolved by agreement between the Claimant and Mr Ramsay that she should be paid for 219.5 hours of TOIL and her full entitlement of 18 days' untaken annual leave. Surprisingly, the Respondent appears to have thought that payment in lieu of untaken annual leave was an appropriate course. The Claimant did not object to this course of action and, importantly, had not made any specific requests for annual leave during the year 2015/16. There is therefore no basis for a finding she was refused annual leave. We do not accept that Mr Ramsay said that the Claimant's TOIL or her annual leave would have to be written off. At that late stage in the holiday year, it was impossible for the Claimant to take off over 200 hours in lieu of payment for hours worked. For its part, the Respondent did not wish those hours to be carried forward into the next year, thus perpetuating the problem. The only practical way in which the account could be brought into balance was by paying the Claimant for those hours. With her agreement, that is what happened. Whilst payment in lieu of annual leave is contrary to the provisions of the Working Time Regulations 1998, it was not something imposed on the Claimant against her will. She had not made a request for annual leave and had not been refused.
20. We should observe that Mr Frew misunderstood the Claimant's case when he identified her alleged public interest disclosure with an email exchange between the Claimant and Miss King on 25 March 2016, shortly after Miss King had left the Respondent's employment. It is clear from the Claimant's evidence and from Miss King's statement that the Claimant's contention is that she made her disclosure to Miss King in the office after a meeting with Mr Ramsay, and therefore before Gemma King left.

21. We do not accept that Mr Ramsay told the Claimant that she could take her holidays only on non-working days. The absence of any reference to such a complaint in Gemma King's statement as well as the inherent unlikelihood of the proposition, satisfies us that that was not said. The Claimant conspicuously failed to repeat that contention in clear terms when she was cross examined.
22. The total amount paid to the Claimant, in two tranches in March and April 2016, was £3,115.62. The Claimant was unhappy at what she considered to be the unfavourable tax treatment of that sum.
23. It was not disputed in evidence that during the Claimant's first year and into the first part of her second year at the Respondent the Claimant's performance of her role was, at least, satisfactory and her relationship with Mr Ramsay had given no serious cause for complaint. The review carried out on the 10 February 2016 supports that position.
24. On the 1 July 2016 the Claimant obtained from her General Practitioner a letter confirming that she had been suffering from depressed mood for over six months and was currently being treated with anti-depressant medication. The Claimant's evidence was that this illness was a matter of some embarrassment to her which she did not wish to discuss widely. She said that she gave a copy of the letter to Lucinda Sewell who had in 2016 taken on the role of Interim HR Administrator, replacing Gemma King, and asked Ms Sewell to speak to Mr Ramsay about the matter. Ms Sewell's statement makes no reference to receiving the GP's letter, and Mr Ramsay adamantly denied any knowledge of it or of the Claimant's medical condition. Denise Taylor, who took over the role of HR Manager on 12 September 2016, said that there was no copy of the GP's letter in the Claimant's file or elsewhere. She also was unaware of the letter or the Claimant's condition. We were satisfied that this letter from the Claimant's GP – if it was received by Ms Sewell – never came to the attention of Denise Taylor or Mr Ramsay. There was also no evidence from the Claimant that she followed up the matter with Ms Sewell to ascertain, for example, whether the letter had been passed to Mr Ramsay and, if so, with what result.
25. One of the first things Denise Taylor did when she took over the role of HR manager on 12 September 2016 was to tackle the long-standing problem of TOIL, which was not unique to the Claimant. By the end of July 2016 the Claimant had accumulated 27.7 hours of TOIL whereas at least five other staff members had higher, and in some cases much higher, totals. In essence, Denise Taylor replaced the problematic TOIL system with a flexi-time system. Over the ensuing months this seems to have alleviated the problem very considerably.

26. Mr Ramsay stated that at the Respondent's October 2016 board meeting the Claimant overstepped her role, intervened inappropriately on two agenda items, was dismissive of comments made by trustees and attempted to shut down discussion on a matter. She also challenged the trustees' intention to divide future agendas into open and reserved items. Mr Michael Taylor, Chairman of the Respondent's Board of Trustees, gave little direct evidence about this matter save to say that he and Mr Ramsay both observed the Claimant had intervened at the last board meeting inappropriately. Professor Valentine, whose statement was tendered on behalf of the Claimant, was the board member with whom the Claimant was discussing matters and he, notably, makes no critical reference at all to the Claimant's behaviour. Susan Bayliss, another trustee, was also present and said that she did not recognise the description given by Mr Ramsay. She recalled the conversation between the Claimant and Professor Valentine and thought that there was no overstepping by the Claimant of her role and that she was not dismissive of trustees' comments.
27. This was the first of a number of causes of dissatisfaction with the Claimant's performance and attitude which Mr Ramsay reported to Mr Taylor in mid-November 2016. He also referred to the Claimant's attitude and behaviour towards colleagues, her attempts to avoid being managed by for example spending work time on personal matters, taking time out of the office without permission, taking on major tasks outside her role without permission and then at times not having sufficient time for her core responsibilities. The major examples of which we heard were the Claimant's agreement to support a colleague who was being prosecuted for a criminal matter and initially seeking to count time spent at court with the colleague as work time, and taking on the role of responding to an environmental health report critical of the Respondent's catering facilities.
28. Mr Ramsay met the Claimant on the 24 November 2016 and discussed these matters of concern and, additionally, the hours of TOIL still being accumulated by the Claimant. Mr Ramsay suggested that she would be paid for these additional hours at the year-end but from the 1 April 2017 she would be expected to follow the new flexi-time policy introduced by Denise Taylor. The Claimant is recorded as having said that she took on board the points made.
29. The Claimant said that she did not specifically recall that meeting, but we are satisfied that it did take place. It is supported by brief notes made by Mr Ramsay near the time which he subsequently typed and elaborated. He also told Mr Taylor that he intended to hold such a meeting.
30. Mr Ramsay spoke to Mr Taylor about the Claimant again on the 15 December when he said that a number of issues persisted; particularly

- that the Claimant had taken a day off at short notice which resulted in him, Mr Ramsay, having to collate and distribute papers for the December board meeting. Mr Ramsay told Mr Taylor that he intended to wait until after the Christmas break to see whether the Claimant's behaviour improved, a course of action supported by Mr Taylor. Mr Ramsay said that the question of dismissing the Claimant was in his mind at this stage and that he told Mr Taylor so. Mr Taylor, however, does not specifically support that.
31. By agreement the Claimant took 3 weeks' away from work over the Christmas period which she deducted from her TOIL account on her January time sheet. Mr Ramsay amended the time sheet so as to designate the last 3 days of that leave as annual leave instead of TOIL, saying in evidence that he believed that otherwise the Claimant would have gone into "negative TOIL".
 32. The Claimant had suggested to Denise Taylor in late 2016 that she might possibly invoice the Respondent through a company for the amount of holiday and time off in lieu outstanding at the end of the holiday year. When Ms Taylor suggested this to Mr Ramsay he rejected the idea, believing that it would amount to tax evasion. Mr Ramsay considered that the problems he saw in the Claimant's behaviour persisted following her return in January in that the Claimant was doing the minimum required on pieces of work and had stopped proactively seeking to support him with administrative work. He had also received complaints from the Head of Development concerning how the Claimant had spoken to her and to another staff member in a condescending manner. Mr Ramsay saw this as a continuation of the problem of the Claimant's communication style.
 33. The Claimant and Mr Ramsay discussed matters on the 2 February 2017. At that stage her TOIL had been reduced to some 2 hours but she still had 15 days' accrued annual leave. Mr Ramsay suggested that the Claimant should consider taking at least some annual leave before the end of March but she said that she had no holidays planned at that stage before the end of the holiday year. She made no application for leave in the period to the end of March. Mr Ramsay had already in November asked the Claimant to give a month's notice for annual leave in excess of 1 day.
 34. Following her meeting with Mr Ramsay the Claimant met Denise Taylor the same day and complained that she was being treated unfairly in relation to what Mr Ramsay was asking, and that no-one else had to give one month's notice of holiday. Ms Taylor said that the Claimant was extremely upset that her January time sheet had been amended by Mr Ramsay; she was angry about it, and Ms Taylor was aware that the Claimant had discussed the possibility of resignation with colleagues in the office. The Claimant also stressed in particular to Denise Taylor that

she was unhappy at Mr Ramsay's implication that she was seeking to evade tax.

35. On the 3 February Ms Taylor told Mr Ramsay about the Claimant's complaints and made some suggestions about the future management of the Claimant's annual leave and Mr Ramsay appeared open to these suggestions. Surprisingly, Ms Taylor's proposals again included paying the Claimant for two weeks of her accrued annual leave. It was Ms Taylor's observation that the Claimant did not appear to have any particular urgent wish to take holidays because of her domestic commitments and the fact that she did not go away for holidays. Ms Taylor also advised Mr Ramsay to be more explicit and insist that the Claimant take her holidays.
36. The Claimant stated that the question of her resignation arose because she had stated to those present in the office that Mr Ramsay wanted her to resign. Those present asked her not to and she said she wouldn't do so until after Mr Ramsay's paternity leave in February 2017 in any case. Denise Taylor reported to Mr Ramsay that the Claimant had suggested she was considering resigning. Mr Ramsay saw this as a threat and thought the associated negative attitude could undermine the morale of other staff.
37. On the 3 February 2017 Mr Ramsay spoke again to Mr Michael Taylor stating that he was of the view that the situation was untenable and that he needed to terminate the Claimant's employment. He had taken legal advice that day on how to handle the matter and had been advised that he could do so with immediate effect given that the Claimant had not acquired two years' service and therefore did not enjoy protection from unfair dismissal. Mr Ramsay foresaw that delay would mean that the Claimant would acquire such protection and the Respondent would have to go through a time-consuming performance management process. On advice Mr Ramsay recorded his reasons for dismissing the Claimant as follows:
 - (i) Not seeking line management approval when needed, e.g. announcing days off at very short notice without asking for approval; using work time to support a fellow staff member with a personal issue.
 - (ii) Lack of willingness to take direction, e.g. arguing with board members during meetings trying to get out of implementing certain decisions which create work for her.
 - (iii) Negative attitude towards other staff, e.g. being consistently critical of several members of staff in front of colleagues; being overly domineering in asking staff members to carry out work.

38. On the 6 February Mr Ramsay informed Denise Taylor of his intention to dismiss the Claimant the following day. On 7 February Denise Taylor accompanied the Claimant to a meeting room where she was summarily dismissed and handed a letter confirming that fact. No reasons were given to the Claimant at that stage.
39. Despite the fact that the Respondent quite consciously did not enter into any disciplinary procedure with the Claimant, in response to the Claimant's letter of appeal dated the 10 February 2017 Denise Taylor replied by letter of the 8 March 2017 setting out 'non-exhaustive examples' of the Claimant's attitude and lack of willingness to be managed which were said to be the reason for her dismissal.
40. We heard evidence that following the Claimant's dismissal the Board of Trustees was extremely unhappy with what had transpired. Mr Michael Taylor had not communicated to his board any of the matters imparted to him by Mr Ramsay. Acting alone, Mr Michael Taylor had said that he would support Mr Ramsay's decision and actions. When the board was seized of the matter it established a panel of three to investigate and report on what had gone on. The panel's report was extremely critical both of Mr Ramsay and of Mr Michael Taylor, and there was even a suggestion of a vote of no confidence in Mr Ramsay. The board did not proceed that far when Mr Taylor said that in that event he too would resign. The board was in particular critical of the fact that it had been kept in the dark and that Mr Ramsay, acting unilaterally, had decided not to give the Claimant the benefit of the Respondent's disciplinary procedure. In the result two trustees, Susan Bayliss and Professor Tim Valentine, resigned as a direct result.
41. Evidence touching on the reason for the Claimant's dismissal was given by Denise Taylor who said that she remembered thinking in December 2016 – when she had worked for the Respondent for 2 months – that the Claimant and Mr Ramsay did not get along and that the Claimant's employment wouldn't work out. Susan Bayliss, who was a member of the board's investigative panel said that it was clear to the panel that there had been a breakdown in the relationship between the Claimant and Mr Ramsay, although it was difficult to pinpoint the date that happened. She concluded from hearing what Mr Ramsay had to say in interview that he felt threatened by the Claimant's considerable experience and lacked the people skills to resolve the situation in an appropriate way.

The Law

42. The Employment Rights Act 1996 provides

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

45A Working time cases

- (1) A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker
- (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
 - (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations.

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.

100 Health and Safety Cases

- (1) 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 -
- (c) being an employee at a place where –
 - (i) there was no such representative or safety committee...
he brought to his employer’s attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

101A Working Time Cases

- (1) 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 –
- (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
 - (b) refused (or proposed to refuse) to forego a right conferred on him by those Regulations.

104 Assertion of Statutory Right

(1) 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 –

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(4) The following are relevant statutory rights for the purposes of this section –

(d) the rights conferred by the Working Time Regulations 1998.

43. The Working Time Regulations 1998 provide rights concerning the taking of annual leave contained in Regulations 13 – 16 upon which the Claimant relies without further particularisation.

44. The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2008 provide

7 Unfair dismissal and the right not to be subjected to detriment

(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part X of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are –

(a) that the worker has –

(v) alleged that the employer had infringed these Regulations.

Discussion and Conclusions

45. The Claimant alleges that she made two protected disclosures: Firstly, in conversation with Gemma King in or around mid-March 2016; secondly, in conversation with Denise Taylor on the 2 February 2017.

46. On the first occasion, the Claimant alleges that she complained to Gemma King that she had been unable to take her holidays during the holiday year and that she had been told by Mr Ramsay that she could only take holiday on her non-working days. She also complained that he had told her that these days should be written off.

47. In relation to the second occasion, the Claimant alleges that she complained to Denise Taylor that Mr Ramsay had told her that

- (i) She would not be able to take any more holidays to the end of that holiday year on the 31 March 2017 (that would leave her with 15 days' untaken holiday),
- (ii) Any annual leave that she wished to take for the 12 months from the 1 April [2017] would have to be agreed in advance at the beginning of the holiday year,
- (iii) She could not take more than a week's holiday at any time apart from Christmas, and that
- (iv) She would be required to give a month's notice for any holiday, even for one day.

48. Whilst we will look in greater detail below at the Claimant's allegations of detriment, there is no doubt that the central mischief about which the Claimant complains is her dismissal. If she had not been dismissed she would not have been in the tribunal at all. It is equally obvious from much of the evidence given by the Claimant and the tenor of her cross examination of the respondents' witnesses that her principal concern – shared by Susan Bayliss and Professor Valentine – is that she was not dealt with fairly. There is force in Mr Frew's submission that at its heart the Claimant's complaint is one of ordinary unfair dismissal which, because of her lack of two years' service, she has been forced to present in a different guise. Each of the five complaints of unfair dismissal brought by the Claimant depends upon a finding that the impermissible reason referred to in each case was "the reason (or, if more than one, the principal reason) for the dismissal". If the Claimant was dismissed for any other reason, however weak, unsatisfactory to the claimant or the trustees or unfair that reason might be, then the claims related to dismissal must fail. It is therefore that issue which we propose to tackle first.

49. There is no doubt on the evidence we heard that there had been a good deal of discussion, and some disagreement from time to time, between the Claimant and Mr Ramsay concerning the amount of TOIL she accumulated. The problem was most acute in her first year, ending March 2016, but the issue at that time was resolved by agreement in circumstances to which we will return below. We are quite satisfied that events which culminated in March 2016 played no part in the Claimant's dismissal 11 months later in February 2017.

50. By February 2017, largely due to the introduction by Denise Taylor of a flexi-time system, the Claimant's accumulation of TOIL had been reduced from 27.70 hours in July 2016 to approximately 2 hours. After Mr

Ramsay's amendment of her January time sheet, the Claimant still had 15 days' untaken annual leave. Denise Taylor put forward to Mr Ramsay proposals which went some way to resolve that problem, by permitting the Claimant to take some holiday in March, by allowing her to carry forward some holiday to the following year and by paying her for some holiday. Denise Taylor had the impression, and Mr Ramsay confirmed, that he was open to those proposals. We accept that that was the position. Thus, in our judgment, neither the Claimant's accumulation of TOIL nor her outstanding annual leave entitlement in February 2017 provide persuasive reasons for her dismissal. Clearly something happened between the 2 February 2017, when Mr Ramsay was asking the Claimant about her holiday intentions for the following year, and the 3 February 2017 when he took advice and communicated to Mr Taylor his intention to dismiss the Claimant. The only thing which we know from the evidence before us which happened in the interim is that Denise Taylor spoke to Mr Ramsay on the morning of the 3 February. In addition to conveying to him the Claimant's unhappiness at the way Mr Ramsay proposed to deal with her outstanding annual leave, Denise Taylor also conveyed three other things. She told Mr Ramsay that the Claimant was extremely upset that he had amended her January time sheet; she told him that the Claimant particularly stressed that she was unhappy at Mr Ramsay's implication that she was seeking to evade tax by her suggestion that she invoice for the outstanding sums; and she told him that the Claimant had been overheard talking about resignation.

51. We were unable to elicit from the Claimant a satisfactory explanation for why Mr Ramsay's amendment of her time sheet made her upset and angry. Rightly or wrongly, three days which she had taken off were being redesignated annual leave instead of TOIL, but there was no suggestion that she would lose any days. We could not share the Claimant's objection to the suggestion that her proposal to invoice the respondent for the hours owed to her, if adopted, would have amounted to tax evasion. The sums in question represented either payment for hours worked or payment in lieu of untaken annual leave; in either case they were sums due under her contract of employment and were plainly and obviously subject to ordinary income tax. We entirely understand the wish of anyone to minimise by legitimate means their tax liability but to suggest that an employee invoice for the gross sum of their wages is not a legitimate means and is plainly an attempt to evade tax. Mr Ramsay was about to depart on paternity leave commencing the 10 February 2017. He had already asked the Claimant not to take leave during that period. It is entirely understandable that he would be concerned at the possibility that the Claimant might be contemplating resignation.
52. Mr Ramsay had already come to the view, a view he had shared with Mr Taylor, that he was finding it difficult to manage the Claimant. It is not

- necessary for us to make any finding concerning where the fault for that difficulty lay, although we note the views expressed by Susan Bayliss and Denise Taylor. Against that background, we consider that the most probable reason for the Claimant's dismissal is that Mr Ramsay saw in the three matters brought to his attention by Denise Taylor a perpetuation of the problems he had encountered with the Claimant since the previous October.
53. Concerning the timing of the dismissal, Mr Ramsay candidly acknowledged that he acted when he did in anticipation of the fact that the Claimant would very shortly acquire protection from unfair dismissal, with all that that would entail for the procedure which the Respondent would have to adopt if he delayed his decision.
54. Our strong impression was that Denise Taylor was an honest and honourable witness who found it difficult to reconcile her loyalty to her employer with her professional standards. As the respondent's HR manager she would have expected to be consulted by Mr Ramsay and to have advised on how the respondent should deal with and treat the claimant. Mr Ramsay thought otherwise. Ms Taylor was embarrassed to have to take the claimant to a meeting on 7 February at which she knew the claimant was to be dismissed, about which she could say nothing in advance.
55. In conclusion on this question, therefore, the reason for the Claimant's dismissal was grounded in a combination of circumstances, but we are satisfied that she was not dismissed, whether wholly or principally, because she had raised any matters connected with her entitlement to annual leave.
56. Further, the Claimant was not dismissed, wholly or principally, because she brought, nor did she bring, to the Respondent's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety. Further, the Claimant was not dismissed, wholly or principally, because she refused (or proposed to refuse) to comply with a requirement which the Respondent imposed (or proposed to impose) in contravention of the Working Time Regulations 1998, or because she refused (or proposed to refuse) to forego a right conferred on her by those Regulations. Nor was the Claimant dismissed, wholly or principally, because she alleged that the Respondent had infringed the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Nor was the Claimant dismissed, wholly or principally, because she had made a protected disclosure. We will consider the circumstances of the Claimant's two alleged protected disclosures in greater detail below when dealing with her claims of detriment.

57. The Claimant has a deep-seated sense of grievance because of the circumstances of her dismissal and, in particular, because she believes that the procedure adopted by the Respondent was fundamentally unfair to her. Susan Bayliss and Professor Valentine share her view. We have noted also the tone and conclusions of the investigative panel's report. The Respondent has not sought to argue that it treated the Claimant fairly; rather that in the circumstances of the case it was not required to treat the Claimant fairly. Unfortunately for the Claimant, the unfairness which aggrieves her, and troubled the trustees, is not something for which the law currently provides a remedy.

58. We turn to consider the Claimant's claims of detriment under the three separate limbs on which she relies.

59. In each claim, the Claimant formulates the alleged detriments she suffered in practically identical terms (which we take from her application to amend her claim), as follows:

"I believe that I was subjected to a detriment by being denied the right to take my full holiday entitlement in the holiday year ending March 2016, being paid those holiday (sic) in lieu and then being subjected to more stringent requirements for the taking and notification of holidays, namely:

- Not to take any more holidays to the end of that holiday year on the 31 March 2017;
- Any annual leave that I wished to take for the 12 months from the 1 April would have to be agreed in advance at the beginning of the holiday year;
- Not take more than a week's holiday at any time apart from Christmas, and
- Give one month's notice for any holiday, even one day."

60. All days which the Claimant took off in the year ending March 2016 were designated as TOIL. Even at the end of that year she had in excess of 200 hours owing to her. She did not take any annual leave, nor did she apply for any annual leave, and no application by her for annual leave was refused.

61. The making of a payment to the Claimant in March/April 2016 in lieu of her untaken annual leave entitlement was in breach of Regulation 13(9)(b) of the Working Time Regulations 1998. If the Claimant had protested and insisted on taking her holiday, then she might have succeeded in surmounting one of the hurdles towards succeeding in a claim under s.45A of the Employment Rights Act 1996. When the Claimant spoke to Mr Ramsay on the 10 February 2016 there were still seven weeks of the

holiday year to run. The Claimant made no application for annual leave in that period. Nor did she apply, as was her right, under her contract, to carry forward two weeks' (in her case six days') annual leave to the following leave year. The evidence of what she did at the time strongly suggests that she was content to be paid for her outstanding annual leave entitlement, and we are unable to accept her protestations to the contrary given to us. The Claimant, therefore, did not refuse (or propose to refuse) to comply with a requirement which the Respondent imposed (or proposed to impose) in contravention of the Working Time Regulations 1998. Nor did she refuse (or propose to refuse) to forego a right conferred on her by those Regulations, at any time up to the end of the leave year in March 2016. Further, we cannot regard the payment in lieu of untaken annual holiday as a detriment since it is something to which the Claimant gave her agreement when there was a clear alternative available to her, namely to apply to take annual leave during some or all of the remaining part of the leave year, or to carry leave forward.

62. There was no evidence before us that the Claimant alleged any infringement by the Respondent of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
63. The Claimant's first alleged public interest disclosure was "in or around mid-March 2016" in a conversation with Gemma King which the latter describes as an informal conversation in which the Claimant said that Mr Ramsay had suggested that she write off both her TOIL and annual leave. This was a private workplace dispute which related exclusively to the Claimant of the kind referred to by Underhill LJ in ***Chesterton Global Ltd -v- Anor and Nurmohamed and another*** [2017] EWCA Civ 979, where he said at paragraph 36:

'The broad intent behind the amendment of s.43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle-blowers'.

64. We have considered Underhill LJ's reasoning and the fourfold classification put forward by Mr Laddie QC in that case. We can find no feature in this case which take the Claimant's complaint to Ms King out of the purely private and into the sphere of public interest. We conclude that the Claimant's complaint to Ms King did not amount to a public interest disclosure. Nor could the claimant have reasonably believed otherwise.
65. Even if we were wrong about the foregoing matter, there is no evidence that Ms King conveyed the content of what she termed an informal discussion to Mr Ramsay, and we find that she probably did not. Further, it

is highly probable that the discussion between the Claimant and Miss King which the Claimant places “in or around mid-March 2016” post-dated her discussions with Mr Ramsay about the management of her TOIL and annual leave for that year and post-dated the Claimant’s agreement to be paid in lieu of her TOIL and annual leave. There is therefore no causal connection between what the Claimant conveyed to Miss King and the final arrangements which were made by Mr Ramsay for that holiday year and the future.

66. Still further, when asked why she delayed making this claim until the 26 May 2017, some 14 months, the Claimant said that she did not make a claim because she did not want to rock the boat, and that she was still working and happy to continue there. She added “of more importance is the public interest disclosure I made to Denise Taylor which led to my dismissal. The first public interest disclosure is to show a pattern”. The matters giving rise to this first claim of alleged public interest disclosure had crystallised at the latest in March 2016, and we tend to think rather earlier than that. There was no evidence before us of any factor making it not reasonably practicable for the Claimant to present her complaint within 3 months of the matters on which she relies. This claim was therefore presented out of time.

67. The second disclosure relied upon by the Claimant took place on the 2 February 2017 when she reported to Denise Taylor that she felt she was being treated unfairly by Mr Ramsay in the arrangements he had proposed for her annual leave. The Claimant complained to Denise Taylor that she had been told by Mr Ramsay that:

- She would not be able to take any more holidays to the end of that holiday year on the 31 March 2017 (leaving her with 15 days’ untaken holiday),
- Any annual leave that she wished to take for the 12 months from the 1 April would have to be agreed in advance at the beginning of the holiday year,
- She could not take more than a week’s holiday at any time apart from Christmas, and that
- She would be required to give a month’s notice for any holiday, even for one day.

68. In her application to amend her claim, the Claimant set out the alleged detriments to which she was subjected in practically identical terms to the above. There is simply no evidence that, as a result of making her alleged disclosure to Denise Taylor, the Claimant suffered any detriment beyond the matters of which she was complaining. That is hardly surprising because when she next met Mr Ramsay in the morning of the 7 February she was dismissed. There was scarcely any time in which any further

detriment could have been imposed upon her. Further, for the reasons set out at paragraph 62 above we find that the Claimant's complaint to Denise Taylor on the 2 February 2017 was entirely personal in character and lacked any public interest. It was therefore not a protected disclosure.

Conclusions

69. The Claimant was not dismissed for any of the impermissible reasons she alleges, but rather for the reasons we have summarised at paragraphs 50-55 above. The conversations between the Claimant and Gemma King in March 2016 and with Denise Taylor on the 2 February 2017 were not protected disclosures, and nor did the Claimant suffer any detriment as a result of them. The Claimant did not refuse, or propose to refuse, to comply with a requirement of the Respondents in contravention of the Working Time Regulations 1998 nor to forgo a right conferred on her by those Regulations, and was not subjected to any detriment in connection with them. The Claimant did not allege that the Respondent had infringed the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and was not subjected to any detriment in connection with them. The claimant's claims are therefore dismissed.

70. Whilst we entirely understand the Claimant's sense of grievance at her dismissal, a feeling shared by at least two former trustees of the respondent and, we suspect, Denise Taylor, that grievance is not one for which the law provides a remedy.

Employment Judge S J Williams
Dated: August 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS