EMPLOYMENT TRIBUNALS

Claimant: **Mrs D. JEPSON**

Respondent: **ACE CAR HIRE (WORTHING) LIMITED**

Heard at: **Southampton** **On:** **3,4,5 June 2019**

Before: **Employment Judge Dawson**

Representation
Claimant: In person
Respondent: Mr B Large, counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claims of direct discrimination because of sex and harassment on the grounds of sex are not well founded and are dismissed.

2. The claim of victimisation is well founded and succeeds.

3. The claim that the claimant was subjected to a detriment because she made a protected disclosure is well founded and succeeds.

4. The claimant was unfairly dismissed because she made a protected disclosure.

5. The claim of unauthorised deduction of wages due to underpayment of holiday pay is well founded and succeeds.

6. All other claims set out in the claim form are dismissed upon withdrawal by the claimant.

7. The compensatory award in respect of the claim of unfair dismissal will be adjusted to reflect the fact that the claimant would have been dismissed at a date 3 months from the effective date of termination of the contract of employment.

8. The award will be increased by the amount of 4 week's pay to reflect the failure by the respondent to provide a written statement of particulars of employment to the claimant.

9. **Further directions will be given in respect of the remedy hearing at a one hour telephone preliminary hearing to take place on Friday 16th August 2019 at 10 am. The parties are to dial in at that time on telephone number 0333 300 1440 inserting PIN no 687204# when prompted**.

REASONS

1 By her claim form, the claimant brings claims of unfair dismissal, automatic unfair dismissal on the grounds of having made a public interest disclosure, discrimination on the grounds of age and sex including direct discrimination, harassment and victimisation; breach of contract, being non-payment of notice pay; unauthorised deduction from wages, being non-payment of the full amount of holiday pay and being subject to detriment for making a public interest disclosure.

2 At the hearing the claimant confirmed that she no longer pursues a claim for age discrimination or in respect of notice pay (the same having been paid). The claim in respect of unauthorised deduction from wages arises from the failure of the respondent, the claimant says, to have paid the proper amount of holiday pay since the respondent failed to take into account the overtime that she had worked, in calculating her holiday pay.

3 In her claim form the claimant also referred to the Data Protection Act 1998 and the Health and Safety at Work Act 1974. She has accepted the tribunal has no jurisdiction in relation to those claims.

4 The claimant gave evidence on her own behalf and the respondent called evidence from Mr Carl Woodcock and Mr Colin Harris.

The Issues

5 Following the presentation of the claim form and response as well as other documents from the claimant, the case was managed by Employment Judge Gardiner on 23 August 2016. He set out a detailed list of issues in agreement with the parties but also required the claimant to provide various further information.

6 At the start of the final hearing, Mr Large helpfully submitted a further list of issues which he contended reflected the list of issues prepared by Employment Judge Gardiner but also took account of the claimant's further information. That list had been sent to the claimant in advance of the hearing and although she thought that it was written in a partisan way, the claimant accepted that it set out all of the factual allegations that she makes in her case. In those circumstances it was agreed with parties that the document was helpful insofar as it encapsulated all of the factual allegations being made by the claimant. This judgment is marshalled by reference to that list, which is appended to it. We are grateful to Mr Large for his industry in producing that list.

7 Mr Large, on behalf of the respondent, conceded that the claimant's grievance of 26 February 2018 was a protected act within the meaning of the Equality Act 2010 and also a protected disclosure within the meaning of the Employment Rights Act 1996. Those concessions seemed to us to be entirely correct. That grievance is the only protected act or protected disclosure that the claimant relies upon.

8 It was not suggested by the respondent that it would not be liable for the acts of its employees or agents in respect of the claims brought.

Conduct of the Hearing

9 The hearing was listed, initially, by employment Judge Gardiner for 4 days. By a later order of the tribunal the listing was reduced to 3 days and the parties made aware. Neither side made representations.

10 After the reduction in hearing length the claimant exchanged a 70 page witness statement with the respondent. The bundle length was limited in accordance with earlier directions of tribunal.

11 The employment tribunal was concerned as to whether matters could be finished within the 3 day allocation but was also aware that one of the members of the tribunal, from the following week, would be unavailable for an undefined, but likely lengthy, period of time.

12 At the outset of the hearing, therefore, the tribunal raised with the parties whether the case could be concluded within 3 days. In respect of the liability section of the hearing, Mr Large stated that he wished to cross-examine the claimant for 4 hours; Mrs Jepson stated that she wished to cross-examine Mr Woodcock for 2 hours and Mr Harris for about 30 minutes. Allowing 30 to 40 minutes for submissions the liability part of the case could therefore be completed and the tribunal commenced the hearing.

13 Both parties completed their cross examination within the time allocated and the tribunal was grateful for their cooperation. As anticipated by the order of Employment Judge Gardiner liability has been dealt with separately to the question of quantum, which could not be dealt with within the three-day allocation.

14 Because of the number of allegations and issues in this case, rather than set out all of the findings of fact in a generic way, this judgment will set out the relevant law and then make some general findings of fact and then make specific findings and reach conclusions on each issue in turn.

The Law

Direct Discrimination

15 Section 13 of the Equality Act 2010 provides

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

16 Section 136 deals with the reversal of the burden of proof and states

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

17 In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraph 56,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

Harassment

18 Section 26 Equality Act 2010 provides that

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

19 Again, the burden of proof provisions apply

Victimisation

20 Section 27 of the Equality Act 2010 provides

(2) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(3) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

21 The respondent referred us to *Martin v Devonshires Solicitors* [2011] ICR 352, in which it was held that (from the headnote) "on any claim of victimisation, the tribunal had to determine the reason the respondent did the act complained of, and, if it was wholly or substantially that the claimant had done a protected act, he would be liable for victimisation, and, if not, he would not be so liable; that there would be cases where an employer dismissed an employee, or subjected him to some other detriment, in response to the doing of a protected act but where it could be said, as a matter of common sense and justice, that the reason for the dismissal was not the protected act as such but some feature of it which could properly be treated as separable, such as the manner in which the employee made the complaint relied on as the protected act"

Public Interest Disclosures

22 The law is found in different sections according to whether a person is certainly have been subjected to a detriment or unfairly dismissed. S.103A Employment Rights Act 1996 provides that

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

23 S.47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

> (5) 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
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

Detriment due to Protected Disclosure

24 In respect of a claim of detriment, Harvey on Industrial Relations states "The term 'detriment' is not defined in the ERA 1996 but it is a concept that is familiar throughout discrimination law … and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of"

25 In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

Unfair Dismissal

26 In respect of a claim of unfair dismissal, in *Kuzel v Roche* [2008] IRLR 530, the Court of Appeal held (taken from the headnote in the IRLR reports)

> "When an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must produce some evidence supporting the positive case. That does not mean, however, that in order to

succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

Having heard the evidence of both sides relating to the reason for dismissal it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

The employment tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the employment tribunal that the reason was what he asserted it was, it is open to the employment tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or of logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must be that asserted by the employee. That may often be the outcome in practice, but it is not necessarily so".

Ordinary Unfair Dismissal

27 Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason.

28 Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".

29 *ASLEF v Brady* [2006] IRLR 576, held that the question is what was the real reason for the dismissal and that it is for the employer to prove. A potentially fair reason may be the pretext for dismissal in other circumstances, for example if the employer makes the misconduct as excuse to dismiss an employee in circumstances where he would not have treated others in a similar way then the reason will not be the misconduct at all since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal. Once the employee has put in issue with proper evidence a basis the contending that the employer dismissed out of pique or antagonism, it is the employer to rebut this by showing that the principal reason is a statutory reason.

30 Where the reason for dismissal is redundancy, the House of Lords in the *Polkey* case referred to the relevant procedures required in a redundancy dismissal in the following terms"… in the case of

redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.'

31 The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. This includes decisions as to the correct pool: see Capita v Hartshead v Byard [2012] IRLR 814 where it was held that the question of how the pool should be defined was primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer had genuinely applied his mind to the problem.

32 The claimant has raised the use, by the respondent, in principle last in first out as part of the selection process in this case. In this respect it is useful to consider what Harvey on Industrial Relations says

> (6) "It is now well established that tribunals cannot substitute their own principles of selection for those of the employer. They can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did (see eg *Earl of Bradford v Jowett (No 2) [1978] IRLR 16*, *[1978] ICR 431*; and *NC Watling v Richardson [1978] IRLR 255*, *[1978] ICR 1049*). Last in, first out ('LIFO') used as a dominant (or even sole) criterion for many years but during the period of major changes in industrial relations in the 1980s suffered a very noticeable decline, partly as a result of the contemporary decline in influence of the trade unions, for whom it had always been the 'least unfair' form of selection. Under the new dispensation, it became clear that (especially in hard economic times) an employer must be entitled to take into account criteria in addition to length of service, eg efficiency and the need to retain a balanced workforce. Provided these are proper criteria the tribunal cannot seek to substitute its own selection method by giving greater prominence to long service (*BL Cars Ltd v Lewis [1983] IRLR 58*). However, the introduction of these wider criteria meant more of a role for judgment of the employee and his performance by the employer, which opened up a greater possibility of a challenge of unfairness by the employee(s) selected; the one major advantage of LIFO for the employer had been that the eventual dismissals were almost certain to have been fair.
>
> (7) LIFO alone as a selection method is now rare, though there may of course still be a role for it as *one* criterion; one particular use for it could be as a 'tie breaker' between two employees scoring equally on other criteria. LIFO survived a challenge under the Employment Equality (Age) Regulations 2006 in *Rolls Royce v UNITE [2009] EWCA Civ 387*, *[2009] IRLR 576*, being held to be justified as a proportionate means of attaining legitimate aims

such as rewarding loyalty and maintaining a stable workforce. However, it should be noticed that in that case LIFO was only one of several criteria and there are indications in the case that use of LIFO *alone* might be hard to justify under the Regulations (or now under the Equality Act 2010).

33 In *Bascetta v Santander [2010] EWCA Civ 351 Pill LJ stated* "The tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the appeal tribunal in *Eaton Ltd v King* … that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessments on which the selection for redundancy was based."

34 In circumstances where it is found a decision to dismiss was unfair the tribunal must consider how much compensation to award in accordance with sections 122 and 123 the employment rights 1996.

35 In respect of the compensatory award, s123 ERA 1996 provides

(8) Subject to the provisions of this section and sections … , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

Working Time Regulations

36 Reg 16 Working Time Regulations 1998 provides as follows

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply—

(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question; and

(d) as if the references to sections 227 and 228 did not apply.

Section 222 Employment Rights Act 1996 sets out the method of calculation of a week's pay where remuneration varies according to the time of work.

S.23 Employment Rights Act 1996 provides

> … (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

General Findings of Fact

37 On 14 February 2007 the claimant's commenced work with the respondent as an office assistant. She worked at the Littlehampton office.

38 The respondent operated a small business of hiring vehicles and providing courier services and had offices in Worthing and Littlehampton, until July 2016 when the Worthing office closed.

39 The business is a family operated business and by early 2018 it was operated by its directors, Colin Woodcock, his father Michael Woodcock, two office assistants, being the claimant and Eric Smith, a bookkeeper – Anne Smith- Eric's wife and 2 drivers, Colin Harris and Graham Padbury. Colin Woodcock was running the day to day operation of the business.

40 In October 2012, Eric Smith who was at that time the office assistant in the Worthing office wrote to the respondent asking it to reduce his hours due to his age. He sought to reduce his hours to working 7:30 AM until 6 PM on Thursdays and Fridays and stated that he would help out at the office on the odd Saturday if free to do so.

41 In July 2016, as stated, the Worthing office closed. At that stage, Mr Smith and his son, Steve Smith who did a small amount of work at Worthing, had their place of work transferred to the Littlehampton office where the claimant was.

42 Prior to July 2016, the Littlehampton office was operated by the claimant and Carl Woodcock who came into the office every day for varying amounts of time. The claimant was responsible for making arrangements for car and van hire and the courier work.

43 At that time the claimant had a considerable workload, we find that she worked hard and conscientiously. She always left the office for 1 hour at lunchtime believing that was the statutory requirement and she was not paid for her lunch. The claimant did not leave the office to run personal errands and did not seek to do so.

44 Following the closure of the Worthing offices and Eric and Steve Smith's move to the Littlehampton office, the claimant hours were varied to accommodate Eric and Steve Smith moving over. She was not given any choice in that variation by Carl Woodcock, whose decision it was, because he believed that Eric and Steve Smith were making the biggest sacrifice in having to change their place of work and face a longer commute to work. There was a small variation to Eric Smith's hours in that they were reduced from working at 7:30 AM - 6 PM to working 7:45

AM - 5:15 PM because the Littlehampton office was open for shorter days.

45 At about that time the claimant worked 3 Saturdays a month and wished to reduce the number of Saturdays that she worked. Therefore, Eric Smith was requested to work 1 Saturday in 3 and the claimant's Saturday work was reduced to 2 in 3. The claimant accepted in cross examination that situation was better for her.

46 When asked about the variation to Eric Smith's hours in cross examination the claimant said that rather than him being treated as an employee, he was treated as a family friend. The claimant also pointed out that Anne Smith's hours were changed to suit her.

47 In August 2017 the claimant raised a grievance about her treatment by Carl Woodcock. She did make reference to not being treated with respect alongside her male colleagues. The respondent did not respond to the grievance until she raised a 2nd grievance on 26 February 2018.

48 The grievance which the claimant raised on 26 February 2018 was lengthy and included allegations that the respondent had committed criminal offences including deception and perverting the course of justice. She stated "… I am increasingly concerned as to unprincipled actions… I am not prepared to sit back and do nothing as it is my duty to expose incidents listed above to the appropriate authorities…"

49 On 2 March 2018 the respondent replied to the claimant's grievance referring to a meeting which it said had taken place on 26 February 2018. There are no minutes of that meeting. We largely accept the claimant's version of events, which is that on the 26 February 2018 she returned from lunch to be met with Michael Woodcock and Carl Woodcock who wished to discuss the grievance which she had submitted that morning. She refused to discuss matters stating that she needed proper notice of the meeting and a companion to the present. No such subsequent meeting ever did take place. However, as we set out below, we do find that on 26th February there was a discussion about the claimant's assertion, contained in her grievance, that she was unhappy with the number of Saturdays she was required to work.

50 On 5 March 2018, the respondent sent a letter setting out its response (at least in part) to the claimant's grievance. The claimant wrote a lengthy document responding to that document, including a request for a contract of employment.

51 On 18 April 2018 Michael Woodcock told the claimant that she could appeal if she wished to do so but, on 26 April 2018, she wrote to the respondent stating that she had referred her grievance to ACAS. On 2 May 2018 she threatened the respondent with an employment tribunal.

52 On 3 May 2018 the claimant was given notice of potential redundancy. There is a dispute between the claimant and the respondent as to whether Eric Smith was given notice on the same day. We find that Mr Smith was given notice but later, after the claimant had left the office for the day.

53 On 8 May 2018 the claimant wrote with various questions for the respondent and on 9 May with a suggestion of how to avoid redundancy.

54 A meeting took place on 9 May 2018 and, although there are no contemporaneous minutes of that meeting, some minutes appear at page 152 and 153 of the bundle.

55 On 14 May 2018 the claimant sent a letter stating that she was not being allowed to answer the business phones, she was being ignored and was not being allowed to do courier work. She also stated that Eric Smith had a key to the back room where "all information is now stored after I raised the issue of all the wrongdoings you were doing and still are doing but I have not got a key which is classed as discrimination because I am not the guilty party."

56 On 15 May 2018, the claimant was told what the redundancy criteria were and a meeting was set up for 23 May 2018. The claimant was given her scores on 22 May 2018.

57 At the meeting on 23 May 2018 the claimant was met and told her score, which was less than Eric Smith's (who was also in the pool for selection for redundancy) and she was selected for dismissal. A letter confirming that selection was sent the same day.

58 The claimant appealed on 25 May 2018 and an appeal meeting took place on the 25 June 2018. The appeal was not upheld.

59 Carl Woodcock admitted in his evidence, and we accepted, that he had disliked the claimant, increasingly since the Worthing office closed. We find that a substantial part of that was because, at some point, he had told the claimant not to make decisions on her own account. We find that she took that instruction literally, too literally, and thereafter asked Mr Woodcock about most small and large decisions. Mr Woodcock found that annoying, but instead of speaking to her about it, simply became annoyed. That led to a downward spiral in the relationship between the two.

60 The claimant received a bonus of £350 in 2016. She said others, in particular men, received a bonus of £500. We note that she also accepted that Anne Smith had been given a bonus of £500, notwithstanding that she was female.

61 On 12 March 2018, the claimant wrote to the respondent as set out above. In her letter she stated "Carl has not got a clue which member of staff does what at any given time…" We accept that assertion as being largely accurate insofar as we find that he was not particularly interested in what office administration staff were doing, being more concerned with the practical side of the business.

62 Over a period of time leading up to her grievance the claimant had become convinced that the respondent was guilty of financial and criminal misconduct. By the time she raised her grievance she had already raised these matters with the respondent on more than one occasion. She had also, secretly, been taking photographs of

documents which she considered incriminated the respondent amounting to a total of 540 photographs at the time of her dismissal.

Specific findings of Fact and Conclusions

63 We state our specific findings and conclusions by reference to the list of issues set out in the appendix to this judgment.

Sex discrimination

Not being paid for lunch breaks until dismissal when Eric Smith was;

64 Eric Smith was paid for lunch breaks. However, he ate his lunch in the Littlehampton office, usually in either the kitchen at the back of the office or in a van parked behind the office. Because the telephone was cordless and a buzzer could be set to alert staff when somebody had entered the office, he was able to still be available to deal with customers whilst he was taking his lunch. The arrangement whereby he was paid his lunch was a long-standing one (he was employed before the claimant) and had been the position when he worked at the Worthing office.

65 The claimant never asked the respondent if she could be paid for her lunch and, as indicated, always absented herself from the office at lunchtime.

66 Whilst there was a difference in treatment between the claimant, as a female and Mr Smith, as a male, we are not confident that the treatment was less favourable. Mr Smith was at the office and available for work, and did work, during the lunch period, Mrs Jepson was not.

67 In any event, even if there was less favourable treatment, we are entirely satisfied that it was not because Mrs Jepson was female. The arrangement reflected long-standing differences between how the Worthing and Littlehampton offices had operated and Mr Smith was paid because he was at the office and available to work, not because he was male.

Being expected to perform the same amount of work as Eric Smith in less time;

68 We accept Mrs Jepson's evidence that Mr Smith did not work as hard as she did. We also accept that he left the office on occasions, leaving unfinished work which Mrs Jepson would then take on because she was conscientious. However, there is no evidence that that situation was created deliberately by the respondent, much less that it was created because the claimant was female. The claimant's own case was that Carl Woodcock did not know what staff were doing on a day-to-day basis.

69 We do not find that the respondent required the claimant to do additional work to Mr Smith and, in those circumstances, we do not find that the claimant was treated less favourably Mr Smith.

70 Moreover the reason for the treatment was not the claimant's sex but the combination of Mr Smith not working as quickly as she did, her being conscientious and doing unfinished work and management being unaware of what was going on.

Expectation to work two Saturdays out of three when Eric Smith worked one

71 We have set out above the history as to why the claimant was working on 2 Saturdays out of 3 when Mr Smith was only working on 1 Saturday out of 3.

72 Before the Worthing office closed, at the Littlehampton office Mrs Jepson, as office assistant worked Saturdays because the office was open and needed to be staffed. Anybody who was working in that role, whether male or female, would have been required to work the same amount.

73 Mrs Jepson then asked to reduce the number of Saturdays that she was working and the respondent agreed to that. That was an improvement in her position. There was no less favourable treatment than a man, in the same position, would have been given. We find that a man, in the same position as Mrs Jepson, would have been treated in the same way.

Being forced to change working days or reduce/increase hours without consultation in (i) July 2016; (ii) October 2016 and 3rd March 2016 when Eric Smith was never expected to change his hours

74 There is a typographical error in this issue in that it should refer to 3 March 2018.

75 The change in hours in July 2016 was because Eric Smith and Steve Smith moved from the Worthing office to the Littlehampton office. It is right to say that the change of hours was imposed upon the claimant but the reason for that was because Mr Carl Woodcock, whether rightly or wrongly, considered that Eric and Steve Smith were making the "bigger sacrifice" in having to move offices and increase their commuting time. Whilst we accept that there was no consultation with the claimant, there is no evidence from which we could conclude that a man in the same position as the claimant would have been treated in any way differently.

76 In respect of the change of hours in October 2016 (the claimant in her evidence stated that this was, in fact, in November 2016) the change was to accommodate Steve Smith leaving the respondent's employment. Eric Smith's hours were not changed and he is, of course, male. We have considered, therefore, whether that is evidence from which we could find that the claimant was treated less favourably because of her sex. We have noted that the claimant, herself, said that Mr Smith was treated more favourably because he was, in effect, a family friend. It is clear from the evidence we heard that Carl Woodcock does not dislike Eric Smith in the same way that he disliked the claimant.

77 We have concluded that the claimant has been able to prove no more than a difference in treatment and a difference in sex. Moreover, on the balance of probabilities, we are satisfied that the variation to the claimant's hours rather than the Eric Smith's hours, was due to the closer

relationship between Mr Smith and Mr Woodcock, the background of him having expressly asked to reduce his hours in 2012 and, probably, a disinclination to be particularly supportive of the claimant. It was not because Mr Smith was male and Mrs Jepson was female.

78 In respect of the variation of hours in March 2018 the position arose as follows. In her grievance of 26 February 2018 the claimant wrote "Eric Smith only has to work one compulsory Saturday in 3… Whereas I have to work two compulsory Saturdays out of three… Why should I have to work more Saturdays and have less hours on Saturday than Eric Smith…"

79 The letter written on 2 March, referred to the meeting after the claimant had submitted her grievance on 26 February and stated "one of the points you raised was having to work on 2 Saturdays…suggested that if you wanted, you could finish working Saturdays completely, which were agreed. Carl repeatedly offered you a further 2 times, the last saying "are you happy with that, you don't want to work any more Saturdays". You agreed."

80 We find that there was a discussion about Saturday working on 26 February, not least because it suited the respondent for the claimant not to work on Saturdays due to diminishing work. However, the decision to reduce the claimant's Saturday working was nothing to do with whether she was male or female but because of the grievance which she had raised.

Removing courier work responsibility on 19th January 2018 whereas responsibility was given to Eric Smith

81 The claimant, on Friday afternoons, traditionally sat at a desk at the back of the office and dealt with courier work, whereas Eric Smith had sat at the front of the office and dealt with customers. On 19 January 2018, the claimant was told that she would no longer be sitting at the courier's desk but there would be a switch and Eric Smith would be doing so.

82 In her evidence the claimant stated that she felt she was moved because she had "seen too much", it was pointed out to the claimant that this was before her grievance and she stated "yes but I was making things known".

83 We make no findings of whether the respondent was guilty of criminal or other wrongdoing but it is clear that the claimant was raising allegations against it. Even if the respondent was innocent of wrongdoing, it is likely that it's directors found the claimant's allegations irritating, particularly when they were based upon her looking at documents (in evidence she referred having seen a particular invoice which she challenged). We find, on the balance of probabilities, the move in respect of desk was to keep the claimant away from documents which she might take issue with but we also find that a man, in the same position as the claimant and acting in the same way as the claimant, would have been treated in the same way. The treatment was not because of her sex.

From July 2016 until dismissal, refusal to allow the Claimant to absent herself from work for personal reasons whereas Eric Smith was given that latitude;

84 We have noted above that the claimant did not ask to be able to leave work for personal reasons and we note that the claimant was clearly disapproving of Eric Smith for doing so. However, Mr Smith did ask and was granted permission as long as the office was quiet. He was not permitted to leave when the office was not quiet.

85 We do not find the claimant has proved any facts from which we could conclude that her treatment was because of her sex. We think it more likely that Mr Smith was allowed to leave the office simply because he asked. We find that it is more likely than not that a woman in Mr Smith's position (that is to say with the same close relationship with the respondent, who asked to leave for a short period when the office was quiet) would have been granted permission.

86 The burden of proof has not shifted in this respect, but in any event the respondent has satisfied us that the treatment was not connected with the claimant's sex.

From July 2016 to 5th March 2018 failure to provide health and safety clothing;

87 There is no evidence that the claimant asked for health and safety clothing, and in particular high visibility jackets, before she raised her grievance. Upon her raising her grievance she was provided with it extremely quickly.

88 Whilst we accept that the claimant had to go onto the road in order to check vehicles, we do not accept that there was a deliberate decision not to provide the claimant with a high visibility jacket. We accept Mr Woodcock's evidence that there were jackets available within the office and note that Mrs Jepson stated that they were torn and smelly and she should not have to wear them. That is slightly different to not being provided with any such clothing.

89 There is no evidence that the claimant was not provided the clothing because she was female.

90 We find that any office assistant in the Littlehampton office in the same position as Mrs Jepson, who had not asked for high visibility clothing, would not have been provided with it, whether they were male or female.

From July 2016 until 9th April 2016 failure to provide the Claimant with first choice of booking of annual leave in contrast with Eric Smith;

91 Eric Smith and Carl Woodcock both sought to take annual leave during the school holidays. Mr Smith had grandchildren he holidayed with and Mr Woodcock had his own children. Because of that and to secure cheaper flights they booked their holiday well in advance. The claimant tended to book her holidays only 6 weeks in advance. If Mr Smith had already booked his holiday then the claimant was not permitted to book a holiday at the same time.

92 The claimant did, however, ask for an additional 1.5 days leave each month to visit her house in Sweden. She was granted that leave, albeit on an unpaid basis.

93 Mr Smith was not given the 1st choice in booking annual leave, he simply booked his leave before the claimant. We were not provided with any example where the claimant had booked her holiday and then it was taken off her and given to Mr Smith, or where the claimant was prevented from booking holiday until Mr Smith had selected his holiday dates.

94 We do not find that the claimant was treated less favourably than Mr Smith, but if she was then it was not because she was female but because she booked her holidays after him.

<u>On 24th June 2014 the Claimant was required to pay for a hire vehicle whereas on 21st July 2017, Colin Harris hired a vehicle without charge</u>

95 In June 2014 the claimant had hired a van for 2 or 3 weeks to go abroad. She was required to pay £600.

96 On 21 July 2017 Mr Harris hired a van for one day to use in the UK. Initially he was required to pay a £70 cost. The card on which the van hire was written out required him to pay the cost in cash. He did not have the cash and Mrs Jepson sought to take payment from his card. Whilst the payment was being taken Mr Woodcock came in and was unhappy - which has led to an allegation of harassment to which we will return below. The £70 payment was later refunded to Mr Harris.

97 We do not find that the comparison between the claimant and Mr Harris is a valid one. Her position was very different, not only was it some 3 years apart from Mr Harris's, but she was seeking to go abroad for 2 or 3 weeks. A vehicle going abroad incurs additional costs for the respondent such as insurance and European breakdown. Moreover, and in any event, there is no evidence from which we could conclude that any difference in treatment was because the claimant was female. We can see no facts on which we could conclude that a man in the same position as the claimant in June 2014 would have been treated any differently.

<u>Conclusions in respect of Sex Discrimination</u>

98 We do not find any basis for concluding that the claimant was treated less favourably than the respondent would have treated a man. In respect of some of the allegations we have not found that the claimant has been able to prove facts from which we could conclude that she was treated less favourably on the grounds of sex but, even where such facts do exist we find that the respondent has shown that treatment was not because of her sex.

99 Even if we step back and look at the totality of the evidence we are unable to see that the Claimant's treatment was because she was female or that a man in her position would have been treated differently because of his sex.

Harassment

On 24th July 2017 Carl Woodcock reacted to the Claimant's mistaken taking of a card rather than a cash payment for Colin Harris in an aggressive manner;

100 As set out above the paperwork in respect of the payment which was due to be made by Mr Harris required the payment to be made in cash. When Mr Woodcock entered the office, the claimant was taking payment from the card. We find that he was cross and shouted at both Mr Harris and the claimant.

101 In the circumstances we accept that Mr Woodcock's behaviour would amount to unwanted conduct which would create a hostile or offensive environment for the claimant.

102 However, we are satisfied that the reason for the unwanted conduct was not related to sex but because the claimant (and Mr Harris) had not been following his instructions.

Michael Woodcock *totally ignored* the Claimant's grievances of 30th August 2017 and 26th February 2018 and said *'if I did not like it I could always leave'*

103 The grievance of 30 August 2017 was not responded to. The grievance of 26 February 2018 was not ignored and the letters set out above were sent.

104 The claimant does not appear to have repeated her allegation, in evidence, that Mr Michael Woodcock said that if the claimant did not like matters she could always leave, but even if that does appear in her witness statement and we have overlooked it, would not accept the truth of it.

105 It is clear to us that the claimant retained some confidence in Mr Michael Woodcock as late as April 2018 when she was asking him to resolve difficulties with her holiday.

106 Thus, the only allegation which we find to be factually made out is that the grievance in August 2017 was ignored. Again, however, there is no evidence that that was because the claimant was female as opposed to any other reason. The claimant is only able to point the fact that her grievance was ignored and she is female. We do not find there is a sufficient factual basis to conclude that this conduct was, or could be, related to the claimant's sex.

Change of working days and hours without notice plus losing compulsory Saturday hours on 2nd March 2018

107 We have dealt with this allegation above in respect of the sex discrimination claim. For the reasons that we have given we do not find that the conduct was, or could be, related to the claimant's sex.

Inability to go to lunch or outside when desired except for work;

108 Again we have dealt with this allegation above in respect of sex discrimination and, again, we are unable to conclude there is any evidence that any conduct was, or could be, related to the claimant's sex.

On 25th August 2017 Carl Woodcock was *disrespectful, bullying and aggressive* to the Claimant *"for asking a question that speedy freight wanted answering*

109 Given the terms of the claimant's grievance in August 2017, we accept that Carl Woodcock was disrespectful and aggressive to the claimant in respect of Speedy Freight. We accept that what the claimant says in that respect is accurate. We therefore accept that his conduct was unwanted and would have created a hostile environment.

110 However, having heard the evidence we are satisfied that the reason for the treatment was not because the claimant was female but because she asked a question, against the background of Mr Woodcock already being irritated by the claimant asking questions. We find that this treatment was not related to the claimant's sex.

111 In any event this allegation, alone, would be substantially out of time and we have been provided with no justification for extending time.

Making the Claimant check vehicles on the highway without protective clothing

112 We do not find that the factual premise of this allegation is made out. The claimant was not made to check vehicles on the highway without protective clothing. The claimant was required to check vehicles on the highway, however, protective clothing was available. Moreover, when the claimant asked for clothing for herself (rather than making use of what was available) it was provided.

113 In any event this conduct was not related to the claimant sex.

Carl Woodcock turning the heating off in the office

114 There were 2 heating systems in the office, an air-conditioning unit and a central heating system. Carl Woodcock did not generally allow the heating to be turned on after a brief period in the morning. We find his motivation was likely to be to save money. We also find that Mr Smith would sometimes ignore Mr Woodcock's stated direction and turn the heating on in any event.

115 We accept that being told that the heating could not be turned on was unwanted conduct. It also may well have created an offensive environment within the office. However we do not find that the direction given by Mr Woodcock was related to the claimant's sex. It was because of his desire to save money.

116 Whilst we accept that Mr Smith was not disciplined when he turned the heating on in contravention of Mr Woodcock's direction, we are not satisfied that there is any evidence that that was because he was male rather than, say, because he was treated as a friend of the family. Thus,

in this respect, the claimant can point to nothing further than a difference in sex and a difference in treatment.

Inability to choose leave before Carl Woodcock and Eric Smith;

117 We have dealt with this above and do not accept, factually, that the claimant was unable to choose leave before Mr Smith.

118 Moreover, although the claimant was not able to choose leave before Mr Woodcock on occasion (we were told that he would on occasion override requests that she made, although again we were not given any examples) we find that this was related to his status as a director rather than Mrs Jepson's status as a female.

Receiving a greater workload than Eric Smith

119 Again we have dealt with this above and for the reasons we set out, if the claimant did carry out a greater workload that was not related to her sex but for the reasons we have set out.

Conclusions in Respect of Harassment

120 Whilst we accept that, in some respects, the claimant was the recipient of unwanted conduct which had the effect of creating a hostile or intimidating atmosphere and that it was reasonable for the claimant to feel as she did, we are satisfied that the treatment was not related to the claimant's sex nor was it influenced by it.

121 We reach that conclusion even when looking at the totality of the claimant's allegations and the facts that we have found, as well as the individual allegations.

Victimisation

From the protect act until dismissal, being ignored by Eric Smith & Carl Woodcock;

122 Mr Woodcock's evidence was that from the time the claimant raised her grievance (or at least shortly thereafter) he only spoke to the claimant when he needed something doing. He would not speak to her otherwise. He explained that was because his father had spoken to him and he thought it safest to limit contact to the bare minimum.

123 In respect of Mr Smith, he understood that Mr Smith had taken a similar approach to avoid misunderstanding of his "jocular nature".

124 We find that approach would create an unpleasant atmosphere for Mrs Jepson. For an employee to be ignored unless an instruction was to be given to her or it was necessary to speak to her about work is bound to be seen by that employee is a detriment.

125 Mr Large urged upon us that the reason for the behaviour was not the fact of the grievance being raised but because Mr Michael Woodcock (who had considered the grievance) had spoken to both men about their behaviour. In this respect he relied upon Martin v Devonshires.

126 We doubt very much that in the minds of Mr Woodcock or Mr Smith any distinction was drawn between the fact that the claimant had raised grievance about them and the fact that Mr Michael Woodcock had spoken to them about their behaviour. In any event, if they were to modify their behaviour at the request of Michael Woodcock it should have been to ensure that the claimant did not feel bullied or harassed.

127 We find as a fact that the reason the claimant was treated as she was by Mr Woodcock and Mr Smith after she raised her grievance was because she had raised her grievance and, in particular, the allegations she had made about those people in it.

128 There is no suggestion that the respondent is not liable for the acts of Mr Smith in this respect.

129 We find that this was victimisation within the meaning of section 27 of Equality Act 2010.

From the protected act until dismissal, not being allowed to answer company telephones, speak to customers or staff;

130 We do not find that factually this allegation is made out.

131 For Mr Woodcock to prevent the claimant from answering company telephones or speaking to customers or staff would cause the company to lose business. There would be no reason for him to do that.

132 We do not accept the claimant's allegation in this respect.

From the protected act until dismissal, not being permitted to access the room at the rear of the premises used for courier and car hire work, which was locked and which other colleagues had a key but the Claimant did not;

133 The room in question was locked from March 2018. The room contained the respondent's business documents.

134 The only people who had a key from that point were the directors and Mr Smith. Mr Smith had a key because his wife was the bookkeeper and he ferried documents between the respondent and her.

135 The respondent's case is that the room was locked because it needed to move files which had been lying in the corridor and blocking the fire door and comply with the forthcoming GDPR requirements.

136 We do not accept that the respondent's motivation in putting documents in the locked room was because of the forthcoming GDPR requirements. We find that it was because the claimant had made various allegations about it in her grievance. Thus the grievance was the reason for the locking of the door and not allowing the claimant to have access to the room`.

137 The respondent did not assert that this did not amount to a detriment. We find that an employee who had been used to having access to documents would find it to their detriment if suddenly the documents were removed and locked away because they had raised a grievance.

138 In the circumstances we find this allegation to be well-founded.

From the protected act until 9th April 2018, denied chosen holidays

139 This allegation was not particularly well explored in evidence by either party. However, it is clear that for some reason the claimant had raised with Michael Woodcock that she was not being allowed to take holidays at all following the raising of the grievance. At page 248 of the bundle is a memo on which Michael Woodcock has written (on 9th of April 2018) "Holiday dates available for 2018. All dates available at this date." Thus, there clearly was some sort of issue which Michael Woodcock had to resolve.

140 Carl Woodcock, in evidence, suggested that this was simply about one request for one holiday over the Easter period and he had declined it because he thought he may want to go on holiday to see his in-laws abroad. We reject that evidence, not only because it appeared to be given on the basis of constructing an explanation in the witness box, but also because it is clear Mr Michael Woodcock is talking about more than one date from the terms of the memo.

141 In the circumstances, given that the respondent has not satisfied us as to the reason for which the claimant was being denied holiday that she requested and given the proximity of the timing of this issue to the grievance, as well as the fact that after Michael Woodcock had been involved the claimant was allowed the holiday, we conclude that the treatment was because the claimant had raised the grievance.

142 Thus this allegation of victimisation is also made out.

Detriment due to Protected Disclosure

143 The admitted protected disclosure is the grievance of February 2018.

144 The alleged acts of detriment are the same as for victimisation. Again, there is no suggestion that the respondent is not liable for the acts of Mr Smith in this respect.

145 Thus, for the reasons we have given already we find that the claimant was subjected to acts of detriment as result of her protected disclosure in the way she asserts, except for the fact that the allegation that she was not allowed to answer company telephones, speak to customers or staff is not made out.

Dismissal on the Grounds of Protected Disclosure

146 We address this question by, first of all, considering whether the respondent had satisfied us of the reason for the dismissal.

147 We accept that there was a redundancy situation within the meaning of section 139 of the Employment Rights Act 1996. The respondent, in May 2018, did reduce the number of office assistants from two to one at its Littlehampton office. We find that, to the extent necessary, it redistributed those tasks amongst existing staff and family members, but that does not mean there was not a redundancy situation.

148 However we have been concerned as to the coincidence of timing in this case. The redundancy process was only activated after the Claimant had raised her grievance, prior to that time the respondent appears to have given no thought to the need to make redundancies.

149 Carl Woodcock, in his witness statement, gives no particulars as to why it was decided that a redundancy situation existed at this point when his evidence was that the business had been in decline for a number of years. When asked about the coincidence of timing, his answer was that he had no idea because his father dealt with the question of redundancies in consultation with solicitors.

150 If there was a genuine redundancy situation it is a matter of some surprise that Carl Woodcock, as the director who was in charge of day-to-day operations of the business, was not involved in discussions about whether the business could manage with fewer staff and who should be selected for redundancy.

151 It is also a matter of concern to us that if the decisions in respect of the claimant's dismissal were made by Michael Woodcock, he did not attend the tribunal to give evidence.

152 Carl Woodcock told us that Michael Woodcock got involved after receipt of the claimant's grievance and, at that point, solicitors were sought for advice.

153 We are satisfied on the balance of probabilities that although a redundancy situation existed that was not the real reason for the dismissal of the claimant. We find that, at least since January 2018, the respondent had been unhappy with the claimant because of the allegations that she was making about its wrongdoing. In that respect the grievance was the final straw and was the reason, or at least the principal reason, that the claimant was dismissed.

154 The list of issues requires us to consider whether there is a prospect that the claimant would have been dismissed in any event. Having given the matter anxious consideration we have concluded that the relationship between the claimant and the respondent was irretrievably breaking down from at least January 2018. From that point the claimant was making allegations of wrongdoing against the respondent and, more significantly, covertly photographing documents on a camera which she had bought in from home.

155 Although the respondent did not know of the photographs until the appeal against the claimant's dismissal it seems to us likely, on the balance of probabilities, that it would have found out about the photographs in any event. The claimant had clearly reached the point of no return in so far as she was making her allegations and was determined to pursue them. Once the respondent was aware that the claimant had been taking covert photographs, we are confident that it would have dismissed the claimant for misconduct. Any such dismissal would have been likely to be fair. Even if the respondent had not become were the photographs we do not see how the relationship between the claimant and the respondent could have continued for long.

156 We have concluded that the claimant's employment with the respondent would have been terminated within 3 months of the date dismissal for the reasons set out in the previous paragraph even if the claimant had not been dismissed for making a protected disclosure.

Ordinary Unfair Dismissal

157 In the circumstances we do not need to consider the question of ordinary unfair dismissal but, for the purposes of clarity, the respondent has not satisfied us that the reason for the dismissal was redundancy. Thus we would have found that the dismissal was unfair even if it was not because the claimant had made a protected disclosure.

158 The point made above as to the likely termination of the employment in any event is repeated.

Unauthorised Deduction of Wages

159 It is admitted by the respondent, and we find, that the respondent did not take into account the overtime worked by the claimant when it calculated her holiday pay.

160 It should have taken that time into account and we find that between November 2014 and 23rd May 2018 the claimant had done a total of 356.25 hours overtime.

161 The claimant's calculation is inaccurate in that she has simply sought additional payment for that overtime at the rate of £8 per hour. However, she has already been paid for the overtime, the failure of the respondent was in failing to calculate the claimant's holiday pay taking account of the overtime payment that she had received.

162 We accept the respondent's argument that the claimant can only recover arrears of holiday pay for the period of 2 years before the presentation of the claim form, however we do not accept the respondent's calculations.

163 Under regulation 16 Working Time Regulations 1998, in order to calculate the correct weekly pay on which holiday pay is to be calculated sections 221 to 224 of the Employment Rights Act 1996 must be applied.

164 Sections 222 requires an averaging out of pay over the 12 week period before any period of annual leave commences. That calculation has not been done in respect of the claimant's period of leave.

165 It is apparent for the purposes of this judgment on liability that there has been a shortfall in respect of holiday pay, however it is also clear that neither party is properly approaching the question of calculation. That should be addressed before any calculation of the sums due to the Claimant can be made at the remedy hearing.

None Compliance with the ACAS code

166 We do not find that there was a failure to comply with the relevant ACAS code. In fact there was no applicable ACAS code in this case. The

claimant was not dismissed for misconduct and the proceedings do not relate to the claimant's grievance (except to the extent that the grievance is relied upon as being a protected act or public disclosure).

167 The ACAS code in respect of disciplinary and grievance procedures makes clear that it does not apply to redundancy dismissals.

168 In those circumstances we do not award an uplift in this respect.

Failure to provide Particulars of Employment

169 The claimant requested particulars of employment shortly after she raised her grievance as set out above. Moreover, we were told by Mr Harris that he had a contract of employment. In the circumstances we can see no good reason why the claimant was not given particulars of employment, particularly when she asked.

170 Notwithstanding the relatively small size of the respondent find that the failure to provide the claimant with particulars is a serious breach and we award 4 weeks' pay.

Overall conclusions

171 The claims of sex discrimination and harassment fail, we have set out our conclusions above but, in brief summary, we do not find that the treatment of the claimant was because of or related to her sex.

172 Largely, we find that the allegations of victimisation and detriment due to making a protected disclosure are well-founded for the reasons that we have set out above.

173 We find that the principal reason for the claimant's dismissal was that she had made a protected disclosure; we find that the reason for the dismissal was not redundancy, even though we accept that a redundancy situation existed.

174 We have concluded that the relationship between the claimant and the respondent would have ceased within 3 months of the date of termination in any event. We consider, on the balance of probabilities, that the respondent would have discovered that the claimant had secretly taken 540 photographs of its confidential documentation and dismissed her for misconduct. Even if it had not done so it is unlikely that the relationship would have survived given the trajectory of events.

175 Whilst the claim in respect of non-payment of holiday is well-founded, neither party has provided the appropriate information to allow for calculation thereof and this will be dealt with at the remedy hearing.

176 There is no uplift for failure to comply with the ACAS code of practice but the claimant is awarded 4 weeks' pay in respect of the failure to provide her with particulars of employment.

177 All other claims are dismissed.

178 A remedy hearing will be necessary if the parties cannot agree matters. Given the likely unavailability of one of the members for the foreseeable future the matter will be listed for a telephone preliminary hearing for further discussion of the appropriate way forward.

Employment Judge Dawson

Date: 7 June 2019

Judgment sent to parties: 20 June 2019

FOR THE TRIBUNAL OFFICE

APPENDIX

IN THE EMPLOYMENT TRIBUNAL AT SOUTHAMPTON **Claim No.1401913/2018**

BETWEEN:-

Mrs D. JEPSON

Claimant

-and-

ACE CAR HIRE (WORTHING) LIMITED

Respondent

RESPONDENT'S LIST OF ISSUES FOR CLAIMS DISTILLED BY EJ GARDINER
(NOTING CHANDOK v TIRKEY/LAND ROVER v SHORT REGARDING OTHER ISSUES)

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1. SEX DISCRIMINATION (ss.13, 23, 123 and 136 EqlA)

1.1 Did any of the following alleged less favourable treatment occur? -

a) Not being paid for lunch breaks until dismissal when Eric Smith was;

b) Being expected to perform the same amount of work as Eric Smith in less time;

c) Expectation to work two Saturdays out of three when Eric Smith worked one;

d) Being forced to change working days or reduce/increase hours without consultation in (i) July 2016; (ii) October 2016 and 3rd March 2016 when Eric Smith was never expected to change his hours;

e) Removing courier work responsibility on 19th January 2018 whereas responsibility was given to Eric Smith;

f) From July 2016 until dismissal, refusal to allow the Claimant to absent herself from work for personal reasons whereas Eric Smith was given that latitude;

g) From July 2016 to 5th March 2018 failure to provide health and safety clothing;

h) From July 2016 until 9th April 2016 failure to provide the Claimant with first choice of booking of annual leave in contrast with Eric Smith;

i) On 24th June 2014 the Claimant was required to pay for a hire vehicle whereas on 21st July 2017, Colin Harris hired a vehicle without charge

1.2 Do any claims crystallise before 21st January 2018 and are potentially out of time (as the ET1 was issued the EC certificate the Respondent will focus on whether claims were in time at commencement of EC on 20th April 2018) (*the Respondent will say items 1.1e); 1.1h) and 1.1i) are prima facie out of time*)?

1.3 If potentially out of time, is it just and equitable to extend time for such?

1.4 If so, has the Respondent treated the Claimant differently in comparison to a hypothetical male with otherwise all the claimant's characteristics (with Colin Smith as evidential comparator for 1.1 i) or for 1.1 a – h to Eric Smith (actual comparator)?

1.5 If so, has the Claimant adduced sufficient evidence, that in the absence of other explanation, that the Claimant was treated less favourably on grounds of sex?

1.6 If so, can the Respondent to show that the treatment was not materially influenced by the Claimant's sex?

1.7 If not, what should the Claimant be awarded?

2. HARASSMENT ON GROUNDS OF SEX (S.26 EqlA; 123 and 136 EqlA)

2.1 Did the unwanted conduct alleged to amount to harassment occur, namely -

a) On 24th July 2017 Carl Woodcock reacted to the Claimant's mistaken taking of a card rather than a cash payment for Colin Harris in an aggressive manner;

b) Michael Woodcock *totally ignored* the Claimant's grievances of 30th August 2017 and 26th February 2018 and said *'if I did not like it I could always leave'*;

c) Change of working days and hours without notice plus losing compulsory Saturday hours on 2nd March 2018;

d) Inability to go to lunch or outside when desired except for work;

e) On 25th August 2017 Carl Woodcock was *disrespectful, bullying and aggressive* to the Claimant *"for asking a question that speedy freight wanted answering"*;

f) Making the Claimant check vehicles on the highway without protective clothing;

g) Carl Woodcock turning the heating off in the office;

h) Inability to choose leave before Carl Woodcock and Eric Smith;

i) Receiving a greater workload than Eric Smith

2.2 Do any claims crystallise before 21st January 2018 & are potentially out of time (as the ET1 was issued the EC certificate the Respondent will focus on whether claims were in time at commencement of EC on 20th April 2018) (*the Respondent will say items 2.1a); 2.1b) (if 26.02.18 falls away) & 2.1e) are prima facie out of time*)?

2.3 If potentially out of time, is it just and equitable to extend time for such?

2.4 If so, was the conduct intended to violate the Claimant's dignity or create an inhumane, degrading, hostile, offensive environment/did it simply have that effect?

2.5 If it merely had the effect, was it reasonable that the Claimant felt as she did?

2.6 If so, has the Claimant adduced sufficient evidence, that in the absence of other explanation, that the Claimant conduct is 2.1 was related to her sex?

2.7 If so, can the Respondent to show that the treatment was not materially influenced by the Claimant's sex?

2.8 If not, what should the Claimant be awarded?

3. VICTIMISATION (S.27 EqlA; 123 and 136 EqlA)

3.1 Was the Claimant's grievance of 26th February 2018 a protected act?

3.2 Did the following treatment which the Claimant says amounts to a detriment occur-

a) From the protect act until dismissal, being ignored by Eric Smith & Carl Wood;

b) From the protected act until dismissal, not being allowed to answer company telephones, speak to customers or staff;

c) From the protected act until dismissal, not being permitted to access the room at the rear of the premises used for courier and car hire work, which was locked and which other colleagues had a key but the Claimant did not;

d) From the protected act until 9th April 2018, denied chosen holidays

3.3 Has the Claimant adduced sufficient evidence, that in the absence of other explanation, the protected act was *the reason why* the conduct in 3.2 occurred?

3.4 If so, the burden shifts to the Respondent to show that the treatment was not materially influenced by the Claimant's sex?

3.5 If not, what should the Claimant be awarded?

4. DETRIMENT DUE TO PROTECTED DISCLOSURE (S.43B-C; 47B & 48 ERtsA)

4.1 Was the Claimant's grievance of 26th February 2018 a protected disclosure, in that it was a communication of information, in the public interest and in the belief crime, breach of legal obligation or health & safety endangerment had or was occurring?

4.2 Did the following treatment which the Claimant says amounts to a detriment occur-

a) From the protect act until dismissal, being ignored by Eric Smith & Carl Wood;

b) From the protected act until dismissal, not being allowed to answer company telephones, speak to customers or staff;

c) From the protected act until dismissal, not being permitted to access the room at the rear of the premises used for courier and car hire work, which was locked and which other colleagues had a key but the Claimant did not;

d) From the protected act until 9th April 2018, denied chosen holidays

4.3 If so, was the treatment in 4.2 materially due to the protected disclosure in 4.1

4.4 If so, what should the Claimant be awarded?

5. DISMISSAL ON GROUNDS OF PROTECT DISCLOSURE (ss.43B & 103A ERtsA)

5.1 Was the Claimant's grievance of 26th February 2018 a protected disclosure, in that it was a communication of information, in the public interest and going to a crime, breach of legal obligation or health and safety was likely endangered?

5.2 Was the Claimant dismissed for *the sole or principal reason* of the disclosure?

5.3 If the dismissal was unfair, should any award be reduced to reflect the prospect that the Claimant have been dismissed in any event?

5.4 What should the Claimant receive having regard to mitigation?

6. ORDINARY UNFAIR DISMISSAL (ss.139, s.98; 119, 122 and 123 ERtsA)

6.1 Was there a redundancy situation (the Respondent cites the requirements of the business to carry out work of a particular kind had diminished for s.139(1)(b)(i))?

6.2 If so, was redundancy the sole or principle reason for the Claimant's dismissal?

6.3 Taking account of all the circumstances including the size and business resources of the Respondent,did any of the following render the dismissal procedurally unfair-

a) Were the selection criteria adopted (length of service, performance and skills, experience, attendance records, time keeping, disciplinary record and future potential) objective;

b) Was selection criteria deliberately selected to achieve the desired result;

c) Was sufficient time given to the Claimant to prepare for meetings

6.4 If the dismissal was unfair, should any award be reduced to reflect the prospect that the Claimant have been dismissed in any event?

6.5 What should the Claimant receive having regard to mitigation?

7. UNAUTHORISED DEDUCTIONS OF WAGES (ss.13 & 23 ERtsA)

7.1 Was the Claimant's overtime pay taken into account when calculating entitlement to holiday pay?

7.2 If not, should the duration for any claim be calculated from November 2014 or is the Claimant limited to losses from 2nd June 2016 by virtue of s.23(4A) ERtsA?

7.3 If the Respondent failed to account for overtime in holiday pay how much should the Claimant receive?

8. FAILURE TO FOLLOW THE ACAS CODE OF CONDUCT ON DISCIPLINARY PROCEDURES (S.207A & Sch.A2 TULR(C)A)

8.1 Were, as the Claimant contends, redundancy meetings culminating in her dismissal not in fact noted during the meetings and did notes produced reflect what was discussed?

8.2 If so, did the ACAS Code of Conduct on Disciplinary Procedures apply?

8.3 If so, which paragraph of the Code is the Respondent supposed to have breached?

8.4 If breached, by what percentage, is it just and equitable to increase the awards (excluding failure to provide employment particulars which is not in Sch.A2)

9. FAILURE TO PROVIDE EMPLOYMENT PARTICULARS (s.38 EA)

9.1 The Respondent concedes it did not supply employment particulars to the Claimant

9.2 Has the Claimant succeeded in relation to any claim?

9.3 Is it just and equitable to award the Claimant two or four weeks' pay?

For completeness the defence on EC compliance concerning dismissal is withdrawn