EMPLOYMENT TRIBUNALS

Claimant: **Miss H Munro**

Respondent: **Sampson Coward LLP**

Heard at: **Bristol** **On:** **24, 25, 26 and 27 September 2019**

Before: **Employment Judge Livesey**
Ms M Luscombe-Watts
Ms Y Ramsaran

Representation:
Claimant: In person
Respondent: Mr E MacDonald, counsel

JUDGMENT having been sent to the parties on 14 October 2019 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim dated 26 September 2018, the Claimant brought complaints of unfair dismissal, detriment and dismissal on the grounds of having made public interest disclosures and discrimination on the grounds of age.

1.2 The complaint of unfair dismissal was dismissed on 19 November 2018 upon withdrawal and the complaint under s. 103A was dismissed on 26 July 2019 upon non-payment of a deposit order. That left the complaints of discrimination and detriment under s.47B.

2. The evidence

2.1 The Claimant gave evidence in support of her case and we read the written supporting statements of Mrs Jane Munro and Mr Mian Shaukat. We also read a letter from Dr Vyas dated 4 September 2019.

2.2 The Respondent called the following witnesses;

2.2.1 Mrs Norrie; legal secretary;
2.2.2 Mr Coward; partner;
2.2.3 Mr Knight; partner;
2.2.4 Miss Wickham; former legal secretary.

2.3 The following documents were provided;
R1; an agreed hearing bundle;
R2; the Respondent's counsel's closing submissions.

3. The hearing

3.1 At the start of the hearing, the Claimant made an application to require the witnesses and the Tribunal to refer to her age as 'x' rather than specifying the number. She said that, to do otherwise, would have served to have further violated her dignity.

3.2 The Tribunal declined to manage the hearing in that way. The Claim Form contained the Claimant's date of birth and other Tribunal documents contained her age, as did the Respondent's witness statements. Her age was also discoverable by way of an internet search because her date of birth is held at Companies House since she is a director of a registered company. Her age was an important and relevant feature of the case because she claimed harassment and/or direct discrimination because of certain words that were used about it. The issues around comparators were not easily addressed without the Claimant's age being known and discussed. Despite the absence of a ruling in the Claimant's favour, the Tribunal, the Respondent's counsel and its witnesses were diligent in avoiding reference to her actual age during the hearing.

3.3 During the cross-examination of the Respondent's third witness, Mr Knight, the Claimant made an application for disclosure of two documents; Miss Wickham's sickness record and documents which identified the date upon which Miss Wickham had reduced her hours to a four day week.

3.4 The Respondent resisted the application on the grounds of relevance and, having heard the Claimant expand upon it, we too rejected it because we did not consider the documents to have been relevant to any issue in the case.

4. The issues

4.1 The issues had been broadly discussed at the Case Management Preliminary Hearing which Employment Judge Goraj had held by telephone on 5 March 2019. They had been finalised at the Preliminary Hearing on 17 June 2019 and the List of Issues attached to the Summary and Order of that date were considered when the Tribunal deliberated at the end of the hearing [242-5] (see below).

4.2 Because a deposit order was made in respect of some of the allegations and was not paid the following paragraphs of the List of Issues were no longer relevant;
- Paragraphs 5 (2)-(4) (three allegations of direct discrimination);
- Paragraph 12 (i) (one of the public interest disclosures);
- Paragraphs 17-19 (the complaint under s.103A).

5. The facts

5.1 We reached the following findings of fact on the balance of probabilities. We attempted to restrict our factual findings to matters which were in issue between the parties being conscious of the fact that there was a good deal of peripheral evidence.

5.2 Page references provided in these Reasons are to pages within the hearing bundle, R1, and have been cited in square brackets.

5.3 The Respondent is a firm of solicitors with offices in Salisbury. There are four partners; Mr Coward, Mrs Coward, his wife, Ms Langdown and Mr Knight. There are 5 additional fee earners and approximately 15 support staff. There are 5 departments; Family, Employment, Property, Wills and Probate and Litigation.

5.4 The Claimant began work as a legal secretary in the Litigation Department on 13 November 2017. Her contract contained a requirement for her to notify her Head of Department of any illness absence by 9:30 am on the day of any absence (see clause 7.1 [300]). The Claimant was auto enrolled into the Respondent's pension with Royal London.

5.5 The Respondent had an office manual which included a Whistleblowing Policy [312-7] and a Grievance Policy [311].

5.6 The Litigation Department contained two fee earners; Mr Knight, the Head of Department and a partner, and Ms Samuels, a Legal Executive. There was another legal secretary within the Department, Miss Wickham. There were other legal secretaries within the Firm, one of whom was Ms Norrie, who featured heavily in the evidence.

5.7 When the Claimant started work, she completed a New Employee Form which contained her address, other contact details, date of birth and information about her next of kin [319-320]. A similar form was completed for the Accounts Department [318].

5.8 The Claimant is a private person and someone who does not share personal information at work. She is guarded about her personal details, including her age. The Respondent informed us that the forms were not kept on the Claimant's personnel file. Rather, they were kept in a locked cabinet in the Accounts Department. Personnel files were kept both electronically and in hardcopy by Mr Coward. The Respondent's case, which we had no cause to doubt, was that the Claimant's personnel file contained no reference to her age and/or date of birth.

5.9 The Respondent is Lexcel accredited. Lexcel is the Law Society's quality mark which is awarded following an assessment which is renewed annually. Bi-annual reviews are more detailed and involve file reviews and staff interviews.

Performance concerns

5.10 There were concerns about the Claimant's performance from a relatively early stage. Miss Wickham had concerns that she was cherry picking the

easier pieces of audio typing and not doing her fair share of the work generally. She spoke to Ms Samuels, Mr Knight and, possibly, Mr Coward, although she could not remember clearly.

5.11 Mr Coward became concerned about the Claimant's lack of output generally and, in particular, how it appeared to reduce further when Mr Knight was out of the office. He was also concerned that she was 'wilful' in respect of her choice of what work she did or how much she did.

5.12 On 18 May 2018, the Claimant's first appraisal was conducted by Mr Coward and Mr Knight [328-330]. The Respondent's case was that, although she was noted to have shown "*good general skills*", concerns were expressed to her about her output. She was asked to keep a record of the work that she undertook over the course of a week so that it could be monitored. In conclusion, though, it was noted that she had made a "*good start*".

5.13 The Claimant's case was rather different. She wholly denied that output concerns had been raised with her. She also denied that she was told to keep a record of her work to enable *her* performance to have been monitored. She understood that she was asked to keep that record so that Ms Samuels' output could have been assessed.

5.14 Having considered both accounts, we concluded that the Claimant was asked to keep the record for both stated reasons. We were satisfied that the partners were trying to support Ms Samuels' request for a pay rise by trying to analyse her output and billing, but we were also satisfied that they had wanted the Claimant to keep that record to enable them to monitor her output as well.

<u>The Claimant's birthday</u>

5.15 It was the practice within the office to mark birthdays with cards. A calendar was kept by the receptionist which showed staff birthdays. Cards were then bought and the receptionist ensured that members of staff signed them. The sense that we had was that not every member of staff's birthday was shown on the calendar. In an employee's third year of service, they also received an additional day of leave on their birthday.

5.16 The Claimant took annual leave between 21 and 25 May 2018. The staff believed that she was going to have been celebrating her 50th birthday whilst she was on leave and a card was bought, signed and sent to her. The Respondent's case was that the staff came by that information because, according to Miss Wickham, the Claimant had mentioned the fact that it was her birthday before she started her leave. She had mentioned it to Miss Wickham and Mr Knight separately. Another of the Firm's secretaries, Yvonne Sargent, had a friend who had been in the same school year as the Claimant, a Mrs Elliott, and Ms Sargent knew that she was 50 that year and she, Miss Wickham and Ms Norrie all determined that the Claimant was likely to have been 50 too. Miss Wickham obtained the Claimant's address from Companies House where she was shown as a Director because she had asked Ms Norrie to post the card but she did not have her address. Miss Wickham did an internet search to find it.

5.17 The Claimant's case was that her personal information must have been

taken from her personnel or other file. She did not know who by or why, but it was the only explanation in her mind for her colleagues' knowledge of her birthday and age. She did not tell Miss Wickham that it was her birthday, but she did tell Mr Knight, she said.

5.18 We concluded that the birthday card was intended for the Claimant as an act of kindness. Having heard all of the evidence, we concluded that it was probable that she had told Miss Wickham that she was taking annual leave over her birthday. We reached that conclusion largely because of Miss Wickham's evidence who the Claimant held out as a truthful, trustworthy and reliable source and a person with a good memory. We too viewed her as a reliable and straightforward witness.

5.19 On 29 May, the Claimant returned to work after annual leave and the bank holiday. Ms Norrie spoke to her and it was agreed that she either said "*it was your 50th wasn't it, you can't hide it you know*" (her account) or "*you are now 50. You can't hide it from us*" (the Claimant's account). Whatever the precise words, we considered that the effect was very much the same.

5.20 The Claimant asserted that she was "*utterly shocked by this remark which* [she] *felt was insensitive, humiliating and insulting*" (her Claim Form). She alleged that it was said as a taunt, that Ms Norrie, with whom she had got on with well, had "*jumped at her like a snake*". Unfortunately, the Claimant shied away from putting that case to Ms Norrie in cross-examination, despite our encouragement.

5.21 The Respondent's witnesses, Ms Norrie and Miss Wickham, asserted that the Claimant appeared unconcerned by the comment. However, Ms Norrie appeared to concede in cross-examination that the comment, albeit intended innocently, may have been received badly. We too felt that she held a suspicion that she may have put her foot in it.

5.22 The Claimant left the office early on 29 May without having given explanation to any of the partners. It was, however, noted with concern. The Claimant said that she left because she had been so upset by the events that she "*would not be able to concentrate further that afternoon*" (paragraph 8.18 of her witness statement). Miss Wickham, however, said that she had told her that she simply needed to go home.

5.23 On 30 May, the Claimant left two voice messages on the Firm's telephone that she was ill and would not be attending for work. She had a stomach upset. She returned to work the following day. In conversation with Miss Wickham, she stated that she had written a letter to Mr Coward which explained her decision to leave the office on the 29th. In the evening, most of the staff left the office to go to a local bar. Mr Coward and the Claimant remained at work and she then presented him with the letter which he read in her presence, part of which read as follows [331-2];

> "*I come to work to earn money. Even so, I try to be friendly, polite and sociable. However, I'm a private person with a belief that personal matters can remain private and should do so if the individual wishes it. I have not sold my soul, only my working hours.*
>
> *I don't want or expect a colleague (KN) to come to my desk and ambush me while I'm working and point out something they believe they know about me which I have not chosen to disclose to anyone…..*

Although I like KN, I am still extremely angry and upset with her utter insensitivity and blunt rudeness at coming to my desk and announcing to my face very proud of herself what she believed she knew about my passing years and rubbing my nose in it. Her unsolicited and unwelcome comments left me reeling. I felt ambushed, punched, slapped and humiliated…..
I do not need her to be spoken to and I do not want an apology."

5.24 On 8 June, Ms Samuels had her own appraisal. She raised concerns about the Claimant's work. She was so dissatisfied with it that she said that she felt that she might as well have typed her own work [333-4]. Her comments prompted further discussions amongst the partners because it was, according to Mr Coward, a turning point of some magnitude.

5.25 In her closing submissions, the Claimant asserted that Ms Samuels' concerns were "*fake*". We accepted that the Claimant may not have agreed with the concerns that were aired, but we did not consider that they had been made up.

5.26 The partners met to discuss the situation on 8 and 11 June. It was resolved that a disciplinary procedure was to have been commenced because of Ms Samuels' loss of trust and confidence in the Claimant but the partners also considered the alternative of securing a mutually agreed departure. There were very limited notes taken of those discussions, but those that there were, were produced in evidence [338-9]. The notes contained the following;

"*Discussing she needs a written warning or settlement agreement*"

It was surprising to us that more formal notes had not been kept of those and other such meetings.

5.27 Mr Coward and Ms Langdown met the Claimant on 15 June. She was provided with a draft settlement agreement together with a letter of that date [343-5]. The Respondent's position was explained with reference to her perceived poor performance, Ms Samuels' views and her unannounced departure on 29 May. She was told that those matters raised questions about the Respondent's trust and confidence in her and that was the reason why she was being offered a means of leaving her employment. If she declined to enter into the agreement, she was asked to return to work by Friday, 22 June and a decision would have been made as to how the partners would have proceeded. They were prepared to treat the following week as additional paid leave which the Claimant alleged was somewhat forced upon her. We agreed.

5.28 The proposed settlement was for the Claimant to have left her employment on 15 June with an agreed reference, one month's salary in lieu of notice and £1,700. Because Mr Coward could not find her address on her personnel file and he did not know or recall the fact that the details were held in the Accounts Department, he asked the Claimant for it and noted it at the meeting [346].

5.29 It was an important meeting and, again, it was surprising that the Respondent had not minuted or noted it. The Claimant produced her own notes which she had written later that day, in the evening [347-9]. She viewed the meeting as having been a point at which her employment was

"*effectively terminated*" [349].

5.30 After 15 June, the Claimant informed herself of her rights. She discovered that she could not have been unfairly dismissed because she lacked two years' service. But she also told us that she discovered that she could have been protected from dismissal as a whistleblower, whatever her length of service.

5.31 In the week of 18 June, a Lexcel Assessor visited the Respondent's offices as part of a regular assessment. The Assessor was notified of the Claimant's absence because she was supposed to have been one of the employees who had been interviewed [350]. Another employee was selected instead [352].

5.32 Also at around this time, the Respondent advertised for a secretary in its Conveyancing Department [340]. The advert was placed on 12 June.

5.33 On 19 June, the Claimant requested an extension of time to consider the settlement agreement [353]. Later that day, she also sought copies of the office manual, her full personnel file and the Respondent's HR policies and procedures, including its disciplinary and grievance policies [354]. She said that they were needed for '*her adviser*' that day. Mr Coward replied [356], stating that, although there was no objection in principle to the provision of the documents, they would not have been provided within the Claimant's stated timescale. In view of her conduct and her limited period of employment, she was urged to either accept the offer or return to work on 22 June.

5.34 On 20 June, the Claimant made what she claimed to have been her first public interest disclosure [357-9]. The document was headed '*Information rights concern/Breach of my personal data/Potential breach of client data*'. Within it, she complained that her personal data had not been kept secure because of Ms Norrie's knowledge of her age. She further stated as follows;

> "*As you know, you have a duty to protect everyone's personal data, clients and staff alike. This is a serious breach given that these are vital pieces of information required for committing fraud….*
>
> *My concerns about my own data breach have led me to consider how insecure client data is. I have serious concerns that there is a public interest issue here as, if my data can be breached, any other person's data you are holding, including those of clients, could be breached.*"

She then explained that there was a risk that, because client files were not stored in fireproof, lockable cabinets, they might have been accessed by cleaners, or been at risk of fire damage, ceiling leaks or burglary. She went on;

> "*All these lax practices and a casual culture in everyday handling of client information at Sampson Coward LLP make for a potentially incendiary situation regarding the security of client and staff data.*"

5.35 The Claimant accepted in cross-examination that the wording of her letter had, in part, come from what she had read about whistleblowing law. She also made a subject access request that day too [360-1] and clarified that the '*adviser*', who she had referred to previously, was in fact a family member.

5.36 On 21 June, the Claimant sent a further email to Mr Coward at 1:20 pm in which she raised further concerns about confidentiality issues and refuted the allegations of poor performance which had been made on 15 June [362-5]. This was the second protected disclosure which was relied upon. She also referred to matters which had been raised on 20 June, albeit in less detail [365].

5.37 The Claimant sent another email at 1:25 pm in which she raised a formal grievance [368]. This was her third and last public interest disclosure, which again referred to her own "*data breach*" being "*of public interest*" and akin to breaches in respect of client files. It was a much shorter document.

5.38 The Claimant sent a third email that day in which she attached a fit note indicating that she would not have been returning to work on 22 June. She was signed off until 3 July with work related stress [369-370].

5.39 Mr Coward replied at length [371-2]. He refuted the allegations of breach of data security. He pointed out that the disclosed personnel file did not contain the Claimant's date of birth or her address but that the information was freely available on the internet in any event. He stated that knowledge of her age had been obtained through a mutual friend who had been in her year at school. He asserted that her reliance on public interest disclosures was in bad faith;

> "*I am concerned that you are acting in bad faith with regard to your alleged concerns of there being a public interest issue. As an employee with less than two years continuous service, you do not have sufficient continuous service to bring a claim for unfair dismissal (as I anticipate you are well aware)…. Your comments regarding client files is a thinly disguised attempt to create a public interest element and is not something that you have ever mentioned before. Indeed, it is a well-known tactic for employees who have less than two years continuous service to try to create a whistleblowing claim and because of this, such claims are viewed with considerable scepticism.*"

5.40 In a without prejudice email which was sent at exactly the same time [374-5], Mr Coward stated that the Respondent's offer would not have been improved upon and that, should a Tribunal claim be brought, the Firm would seek its costs. He nevertheless hoped that the Claimant would sign the settlement agreement and that litigation would not arise. He provided her with an extension of time until 29 June in which to consider the offer.

5.41 Mr Coward wrote again on 22 June, this time in response to the Claimant's grievance [406]. He said that he would not produce the office manual at that stage until he was satisfied that the "*confidential information within that document will not be disclosed to any third parties*". He said that he chose those words because of the Claimant's earlier decision to disclose the fact of her letter to him of 31 May to Miss Wickham and the fact that he had been misled by the use of the word '*adviser*' in relation to a family member. He ended the letter as follows:

> "*We are also mindful that you are now signed off work and accordingly do not intend to correspond with you any further at this stage save, with regard to, the issue of the grievance referred to above.*"

5.42 Mr Coward wrote to the Claimant again on that day [407]. He offered her a

further extension within which to consider the settlement offer in light of her illness absence; a further week from the end of her fit note, to 10 July. If she did not accept the offer, he then expected to see her back at work on 10 July and he clarified that her leave remained paid.

5.43 On 18 July, the Claimant resigned [442-7]. She asserted that the Respondent had breached its duty of care towards her, had breached her confidentiality, had caused her to resign under duress and had treated her in an unjustified and unfair manner in a number of ways.

Pension

5.44 The Claimant complained that Royal London were notified that she had been reported as a 'leaver' before she had resigned, thereby indicating the Respondent's mindset to dismiss her.

5.45 Mr Coward accepted that the Respondent's Accounts Department *did* liaise with the Firm's accountants to make provision for the Claimant's early departure if she had accepted the offer. It was discussed as a "*possibility*" in an email to the accountants from the Accounts Department [405]. It was, however, later acknowledged that she was not a leaver in June [410-1]. Action was then taken when she did subsequently resign in July [450].

5.46 The Claimant complained that one of the documents in the hearing bundle [451], a substantially similar version of the email of 24 July [450], had been '*doctored*'. It was an odd allegation to have made since it appeared to serve no obvious purpose for the Respondent to have altered it, particularly in the face of the innocuous explanation that was provided (a Microsoft bug relating to draft emails (see [452] and [457])).

5.47 The Claimant's argument was that the 'edited' version sought to distance Mr Coward from the Accounts Department and, therefore, knowledge of the New Employee Form that was kept there. In other words, the change in the email was done to deliberately conceal a state of knowledge on his part of the existence of data relating to her date of birth.

5.48 Having considered the innocuous explanation and the Claimant's evidence, we considered her theory to have been utterly fanciful.

6. Conclusions

6.1 We dealt with paragraphs 4-11 of the List of Issues first [242-3] and the complaints under ss. 26 and 13 of the Equality Act. The conduct complained of was described as the "*comment made by Mrs Norrie on 29 May 2018 (paragraph 6 of the Claim Form)*"

Harassment; relevant legal test

6.2 Under s. 26, not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

6.3 As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide

whether any conduct falling within sub-paragraph (1) (a) had either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) *and* (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to have been regarded as having had that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived her the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

6.4 It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Harassment; conclusions

6.5 We were satisfied that Ms Norrie's comment met the subjective test; the Claimant was genuinely upset and the comment was self-evidently related to her age.

6.6 We were not, however, able to accept that, objectively, the comment ought reasonably to have been regarded as having had the prohibited effect. The Claimant's sensitivity about her age appeared unusual and extreme. The Respondent's witnesses thought so and we shared that view. The comment was trivial and had not been delivered maliciously. Whatever the precise words which had been used, they ought not to have been considered as words of harassment when viewed objectively. To have done so would have been to cheapen the application of s. 26. In making that assessment, we had to look at all of the circumstances of the case which included the fact that the Claimant worked for a Firm which publicly celebrated and rewarded people's birthdays.

Direct Discrimination; relevant legal test

6.7 The complaint that was brought under s. 26 was brought in the alternative under s. 13 of the Equality Act 2010:

> "*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.*"

6.8 The protected characteristic relied upon was age and the comparison that we had to make was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

6.9 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(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."

6.10 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden shifted. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of her age, because of her age.

6.11 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

6.12 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply. As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question.

<u>Direct discrimination; conclusions</u>

6.13 This complaint did not work as one under s. 13. There was no sufficient evidence from which we were able to conclude that Ms Norrie, a 52-year-old, or Miss Wickham, a 60-year-old, would have been treated differently. Ms Norrie could not, of course, have made the comment to herself. She could have made it to Miss Wickham or any other hypothetical comparator aged 51 or above and we saw no reason why she might not have said the same or a similar thing to anyone, of whatever age, who was celebrating a birthday.

6.14 Further, we concluded that the comment was not objectively less favourable or disadvantageous for the reasons set out in more detail in paragraph 6.6 above.

6.15 Next, we turned to paragraphs 12 to 16 of the List of Issues and public

interest disclosure complaints.

Public interest disclosure; relevant legal test

6.16 First, we had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as the making of a simple or bare allegation (see the cases of *Geduld-v-Cavendish-Munro* [2010] ICR 325 in light of the caution urged by the Court of Appeal in *Kilraine-v-Wandsworth BC* [2018] EWCA Civ 1346). Next, we had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made, such that the Respondent was given a broad indication of what was in issue (*Western Union-v-Anastasiou* UKEAT/0135/13/LA).

6.17 We also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(b) had been or were likely to have been covered at the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that she held it (*Babula-v-Waltham Forest College* [2007] IRLR 3412, *Korashi-v-Abertawe University Local Health Board* [2012] IRLR 4 and *Darnton-v-University of Surrey* [2003] IRLR ICR 615). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in *Kraus-v-Penna* [2004] IRLR 260 EAT). Further, the belief in that context had to have been a belief about the information, not a doubt or an uncertainty (see *Kraus* above).

6.18 Next, we had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that she possessed it (see *Babula* and *Korashi* above). That test required us to consider her personal circumstances and ask ourselves the question; was it reasonable for her to have believed that the disclosures were made in the public interest when they were made.

6.19 The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance. Supperstone J decided that the public interest may have been limited to a small group of 100 or so employees (in that case, about 100 senior managers were potentially affected by the employer's massaging of performance figures in relation to bonus). The Court of Appeal confirmed the decision and determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

6.21 The position was to have been compared with a disclosure which was made for purposes of self-interest only, as in *Parsons-v-Airplus International Ltd* UKEAT/0111/17 (see, in particular, paragraph 37 of Underhill LJ's decision in *Chesterton* cited in paragraph 26 of *Parsons*).

6.22 We did not have to determine whether the disclosures had been made to the right class of recipient since the Respondent had accepted that they had been made to the Claimant's 'employer' within the meaning of section 43C (1)(a) (paragraph 15 of the List of Issues).

6.23 Then there came the issue of causation; had the Claimant suffered the alleged detriments as a result of the disclosures? The detriments relied upon were those in paragraph 16 of the List of Issues.

6.24 The test in s. 47B was whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosures had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in *Harrow London Borough Council-v-Knight* [2002] UKEAT 80/0790/01).

6.25 Section 48 (2) was also relevant;

> "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

That section was easily misunderstood. It did not mean that, once a claimant asserted that she had been subjected to a detriment, the respondent had to disprove the claim. Rather, it meant that once all of the other necessary elements of the claim had been proved on the balance of abilities by a claimant (that there was a protected disclosure and a detriment which the respondent had subjected her to), the burden shifted to the respondent to prove that the detriment was not caused on the grounds of the disclosure. The test was not one which was amenable to the approach in *Wong-v-Igen* (above) according to the Court of Appeal in *NHS Manchester-v-Fecitt* [2012] IRLR 64.

<u>Public interest disclosure; conclusions</u>

6.26 It was odd that, in a long, intelligently written and detailed witness statement, the Claimant did not specifically refer to the disclosures which had been recorded in the List of Issues *as* public interest disclosures (paragraph 12 (ii)-(iv) [243]). The first one [357-9] was not referred to at all. The second and third ([362-5] and [368]) were not referred to as public interest disclosures, although they were at least mentioned (paragraphs 23.2 and 23.7 of the witness statement). Instead, both in her evidence and during her cross-examination of the Respondent's witnesses, she repeatedly referred to the cause of many of the alleged detriments as having been her letter of 31 May which was no longer relied upon as a disclosure because of her failure to pay the deposit order (see above).

6.27 We approached our conclusions in accordance with the stages of the legal test. First, we had to determine whether information had been disclosed, which the Respondent did not dispute. Next, we had to consider whether the information disclosed was of the necessary type or kind under s. 43B (1)(b) or (d). Again, it was not in dispute that the subject matter of the disclosures covered legal obligations which the Respondent had to the Claimant and their clients in relation to personal data.

6.28 Next, we had to consider whether the Claimant held a reasonable belief that the information tended to show an actual or likely breach of any legal obligation. We had to distinguish between the two types of disclosure which had been made; those which related to the Claimant's own data and those which related to client data.

6.29 In relation to the former, we were satisfied that the Claimant had a genuine belief, that was probably reasonably held at the time, that confidentiality in relation to her data had been breached; her belief that her date of birth had been sourced from her personnel and/or other file held by the Respondent. In relation to the latter, however, we were not satisfied that the Claimant held a reasonable belief of the likelihood of a breach of a legal obligation in other respects. The risks of burglary, water ingress, theft by cleaners or fire, whilst all theoretical possibilities, were not, in our judgment of the evidence, at all likely. The Claimant's evidence fell well short in that respect. Her witness statement contained no explanation of how she reached any form of assessment of the level or severity of such risks.

6.30 Next, there was the public interest requirement. As to the Claimant's own data, we did not consider that the public interest requirement was met. There was no public interest associated with the fact that members of staff had knowledge of her date of birth. She argued that others might have been affected by similar data breaches and that Ms Norrie had not appeared to understand the legal obligations that she had been under in respect of personal data, and that the public interest was therefore served by disclosing the breach and raising awareness of data security issues. We did not accept that argument. It appeared to us that the Claimant's motivation for raising complaints about her colleague's knowledge of her age related solely to her own sensitivity about the issue. The public would have had no interest in such a matter and we did not accept that she had a reasonable belief that that element of the disclosures was in fact in the public interest.

6.31 In relation to the second category of disclosure, those related to client data, although we considered that there certainly could have been a public interest in respect of them, we ultimately also concluded that they had been made for reason of pure self-interest. We reached that view for a number of reasons.

6.32 First, there was the timing of the disclosures. The Claimant had worked for the Respondent since November 2017. She had seen how client data was kept for over six months but had not said anything, despite having been "*a natural whistleblower*" according to her supporting witness, Mr Shaukat. It was only after the meeting of 15 June, when she was offered a choice between a settlement to leave her employment or facing an internal process, that she made the disclosures.

6.33 Secondly, we considered that the language of the disclosures was suffused with statutory language which the Claimant had picked up from her reading. She accepted in cross-examination that she had read up on her position after 15 June, that she had realised that she could not have brought an 'ordinary' complaint of unfair dismissal but could if she was protected as a whistleblower. That is what she therefore did; she made the disclosures to improve her position and create an argument which would otherwise not

have existed.

6.34 We reminded ourselves paragraph 26 of the judgment in *Parsons*. We had to look at all of the circumstances in the case and, having done so, we concluded that the disclosures were not made in the public interest.

6.35 Despite our findings in respect of the disclosures themselves, we nevertheless went on to consider the detriments which had been raised.

6.36 The chain of events about which the Claimant complained commenced before the three disclosures which were relied upon at the hearing. She complained that the partners had decided to bring her employment to an end on 8 June after her letter of 31 May [338]. "*The link*", she said, was "*crystal-clear*" (paragraph 14.4 of her witness statement). The problem was that the course of conduct about which she complained was not triggered by any of the remaining disclosures upon which she relied, which were made on 20 and 21 June 2018.

6.37 The disclosures which predated the 20 or 21 June were as follows (adopting the paragraph numbers from the List of Issues [244]);

(1) The detriment was said to have occurred from 31 May;
(2) The detriment occurred on dated 15 June;
(3) As (2);
(4) As (2);
(5) The allegation ran from 15 June. Mr Coward's refusal to grant an extension of time was on 19 June but he then *did* grant extensions on 21 and 22 June;
(6) As the Claimant confirmed in cross-examination, the allegation was dated to 19 June (see paragraphs 16 to 17 of the Claim Form [20-1] and [355-6]);
(7) Lexcel's visit was in the week of 18 June;
(13) The Claimant asserted that the advert went out on 14 June (paragraph 25.1 of her witness statement). The document showed that it went live earlier (on 12 June [34]) and that it related specifically to the Conveyancing Department.

6.38 As to those allegations which remained and which postdated the disclosures relied upon, we reached the following further conclusions;

(8) It was not clear to us what the detriment truly was. The Claimant did not tell us what was in the Policy which she was allegedly denied access to. It was nevertheless clear that she *did* put in a grievance on 22 June;

(9) Mr Coward had seemingly referred to the old statutory test of 'good faith' under the Act which was replaced by the test of 'public interest' following the amendments introduced by the Enterprise and Regulatory Reform Act. Mr Coward had been entitled to state the Firm's case. It was, perhaps, unfortunate and more emotive for him to have quoted the wrong test;

(10) The Manual was thought to contain confidential information and Mr Coward did not consider it to have been relevant. Further, he had felt that he had been somewhat duped by the Claimant, both in

relation to her disclosure of her letter of 31 May to Miss Wickham, when he thought it was confidential to him, and in relation to her request for other documents for her 'adviser', who turned out not to have been a lawyer. His suggestion in his email of 22 June was not, therefore, linked to the disclosures, but to those experiences;

(11) We did not consider this to have been detrimental treatment. The Claimant was on sick leave and Mr Coward referred to that as the reason;

(12) The Claimant was off sick until 3 July. She had asked for an extension of time in which to consider the offer. It was not therefore a detriment to have been offered *more* paid leave in which to have considered the offer. Even if it was, this had all started on 15 June, before any of the disclosures;

(14) The Claimant was shown as a pension scheme 'leaver' on 30 June in a letter dated 26 June [409]. There was a wholly innocent explanation for that, as set out in paragraphs 5.44 and 5.45 above.

6.39 Accordingly, the Claimant's complaints were not well founded and were dismissed.

7. Costs

7.1 At the conclusion of the hearing, the Respondent applied for its costs. It maintained that the public interest disclosure element of the claim had been brought and/or pursued vexatiously, abusively or otherwise unreasonably within the meaning of rule 76 (1)(a) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013. Specifically, it was said that the Claimant had pursued the claim vexatiously because of the Tribunal's finding in relation to the public interest element of the alleged disclosures. Since we had found that they had been motivated by self-interest and that the Claimant, having consulted the law, had formulated the claim because an 'ordinary' complaint of unfair dismissal was not possible, it was an unjustified and unreasonable use of the legislation.

7.2 The Respondent also alleged that the Claimant had behaved unreasonably in rejecting certain offers which were made. It was evident from the documents which we were shown that the Respondent had threatened a costs application if a complaint public interest disclosure was brought, even before proceedings had been issued [374-5]. The Respondent then made a series of further offers including, most recently, a 'drop hands' offer on 20 September and a further offer that the Claimant would receive £1,000 if she withdrew her claims on Tuesday, 24 September, after she had given evidence.

7.3 The Respondent sought the sum of £12,740 in costs, being counsel's fees for the entirety of the case. Mr MacDonald indicated that his daily refresher had been £850.

7.4 We heard the Claimant respond to the application. She alleged that Mr Coward, an employment solicitor of 30 years standing, could have represented the Firm himself without having involved counsel. She said that

she had believed in her case and still did so. She stated that she had revealed lax procedures within the Respondent and that she had been brave enough to raise head above the parapet. She confirmed that her means were still as out in paragraph 21.1 to 21.2 of the Case Management Summary and Order of 17 June 2019, save that her credit card bill had been reduced to approximately £10,000.

Relevant legal test

7.5 The question which arose under rule 76 (1)(a) was whether the Claimant had "*acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) the way that the proceedings (or part) had been conducted*".

7.6 Just because a party did better than an offer that was made during interlocutory correspondence did not necessarily mean that his opponent behaved unreasonably by rejecting it (*Kopel-v-Safeway Stores* [2003] IRLR 753). However, when a party held out an unrealistically high expectation, not only in excess of what was awarded, but in excess of what might ever have been awarded, unreasonable conduct may have been demonstrated (*Power-v-Panasonic* [2005] All ER (D) 130 and *G4S Security-v-Rondeau* [2009] UKEAT/0207/09).

7.7 Although not specifically raised as an application under rule 76 (1)(b), the Respondent was effectively arguing that the complaints under s. 47B had never had any reasonable prospect of success. In such circumstances, it was not necessary for the Claimant to have lied or otherwise acted unreasonably for an award to have been made on that basis alone (*Topic-v-Hollyland Pitta Bakery* UKEAT/0523/11). The essence of the test was neatly summarised in *Millin-v-Capsticks Solicitors* [2014] UKEAT/0093/14;

"*Where a claim is truly misconceived and should have been appreciated in advance to be so, we see no special reason why the considerable expense to which a Respondent will needlessly have been put (or a claimant in a case within which a response is misconceived) should not be reimbursed in part or in whole*" (paragraph 67).

7.8 Rule 76(1) imposed a two-stage test: first, we had to ask whether the Claimant's conduct had fallen within rule 76 (1). If so, we had to go on to ask ourselves whether it was appropriate to exercise discretion in favour of awarding costs against her. As the Court of Appeal reiterated in *Yerrakalva-v-Barnsley Metropolitan Borough Council* [2012] ICR 410, costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs was more sparingly exercised and was more circumscribed than that of the ordinary courts, where the general rule was that costs followed the event. Further, in *AQ Ltd-v-Holden* [2012] IRLR 648:

"*A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel for the*

claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser…"

7.9 We recognised that, in terms of causation, it was unnecessary to show a direct causal connection (*McPherson-v-BNP Paribas* [2004] ICR 1398 and *Raggett-v-John Lewis* [2012] IRLR 911, paragraph 43), but there nevertheless had to have been some broad correlation between the unreasonable conduct alleged and the loss (*Yerraklava* above). Regard had to be taken of the '*nature, gravity and effect*' of the conduct alleged in the round (both *McPherson* and *Yerraklava*). A costs order was restorative, not punitive (*Lodwick-v-Southwark London BC* [2004] EWCA Civ 306) and we could not make one simply because the Claimant had got something wrong.

7.10 Under rule 84, we *may* have taken into account the Claimant's means when considering both whether to make a costs award and, if so, in what amount.

Conclusions

7.11 We concluded that the Claimant was wrong to have artificially attempted to cloak herself with the protection afforded by the whistleblowing legislation by making disclosures which had not been public interest. That had been conduct which was properly described as unreasonable within the meaning of rule 76 (1). It was not just inexperience, naivety or lack of objectivity that she demonstrated but, rather, a deliberate attempt to make her case something that it was not.

7.12 We further concluded that we ought to exercise our discretion in the Respondent's favour in respect of costs. In doing so, we paid particular attention to the Claimant's rejection of the Respondent's offers. Although not, perhaps, unreasonable conduct per se, the Claimant's approach to offer which was made after she had finished giving evidence, when her case ought to have been at its height, demonstrated a somewhat headstrong and stubborn approach. The rejection was despite the several important concessions which she had made. The offer ought to have been considered generous at that point, but it was not clear what, if any, serious thought was given to it.

7.13 The next question we had to address was the value of the award. There was no doubt that there would have been some case to hear because the Respondent did not allege that the entire claim had been unreasonably brought. The complaint of age discrimination had been trimmed somewhat following the making of the deposit order, but all four of the Respondent's witnesses covered it as too, of course, did the Claimant. Accordingly, the Claimant's pursuit of the public interest disclosure complaints had probably only extended the hearing by two days, to four days.

7.14 Doing the best that we could in the circumstances therefore, we considered that an award to the Respondent to the value of two refresher fees was appropriate; £1,700. We did not consider that Mr Coward was unreasonable in instructing counsel and not conducting the case himself, particularly as he was a witness.

7.15 We accounted for the Claimant's means in making that award as set out above.

Employment Judge Livesey

Date 29 October 2019