



EMPLOYMENT TRIBUNALS

Claimant: Ms L Foure

Respondent: Shurguard UK Ltd

Heard at: London South

On: 2-5 September 2019

Before: Employment Judge Martin
Ms B Leverton
Nr N Shanks

Representation

Claimant: In person

Respondent: Mr Green - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims are dismissed

RESERVED REASONS

1. The Claimant presented a claim form on 29 June 2018 making claims of unfair dismissal and whistleblowing. The Responded defended the claims.

The Issues

2. The issues for the Tribunal to determine were agreed by the parties as set out in the case management order of 5 October 2018:

Constructive Unfair dismissal

3. The Claimant claims constructive unfair dismissal, she confirmed that the final straw was when she received the outcome of her grievance. For the avoidance of doubt, the Claimant confirmed that she was relying on all the points she had raised in her whistle blowing complaint as the evidence that led up to the final straw (see below).
4. Did the Claimant resign in response to the breach? Was there any delay in resigning which could amount to an acceptance of the breach?

5. Can the employer show a potentially fair reason which would justify dismissal?
6. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities, that the Claimant committed misconduct.

Public Interest disclosure claims

7. What did the claimant say or write?
 - a. The Claimant raised a grievance on 13 January 2018 raising a complaint the Respondent failed to allow employees to take their legal holiday entitlement and referring to the health and safety risks associated with carrying out cleaning on the premises.
 - b. On the 2 February 2018 the Claimant raised a grievance
8. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show one of the following?
 - a. The Respondent had failed to comply with a legal obligation of allowing the staff to take statutory annual leave.
 - b. The health or safety of the Claimant had been put at risk when carrying out cleaning on the premises.
 - c. If so, did the Claimant reasonably believe that the disclosure was made in the public interest. The Claimant confirmed in the hearing that the reference to failure to allow statutory annual leave was a reference to all those in the company and not just her.

Public Interest detriment complaints

9. If protected disclosures are proved, was the Claimant on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that:
 - a. Not following the sickness absence procedure;
 - b. Attempting to remove the Claimant from the company premises on 30 January 2018
 - c. The handling of the grievance (including criticising the Claimant's character).
 - d. The Claimant confirmed that the detriment of 'asking her to work 9 days when sick' was an allegation that was not on her claim form, was not a claim she was pursuing (but was background information).
10. If the act of detriment was done by another worker
 - a. Can the employer show that it took all reasonable steps to prevent that other worker from doing that thing or acts of that description; or
 - b. Can the worker show that s/he had relied on a statement by the employer that the doing of the act did not contravene the Act, and that it was reasonable to rely on that statement.

Unpaid annual leave – Working Time Regulations

11. This was resolved by the time of the hearing.

The Law

12. The law as relevant to the issues is:

Unfair dismissal

s95 Employment Rights Act 1996 provides that an employee is dismissed by his employer if the contract under which he or she is employed is terminated by the employer (whether with or without notice) or the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct.

Mahmud v BCCI [1997] IRLR 462 which held that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is objective and not what the Claimant believed was breached.

Protected disclosures

The principal definition is in section 43A Employment Rights Act 1996 which refers to other sections.

43A Meaning of 'protected disclosure'

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.

43B Disclosures qualifying for protection

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

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

The Claimant must therefore prove as a first step that there has been a disclosure of information. The Tribunal will have to find that the Claimant believed that that information tended to show one or more of the matters set out in paragraphs (a)-(f), and also that it was reasonable for that belief to be held.

47B Protected disclosures

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

made a protected disclosure.

The enquiry of the Tribunal will therefore initially be whether there was in fact any detriment, and then whether that detriment was 'on the ground' of a protected disclosure having been made. Section 48 provides so far as is relevant:

The Hearing

13. The Tribunal heard from the Claimant. For the Respondent, the Tribunal heard from Mr Jamie Taylor (Senior District Manager who heard the grievance) and Ms K Murrell (Market Manager who heard the appeal). The Tribunal had before it an agreed bundle of documents numbered to 396.
14. The Tribunal also had two witness statement prepared on behalf of the Claimant and a witness statement from Ms Shani Davies (previously HR Manager who has left the Respondent's employment) for the Respondent. These witnesses did not attend the Tribunal and therefore as their evidence could not be challenged by way of cross-examination very little weight could be attached to them. The Claimant had been expecting these witnesses to attend and the Tribunal told her that they could be called as a witness at any time up to the end of the evidence even if that meant interrupting the Respondent's evidence.
15. The Tribunal appreciated that the Claimant was a litigant in person, and tried, as far as it was able to, to assist her in putting her case whilst at the same time informing her that it could not make her case for her. The Tribunal gave her time to ask her questions of Mr Taylor which were extensive (he was cross examined for nearly a day), gave adjournments when needed and guided the Claimant on the issues that the Tribunal were to determine which are set out above to ensure that her questions were relevant. It became clear during the hearing that the Claimant thought the Tribunal would consider whether the Respondent had breached health and safety laws despite the issues which had been agreed and set out above. It was explained that that was not within the issues or the Tribunal's jurisdiction. The Claimant accepted this.
16. English is not the Claimant's first language however her English is excellent with wide ranging vocabulary and good use of idioms. However, the Tribunal wanted to make sure that the Claimant understood what various words she used meant and the seriousness of the allegations being made to ensure that it properly understood what the Claimant was saying. For example, the Claimant alleged that documents had been 'fabricated', that the Respondent 'stole' her holiday to make their statistics look better, allegations of 'conspiracy and collusion'. The Tribunal checked with the Claimant to make sure that everyone was clear on the meaning of the allegations she was making. She said that she understood the meanings and repeated her allegations. She said the meaning of the words used was the meaning most would consider correct, eg. 'fabricated' means something is made up.
17. The Tribunal offered the Claimant adjournments as she needed both when she was giving evidence and when cross examining the Respondent's witnesses. The Claimant was given time to prepare her submissions at the conclusion of the evidence. The Respondent gave its submissions at the end of day three and the Claimant gave her submissions on the morning of day four.
18. The Claimant was critical of the manner in which questions were put in cross examination to her describing them as "an interrogation". The Tribunal assured the Claimant that the questions were appropriate and legitimate and that had they

not been that it would have intervened.

19. The issues record that there were two disclosures which the Claimant relied on as protected disclosures. On day two the Claimant withdrew the second grievance (2 February 2019) as being a protected disclosure and confirmed she was only relying on the first disclosure made via the Respondent's whistleblowing hotline to Brussels where the Respondent's Head Office is located.
20. The Claimant had prepared a lengthy opening statement which she said would take about 40 minutes for her to read out. It was explained to her that the Tribunal does not hear opening statements but goes straight to the evidence. The Tribunal did look at the opening statement she had prepared and noted that the content went outside the issues that had been agreed for determination. This was explained to the Claimant and it was also explained that the relevant parts of the opening statement could be used in her submissions at the end of the evidence if she so wished.

The facts that the Tribunal found

21. The Tribunal found the following facts on the balance of probabilities having heard the evidence and considered the documents and submissions. These findings of fact are limited to what is relevant to the issues and necessary to explain the decision reached. All evidence was considered even if not specifically referred to. Where there was a conflict of evidence the Tribunal considered whose evidence it preferred, on the balance of probabilities, i.e. whose evidence it felt was more likely to be true.
22. The Claimant was employed as an Assistant Store Manager at the Fiveways store from 18 January 2016 and was later promoted to Store Manager. The Respondent is a self-storage facility. The Claimant resigned on 6 March 2018 working her notice with the effective date of termination being 6 April 2018.
23. The management structure in the UK is that there is a HR Manager, a Market Manager, a Senior District Manager, District Managers and Store managers. The HR Manager has an office which is occasionally used by the Senior District Manager and Market Manager when they are not visiting stores. Mr Taylor said he was there only a couple of times a month.
24. The Market Manager was Ms Murrell. She was new to the Company and had not worked in the industry before. Her appointment was announced to staff on 6 November 2011 by email and there was a photograph of her attached. It stated that she was joining the company on 15 January 2018.
25. The Store Managers must complete what is known as the 'Daily Path'. This is a process whereby they go through the store each day and check it is clean and check maintenance issues. The Respondent has a contract with Rentokil to deal with vermin, vermin droppings and so on. This comprises a monthly maintenance check where levels of infestation are monitored with appropriate action being taken, and a call out service for when issues such as dead vermin need to be dealt with. In relation to general maintenance there is a contract with a handyman company and when five maintenance matters are recorded that company is called out to do the repairs. This includes changing lightbulbs which are high up and need a ladder to change. If something is urgent then that company can be called out as required.
26. The Claimant was regarded as a very good employee and there were no

disciplinary matters during her employment. The Claimant similarly had no issues with the Respondent until December 2017 which are discussed below. No complaints or grievances had been raised by the Claimant until this time.

27. The Respondent has a comprehensive set of policies which were before the Tribunal. Included in those policies is a policy relating to holiday, a sickness absence policy, a grievance policy and whistleblowing policy.

Holiday issues

28. The Respondent give staff a holiday entitlement and the handbook states that holiday cannot be carried forward from one year to the next and that no payment in lieu is made. This is a 'use it or lose it' policy. However, over the years it became common practice that holiday was carried over to the next holiday year. The Respondent made a management decision to reaffirm the policy on 11 December 2017 so that no holiday could be carried forward to the next holiday year or paid in lieu in line with the written policy. This applied to all staff who were all notified on 11 December 2017. The Respondent also implemented a new pay structure where more pay would be earned in basic pay, and less by way of bonus or commission. The Respondent said that this would not mean that anyone would earn less but was a way of making pay more consistent across the organisation. The Claimant was not happy about this believing it would reduce her pay overall as she was a high performing employee this was disputed by the Respondent.
29. The holiday year runs from 1 January to 31 December, so the announcement was right at the end of the holiday year when nearly all staff had booked their holiday for that year. The Respondent implemented a new computer system called Dayforce when the policy was reaffirmed, which had glitches to start with. The glitch that affected the Claimant (and a few other employees) was that when a week's holiday was recorded it counted seven days rather than five working days. At first it was not possible to override this system with the result that holiday could not be booked if it appeared that member of staff had used their holiday entitlement. This affected the Claimant in respect of four days holiday. Mr Taylor's evidence was that very few people were affected as most staff had used their holiday entitlement by this time either by taking holiday or having already booked holiday. The Respondent pays over and above the statutory holiday required pursuant to the Working Time Regulations 1998 and any contractual holiday over and above the statutory holiday is not subject to the same rules under this legislation.
30. The holiday issue became significant for the Claimant who complained about the situation to Ms Davies the HR Manager. At first Ms Davies thought she was complaining about the policy itself and when she realised it was about four days holiday outstanding, she agreed either to pay for that holiday or carry it forward. By the time of the Tribunal this issue had been resolved and the Claimant had been paid for this holiday.

Rotas

31. The Claimant had a period of ill health in November 2017. Her District Manager at that time was Hannah. Hannah agreed that there could be a departure from the sickness absence policy which required staff to call the store on each day of sickness. She also agreed that as part of the Claimant's return to work that she would not be rostered to work more than four consecutive days. This was also a departure from normal practice and agreed specifically with Hannah.

32. The rotas were compiled and published about 8 weeks in advance to give time for staff to ask for changes if needed. This means that the rota for January 2018 would have been prepared in about November 2017. This was when Hannah was the District Manager. Unfortunately, there had been a high turnover of District Manager's covering this store and Mr Taylor recognised in his evidence that this was not ideal and did have an impact on how the stores ran especially as different managers would have different views on how polices should be implemented and exceptions to them. Alex became the District Manager for the Claimant's store in January 2018. She was a new District Manager and came to the area straight after a period of training.
33. The Claimant then had a second spell of illness for the same cause as the illness in November 2017. Alex took a different view to Hannah and required the Claimant to adhere to the sickness absence policy and call in daily. The Claimant was upset about this as she had previously been given dispensation over this and considered it unfair. However, there is no evidence to suggest that she told Alex the reason why calling everyday was difficult or that she challenged this decision. The Claimant gave an explanation in submissions why it was difficult, but this explanation appears not to have been given to Alex at the time or given during her evidence when it could have been challenged by the Respondent.
34. While on sick leave, the Claimant asked Alex that she should not work more than 4 consecutive days. The Claimant complains that Alex did not permit this. However, the evidence shows that Alex did not refuse, but asked for medical advice that this was required as is set out in the Respondent's policy. The Claimant did not provide any medical advice.
35. The Claimant also complained to Alex that she was on the rota to work nine consecutive days when she was returning to work. This was a rota that Hannah had compiled before she left the business. In response, Alex said that no one was required to work this number of consecutive days and asked the Claimant to give her information about this so she could investigate the inference being that this was the first she knew of this. The Claimant did not do this. She said that she did not do this because she thought Alex had put this rota together. This was an erroneous assumption as it was already in place when Alex joined the Respondent as District Manager. The Tribunal finds that the Claimant did not put this to Alex or check who had compiled the rota.

Cleaning and maintenance issues

36. Vermin such as mice and rats are a problem for the Respondent. There can be infestations for example where clients store perishable goods in the storage facility. Therefore, the Respondent has a contract with Rentokil. This contract provides for a monthly maintenance visit where levels of infestation are monitored and appropriate action taken when needed. If there are issues between maintenance visits, then a call-out can be arranged.
37. The Claimant gave evidence that vermin were a very frequent problem and that she was expected and required to dispose of dead or dying vermin and clean their faeces. Mr Taylor said that whilst vermin can be a problem, it was never as bad as the Claimant was suggesting. He said that the maintenance contracts usually sorted matters out and that where dead or dying vermin are detected the store manager is required to take the appropriate action to remove them. The appropriate action is to contact Rentokil with whom there is a service level agreement requiring a visit within 24 hours. The Tribunal also accepts Mr Taylor's

evidence that staff are not required or expected to deal with such matters personally as the Claimant appears to have done.

38. The Respondent's premises have light bulbs which are high up and require a ladder to change them. The Respondent has a contract with a handyman company to deal with such matters. The process is that maintenance issues are recorded in a book and when there are five matters to be dealt with the handyman company is called in. If there is something urgent then that company can be called in just to deal with that issue. The Claimant says she personally climbed ladders to change the bulbs. The Tribunal finds that there was no obligation on the Claimant to do this given the contract with the handyman.
39. The Claimant says she dealt with these issues personally throughout her employment but did not complain about having to do these tasks until her period of sickness and her complaint is based on the problem with doing it being her ill health. The first time she raised it was in her disclosures to the whistleblowing hotline on 13 January 2018 which is discussed below.
40. Mr Taylor was adamant that staff were not expected to and should not deal with these issues and that the service contracts the Respondent had were appropriate to deal with these matters. The Tribunal accepts his evidence and finds that there was no requirement to deal with vermin as the Claimant says and that if the District Manager or other management said it had to be dealt with this meant calling Rentokil. If the Claimant did do this, then this was her choice but not a requirement or management instruction.
41. Similarly, the Tribunal does not find that there was a requirement for the Claimant or other Store Managers to climb on ladders 3 meters up to change lightbulbs. There is a handyman contract for this. If the Claimant did this, this was her choice and decision and not a requirement imposed by the Respondent.

13 January disclosure to whistleblowing hotline

42. On 13 January 2018 the Claimant sent a letter to the whistleblowing hotline which she relies on as a protected disclosure. In her disclosure she says (referring to her return to work from sick leave) **"Since I always make sure all aspects of the job are done, I have been doing my job as normal including carrying and going larger ladder (sic) and replacing light tubes 3 meters high and doing all the cleaning and lifting as normal despite being in pain. My doctor has recommended that I take more time of work and rest but I did not complain or slack of work. Over the 2 year I have cleaned rotten and fresh mice and bird carcasses, animal faeces, dirty tampons, rotten smelly unknown substances and I have never complained once as I consider it my job to clean my store clean and I very proud that my store was voted the Cleanest Store in the UK (sic)".**
43. The Claimant made no complaint about having to dispose of vermin or the other matters mentioned until this time and her complaint in this document references problems she had doing this because of her ill health and does not raise issues with it as something that generally has to be done. The disclosure also raised the issues she had with holiday pay and issues relating to a colleague who had been drug tested without her knowledge. The normal process is that disclosures to the hotline were dealt with by a dedicated person who maintains strict confidentiality in accordance with the policy.

12 January 2018

44. On 12 January 2018, the day before the disclosure was made, Ms Davies raised concerns to Mr Taylor about the Claimant. She told Mr Taylor that she had visited the store that day and that the Claimant had been rude and aggressive resulting her abandoning a conversation and leaving the premises. Mr Taylor said that Ms Davies was very upset about this. This was compounded in Ms Davies view by emails received from the Claimant which she interpreted as being sarcastic and disrespectful. It is not necessary for the purposes of these reasons to set out precisely what was said or written.

15 January 2018 – Ms Murrell’s visit to the store

45. Ms Murrell joined the Respondent on 15 January 2018 as Market Manager from a different industry sector. Part of the induction process for all staff joining the Respondent is that they do some ‘mystery shopping’ by attending a store to see how things are done. Ms Murrell said she went to two Shurgard stores on her first day of work together with two stores run by competitors. Ms Murrell obviously did not announce herself as she wanted to see the operation from the viewpoint of a customer and not be treated like a manager.
46. The Claimant recognised her from the bulletin announcing her appointment some months previously and jumped to the conclusion that she had gone to the store to intimidate her because of the whistleblowing complaint she had made a couple of days before. She relies on this as a detriment. The Tribunal accept Ms Murrell’s evidence and does not find any link to the disclosure which in any event had been kept confidential and not disclosed to anyone. The assumption the Claimant made was wrong. Ms Murrell did not know about the disclosure. Given that the announcement of Ms Murrell’s appointment was made some months earlier it is reasonable for her to expect not to be recognised when she went into the stores on that day. The Claimant clearly has a very good memory and visual recall.

30 January 2018

- 30** The Claimant alleges that Ms Davies “**attempted to have me removed from the store and what started as bullying turned into victimisation**” (from Claimant’s particulars of claim). In the lead up to this date there were a series of communications by email which both parties to that correspondence seem to have inferred sarcasm and disrespect. Ms Davies recognised that the correspondence was becoming more acrimonious and therefore to diffuse the situation she telephoned the Claimant. The Claimant said she only wanted to communicate by email with Ms Davies however Ms Davies considered this the best way to try to clear the air. What seems to be innocuous emails from Ms Davies (saying she had corrected a date on the Claimant’s self-certification of absence form) were interpreted by the Claimant as an attack on her. The Claimant said she was scared by this phone call and suffice it to say that the call did not go well. Ms Davis in her witness statement describes the Claimant in this conversation as being unreasonably sarcastic and negative in her manner and that she told the Claimant she would be reporting the conversation to Mr Taylor and that she had to terminate the call. Her statement denies that she threatened to have the Claimant removed from the store. Although Ms Davies was not present to give evidence, the subsequent events back up her written statement. On balance the Tribunal does not find that she attempted to remove the Claimant from the premises.

2 February 2018

- 31 Ms Davies had spoken to Mr Taylor about the issues she was having with the Claimant and Mr Taylor went to the Fiveways store on 2 February 2018 to

discuss what Ms Davies had reported. There is a conflict of evidence about what happened on that day.

32 The Claimant's evidence is that she wanted to record the conversation, but this was refused. She says ***"He discussed my grievance and told me I went through the wrong channel and that Bruno (from the hotline) would not be investigating my grievance and that he would be taking over. He assured me that this would move the process along quickly..... he acted like he was on my side and would help"***.

33 Mr Taylor said he went to see the Claimant to discuss the issues that Ms Davies had raised with him without knowledge of her disclosure to the whistleblowing hotline, and that when he arrived the Claimant immediately started talking about it to him. Mr Taylor's evidence is that when the Claimant told him about her grievance to the hotline (not mentioning the cleaning issues) he viewed this as a personnel matter which he should be dealing with. It was agreed that Mr Taylor would deal with the issues that the Claimant raised and the Claimant was asked to send her grievances to Mr Taylor for him to deal with.

The grievance processes

34 Following the meeting on 2 February 2018, the Claimant immediately sent a grievance to Mr Taylor. The Claimant's grievance raised matters from 27 November 2017 (about holiday pay) through to 30 January 2018. Mr Taylor took what he received from the Claimant directly as her complete grievance which included matters she had raised with the hotline as this was the understanding he had following the conversation on the 2 February 2018. The hotline had not provided him with the actual document the Claimant sent which is to be expected given the confidential nature of the hotline. The grievance did not raise issues of the vermin or other maintenance issues which had been part of the 13 January 2018 disclosure.

37. The issues raised in the 2 February grievance were:

- Rights being breached under working time regulation
- Victimisation for disclosing this on 13 January 2018
- Issues relating to her sick leave and Alex request for a doctor's note
- Ms Davies' call to the Claimant on 30 January 2018 when she alleges Ms Davies threatened to have her removed from work.

38. Mr Taylor had asked the Claimant to send all her grievances to him and reasonably thought she had done so. Therefore, he only dealt with the document the Claimant sent him on 2 February 2018. In her evidence the Claimant said she assumed that he would have got the 13 January 2018 disclosure too and he was dealing with this. The Tribunal cannot understand this as many matters from the 13 January 2018 disclosure were not raised at the grievance hearing by Mr Taylor and the Claimant similarly did not mention anything to do with vermin or having to change light bulbs for example, which the Tribunal find she would have done if she had thought Mr Taylor had this information and expected them to be dealt with.

39. Mr Taylor considered the grievance he had and partially upheld it. He found that the holiday issues should have been dealt with better. He confirmed that the Claimant was entitled to four days holiday and gave an apology. This is what the Claimant had said she wanted in the appeal hearing when Mr Taylor asked her what her desired outcome was. Mr Taylor did not however, accept that the Claimant had been victimised as a result of her making a whistleblowing complaint.

Even at this stage the Claimant did not provide Mr Taylor with the medical evidence to support her request to work a four-day week, but he did think this matter could have been handled better.

40. The Claimant said that items were missing from the notes of the meeting and that she had also said that she wanted the cleaning issues to be addressed. This was not noted in the notes of the hearing or referred to in the outcome. The Tribunal accept Mr Taylor's evidence that cleaning and maintenance issues were not brought up in the hearing and that the notes of the meeting are a fair reflection of what was discussed.
41. The Claimant alleges that the grievance outcome was a "character assassination". When asked about this in cross examination she answered **"He agrees sarcasm, lack of respect to management. Main one is Mediterranean fire. Seems here Alex is saying that is where I am from and I am fiery"**. The Claimant's complaint here is that she is not from the Mediterranean (she is from Northern France). This refers to the part of the grievance outcome where Mr Taylor writes: **"In my interview with Alex she informed me that she had addressed your communication style with you and you admitted you could have adapted the tone of your emails and that your "Mediterranean fire" was the cause"**. The Tribunal finds that Mr Taylor is reporting what he had been told the Claimant had told Alex. The Tribunal does not find this part of the grievance (or any other part) to be a character assassination. It is commentary on the Claimant's communication style which the Respondent had been seeking to address which was permissible for it to do if it had concerns.

The Claimant's resignation and appeal

42. The grievance outcome was sent to the Claimant on 1 March 2018. On 6 March 2018, the Claimant sent an email to Ms Davies at 18:13 resigning her position and giving one months; notice. The reasons for her resignation are given as:

1. **"Shurgard management have subjected me to undue, disproportionate harsh treatment in the form of bullying victimisation and harassment.**
2. **Shurgard have not carried out grievance procedures in line with my contract**
3. **Breach of Trust and Confidence**
4. **The grievance outcome letter was the last straw for me**
5. **My health and safety being put a risk**
6. **Bonus cut resulting in a substantial pay cut and no performance related pay rise**

I consider these to be a fundamental and unreasonable breach of contract on your part. I appreciated the experience and believe that the skills I have gained will serve me well in the future. I will do my very best to ensure a smooth transition on my departure and will do my very best to ensure that all the information is left available to the person who takes up my position following my departure".

43. On 7 March 2018 at 08:53 Ms Davies replied saying: **"It is a shame that you feel this way and wish to resign from your position at Shurgard. Is there anything we can do to change your mind in relation to your decision to leave"?** On 8 March 2018 Ms Davies wrote confirming acceptance of the Claimant's resignation and confirming outstanding matters such as holiday and keys etc.
44. The Claimant appealed the grievance outcome on the same date she resigned. The appeal was heard by Ms Murrell who dismissed the appeal. The grounds of

appeal were contained in a two-page document which appended various email communications that the Claimant wished to rely on. At the time the Claimant made no complaint that Ms Murrell was hearing her appeal. She now complains that Ms Murrell was not independent because she went to the store to intimidate her because she had made a disclosure on 14 January 2018. The Tribunal has made its finding about that visit and finds that Ms Murrell was an appropriate, impartial person to hear the appeal.

45. The Claimant is critical of the grievance process and says the way it was conducted was because of her disclosure on 13 January to the whistleblowing hotline.
46. During her evidence the Claimant alleged that many staff left the Respondent because of the holiday issue. She was reluctant to give names and eventually gave one name. The Respondent was able to give evidence that this person had left the business, but for other reasons. The Claimant accepted she was not privy to the reasons why this person had left, and had assumed it was because of the holiday issue.
47. There was an issue regarding an employee working with the Claimant who will be referred to as A. A had a drug problem and the Respondent had been working with him in his recovery. A had returned to work and was clear of drugs. The Claimant was told this, and was upset that she had not been notified that there may be a problem in the few days between when A returned to work and confirmation that he was clear of drugs. This is not a detriment set out in the list of issues so the Tribunal has not considered this further.
48. During the hearing The Claimant alleged that the Respondent had not disclosed emails which is why she was unable to provide evidence, (for example that Mr Taylor knew of the disclosure to the hotline before 2 February 2018). The Respondent's position is that there were no emails to disclose. The Claimant did not accept this but had nothing to back up her allegations that emails had been withheld. Similarly, in relation to allegations about Ms Davies knowing about the disclosure to the hotline, she again said that the Respondent was withholding documents which would show this. Again the Respondent said that no such documents existed. The Tribunal finds that the Claimant has made assumptions about evidence being withheld but has no basis for this. The Tribunal accepts that there was no email evidence of this kind to disclose. Wont accept 'anything to do to change your mind' was supportive. P131 lie –Language uses eg xx by

Conclusions

49. Having found the factual matrix as set out above, the Tribunal has come to the following conclusions on the balance of probabilities.

Whistleblowing complaints

50. The Tribunal finds that no one in the UK knew that the Claimant had made a disclosure on 13 January 2018 to the whistleblowing hotline until the Claimant told Mr Taylor on 2 February. Even then, Mr Taylor only knew of the existence of a complaint but did not know the details of it. The only complaint Mr Taylor was aware of was the grievance of 2 February 2018,

which the Claimant is not relying on as being a protected disclosure. It follows therefore that no action taken by the Respondent was because the Claimant had made a protected disclosure. Therefore, even taking the Claimant's case at its highest (ie assuming the disclosure was protected) the Claimant's claim of detriment for making a protected disclosure is dismissed.

51. In any event, the Tribunal finds that the detriments set out in the issues (not the grievance process) are out of time. The test is whether it was reasonably practicable for this part of the Claimant's claim to be brought in time.
52. When considering whether a claim is out of time for a whistleblowing claim the relevant date is the date of the detriment that is alleged. The detriment relied on are the matters relating to 30 January 2018 and the grievance. There is no concept of a continuing act in this type of claim. ACAS was contacted on 16 March 2018 with the conciliation period running to 16 April 2018. The ET1 was presented on 28 June 2018. Because of the ACAS early conciliation procedure, the date for presentation of the claim was extended to one month after the end of conciliation i.e. 16 May 2018. This part of the Claimant's claim is therefore about six weeks out of time.
53. In the period between 30 January 2018 and the presentation of her claim, the Claimant brought and participated in the grievance, resigned, worked out her notice and applied for and obtained alternative employment. When asked why she did not present this part of her claim in time the Claimant said that she was stressed, unwell, job hunting and could not sleep. The Tribunal finds that as the Claimant was able to do these things, that there was nothing stopping her from bringing this part of her claim in time. The test is whether it was reasonably practicable to have brought the claim in time. The Claimant was clearly able to participate in the grievance process and was able to apply for and obtain alternative work. There was nothing preventing her from presenting her claim in time.

Unfair dismissal

54. The Tribunal finds that the Claimant resigned and was not dismissed. The Tribunal does not find that there was a breach of the implied term of trust and confidence. The Respondent accepted the holiday issue had not been handled well and made good the four days outstanding holiday pay. It apologised for the way the holiday issue had been handled. The criticisms of the grievance procedure were unfounded. The grievance procedure proceeded within a reasonable time frame. The Claimant complains that it took longer than the indicative timeframe in the grievance policy. However, this was just an indicative time frame and the policy gives flexibility depending on the circumstances.
55. The Tribunal is mindful of the case of **Mahmud v BCCI [1997] IRLR 462**. The test is objective and not what the Claimant believed was breached. The Claimant relies on the grievance outcome being the last straw that led her to resign. Whilst the last straw does not in itself have to be a fundamental breach of contract, it does need to be a breach of some kind. The Tribunal

therefore concentrated on the grievance outcome to see if it could amount to a breach of contract whether implied or a breach of a specific contractual term.

56. The Tribunal considered the grievance outcome letter which is relied on as the last straw to see if it shows a breach of contract of any description. The letter is comprehensive and deals with each of the matters set out in the Claimant's grievance and which were discussed at the grievance hearing. The Tribunal notes that the Claimant said that she wanted her holiday and an apology which is what she got. Whilst there is some criticism of the Claimant's style of communication this is fair comment and relevant to the matters which formed the subject of the grievance. The complaint about "Mediterranean fire" is in context something which was reported to Mr Taylor as part of problems people had with the Claimant's communication style. The Tribunal does not find this to have breached any implied term of trust and confidence.
57. As to the Claimant's complaint that Mr Taylor did not deal with matters such as vermin or lightbulbs this was because he did not have the 13 January disclosure and had asked the Claimant to send him her grievances which she did on 2 February 2018. The Claimant did not mention it at the hearing and there was therefore nothing to alert Mr Taylor about these matters. If it had been important to the Claimant, the Tribunal have no doubt that she would have raised it at the grievance (and at the subsequent appeal which was post termination so would not have influenced her decision to resign). As there is no breach, the grievance is not capable of amounting to a last straw.
58. In terms of the grievance procedure, the Tribunal finds this to have been correctly applied. It is correct that the indicative timetable in the procedure was not followed however this is not enough to amount to an actual breach or a breach of trust and confidence. The Claimant complains that Mr Taylor interviewed her before investigating the written grievance by interviewing others. The Tribunal does not find this to be a breach of the policy or of trust and confidence. To the contrary it is normal and good practice to meet with the person raising a grievance before investigating to first ensure that all matters are properly understood and second to establish what the person making the grievance would like the outcome to be. This is what happened when Mr Taylor met with the Claimant. He then went on to investigate her concerns and the outcome he gave was what she had asked for. This is not a breach of any actual term or implied term. The time scale for the grievance once Mr Taylor became involved was also reasonable.

Credibility

59. There was a substantial amount of contradictory evidence between the parties which the Tribunal had to resolve. The burden of proof is the balance of probabilities and in assessing this the Tribunal had to consider the credibility of the witnesses that came before it.
60. The Tribunal found the Respondent's witnesses to be credible and consistent. Mr Taylor gave evidence for nearly a day and was consistent

and calm throughout. He presented himself as someone who had taken his role in hearing the Claimant's appeal seriously and conscientiously. Similarly, the Tribunal found Ms Murrell's evidence to be credible. Both witnesses used measured language and conceded where things may have not been done perfectly.

61. The Claimant was emotional during her evidence and this was considered as was her being a litigant in person. However, even taking these matters into account the Tribunal found the Claimant's evidence to be contradictory and at times difficult to follow. The Claimant was happy to make very serious allegations of for example, fabrication of documents and conspiracy without any evidence to back these allegations up. The Tribunal checked that the Claimant understood the meaning of the words she was using, and the Claimant confirmed that she did and repeated the allegations.
62. Throughout the Claimant's evidence it was apparent that she was quick to jump to conclusions without any basis for them. One such conclusion was that Ms Murrell was sent to the Fiveways store to intimidate the Claimant because she had raised a disclosure on her first day working for the Respondent. There was no basis for this assumption, either that she had gone there for this purpose or that she had any knowledge of the whistleblowing complaint, which under the procedure (and in fact) was to be kept confidential. This is just one example of many assumptions the Claimant made about the Respondent and its motivations and actions.
63. The Tribunal observed how the Claimant answered questions when being cross examined by the Respondent's representative. The Claimant on many occasions did not listen to the question and answered something else and was argumentative. The Tribunal compared what it saw of the Claimant during the hearing with what the Respondent was saying about her communication style and could see aspects of what they had complained about.
64. What is surprising is that the Claimant was given what she wanted from the grievance namely her holiday and an apology from Ms Davies but was still unhappy. She now says she was unhappy that the issues relating to vermin and so on were not considered. If this was something she was unhappy about at the time the Tribunal would have expected her to have raised this as a ground of appeal. The Tribunal has considered the grounds of appeal (which is two pages closely typed) and the minutes and outcome of the appeal meeting and find that the Claimant even then did not raise the issue with vermin but did raise the issue about changing lightbulbs.
65. The Tribunal noted that both in the grievance outcome and in the appeal, Mr Taylor and Ms Murrell acknowledged where things could have been done better. Mr Taylor acknowledged the holiday matter could have been dealt with better and said Ms Davies would apologise and Ms Murrell acknowledged that the time taken between the whistle-blower submission of the 13 January to the grievance investigation on the 16 February could have been reduced and communicated to the Claimant better. She also acknowledged that the holiday issue could have been dealt with better.

66. Taking all these matters into account the Tribunal prefers the evidence of the Respondent to the Claimant where there is a dispute.

67. In all the circumstances the Claimant's claims are dismissed.

Employment Judge Martin

Date: 11 November 2019