Case No: 2200851/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Best**

Respondent: **C Retail Limited**

Heard at: **London Central** **On:** **9, 10, 11 December 2019**

Before: **Employment Judge Davidson**
Mr T Robinson
Mr I McLaughlin

Representation
Claimant: in person
Respondent: Ms C Ashiru, Counsel

RESERVED JUDGMENT

The claimant's complaints of automatic unfair dismissal and detriment on health and safety and public interest disclosure grounds fail and are hereby dismissed.

REASONS

Issues

1. The issues for the hearing were as follows:

Protected disclosures (Sections 43A and 43B ERA)

1.1. Did the claimant make a protected disclosure within the meaning of sections 43A and 43B (1) (d) of the Employment Rights Act 1996 (ERA)?

1.2. The claimant relies on the following alleged disclosures:
1.2.1. Whatsapp conversation with the Operations Manager, Ashlea, on 6 December 2018 (Disclosure 1);
1.2.2. phone call with Patrick Dunhue on 8 December 2018 (Disclosure 2);

1.2.3. phone call and email with HR on 10 December 2018 (Disclosure 3);
1.2.4. phone call with Rosie Black (HR) on 12 December 2018 (Disclosure 4);
1.2.5. phone call to Hammersmith & Fulham Council Environmental Health Department on 13 December 2018 (Disclosure 5);
1.2.6. Email to HR on 14 December 2018 (Disclosure 6).

1.3. If the claimant made a disclosure, was it a qualifying disclosure? In particular
1.3.1. did the communication amount to the disclosure of information?
1.3.2. If so, did the claimant believe that the information disclosed showed that the health and safety of any individual had been, was being, or was likely to endangered?
1.3.3. If so, was that a reasonable belief?
1.3.4. Did the claimant believe that the disclosure was made in the public interest?
1.3.5. If so, was the belief reasonable?

Health and safety claims sections 44 and 100 ERA

1.4. In the period from 6 December to 14 December 2018:
1.4.1. did the claimant bring to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety?
1.4.2. Were there circumstances of danger in the respondent's stockroom?
1.4.3. If so, did the claimant believe those circumstances to be serious and imminent?
1.4.4. If so, was that belief reasonable?
1.4.5. If so, could the claimant reasonably be expected to avert those circumstances?
1.4.6. If not, did the claimant while the danger persisted refuse to return to his place of work or any dangerous part of his place of work?
1.4.7. Alternatively, did the claimant (taking account of all the circumstances including in particular his knowledge and the facilities and advice available to him at the time) take (or propose to take) appropriate steps to protect himself (or other persons) from the danger?

Detriments (sections 44 and 47B ERA)

1.5. The claimant alleges the following detriments which he has described as follows:

1.5.1. On 8 December Patrick Dunhue telling the claimant not to come in if he didn't want to when the claimant disclosed information and asked to be placed elsewhere (detriment 1);
1.5.2. On 10 December, Shannon Reed unnecessarily looking into his background; stating and conveying to other members of staff the

claimant's position as a seasonal temp on a fixed term contract. That he hadn't been in the business long. That the claimant's manager will have to make him choose whether he wishes to continue his employment and stating that he 'needn't come back to the store'. Also stating that there 'seems to be a lot of hearsay and attempts to rally the troops to create some unnecessary level of drama'. This was stated in emails to place the claimant in a bad light (detriment 2);

1.5.3. On or about 10 December, Patrick Dunhue inappropriately asking the claimant if he intended to leave and telling him he needed to have a think and make a decision during a phone conversation. Also unfairly saying the claimant was not a 'team player' and that he was going to be recorded as AWOL. These acts made the claimant feel he was unwanted (detriment 3);

1.5.4. On 10 December, Ashlea preventing the claimant from communicating with colleagues about the subject of his disclosure and any future occurrences of that nature by stopping communication in the Whatsapp group chat (detriment 4);

1.5.5. On or about 10 December failing to follow the grievance procedure after the claimant's email dated 9 December in order to avoid the finding of an inconvenient truth and to pressure and frustrate the claimant into leaving (detriment 5);

1.5.6. On 12 December Patrick Dunhue subjecting the claimant to an impromptu probation review meeting invite where the claimant was accused of unauthorised absence and unreasonable behaviour (detriment 6.1);

1.5.7. Subjecting the claimant to a probation review meeting held by his manager which given his disclosures and grievance presented a conflict of interest within the notification letter it was stated that the claimant should attend a 'disciplinary' meeting (detriment 6.2);

1.5.8. On 14 December Patrick Dunhue subjecting the claimant to a rushed probation review meeting where he was not allowed to postpone when his colleague failed to show without warning in order to expedite to the claimant's dismissal (detriment 6.3);

1.5.9. Patrick Dunhue subjecting the claimant to the vague allegations of unreasonable behaviour. Then having said it when the claimant enquired that he was 'aggressive' to his manager the person conducting the meeting and HR staff. This was said during the meeting (detriment 6.4);

1.5.10. Failure to provide evidence to substantiate the claim of aggressive and unreasonable behaviour during and prior to the claimant's probation review meeting. On 13 December 2018 the claimant requested the evidence through email (detriment 6.5);

1.5.11. Subjecting the claimant to the allegation of unauthorised absence when his confirmation to attend was conditional and based on his receipt of a letter outlining the conversation he had and the assurance provided him over the phone by a female HR team member (detriment 6.6);

1.5.12. On 14 December Lee Kinkela subjecting the claimant to the production of probation review meeting notes/accounts that were not representative in order to corrupt future proceedings such as the

appeal process e.g. asking the claimant's manager if what he said was on the record and subsequently missing out or not appropriately taking the conversation down. Putting words into the claimant's mouth and saying 'that discriminates against you' when the claimant did not say anything of this nature (detriment 6.7);

1.5.13. On 14 December Patrick Dunhue ejecting the claimant from the building when he asked for the notes to be corrected and refused to sign certain pages and subjecting the claimant to the claim that he was putting words in his manager's mouth (detriment 6.8);

1.5.14. On 4 January 2019, Shannon Reed subjecting the claimant to the retracting of the allegation of aggressive behaviour and having it said that he introduced to the terms of the conversation in the claimant's appeal/grievance outcome letter (detriment 6.9);

1.5.15. On 4 January 2019, Shannon Reed subjecting the claimant to the retroactive justification of the allegation of unreasonable behaviour to the number of calls he made to HR and payroll as well as the way in which he spoke to his manager. Again, no evidence was provided and the point was not made at the claimant's dismissal preventing him the opportunity to explain or defend his actions (detriment 6.10);

1.5.16. On 4 January 2019, Shannon Reed subjecting the claimant to the suggestion that he was unreliable so not suitable for reinstatement. Again, without evidence and the opportunity for the claimant to present an argument. It was not a topic raised or discussed at the claimant's appeal (detriment 6.11);

1.5.17. On 20 December and 3 January 2019 Hannah Yeatman subjecting the claimant to an unfair appeal process from the outset as it was decided by an impartial person who had already established views on the claimant and the situation. Also ignoring this piece of information when the claimant raised it as a concern (detriment 6.12);

1.5.18. On 14 December Patrick Dunhue subjecting the claimant to the claim that he wasn't 'happy' working at the store and saying it was clear from the 'way' he was acting during his probation review meeting (detriment 6.13).

1.6. If the claimant establishes that he made a protected disclosure or that he falls within the health and safety provisions of section 44 ERA, was he subjected to a detriment as a result thereof? In particular,

1.6.1. Was the claimant subjected to the treatment set out in the claimant's list of alleged detriments, summarised at 1.5 above?

1.6.2. If so, does the treatment relied upon amount to a detriment in the circumstances?

1.6.3. If so, was the claimant subjected to said treatment on the ground of one or more of the matters set out above?

Automatic unfair dismissal

1.7. Was the reason or principal reason for the claimant's dismissal that he had made one or more of the protected disclosures referred to in paragraph 1

above, such that the claimant was automatically unfairly dismissed under s103A?

1.8. Was the reason or principal reason for the claimant's dismissal one or more of the matters set out in paragraph 1.4 above such that the claimant was automatically unfairly dismissed under s100 ERA?

Time limits

1.9. The claimant added claims for whistleblowing detriment, health and safety detriment and automatic unfair dismissal on health and safety grounds by way of amendment on 8 November 2019. These appear to be out of time. Was it reasonably practicable for the claimant to present the claims in time? If not, did the claimant present the claims within a reasonable period thereafter?

Evidence

2. The tribunal heard oral evidence from the claimant on his own behalf and from Patrick Dunhue (Store Manager), Charlotte Goodson (HR Adviser) and Shannon Rees (Area Manager) on behalf of the respondent. The tribunal also had a bundle of documents running to approximately 250 pages.

Facts

3. The tribunal found the following facts on the balance of probabilities:

3.1. The respondent is a global digital branded clothing company operating form 515 branded locations in 46 countries including the United Kingdom. The respondent has a store under the branding 'Superdry' in the Westfield Shopping Centre in West London.

3.2. The claimant started working for the respondent on 31 October 2018 as a fixed term seasonal sales assistant for the Christmas period, working in the stockroom. The fixed term ended on 31 January 2019. The respondent's policy is that, if there are vacancies at the end of the fixed term, seasonal staff may be offered permanent contracts. In the event, none of the seasonal staff were kept on at the Westfield branch in January 2019.

3.3. On 4 December 2018, there was a flood at the store following a burst air conditioning pipe and the store was closed for two days. The staff, including the claimant, were sent home. The store was assessed by Westfield Centre personnel and passed as safe to re-open on 6 December. Patrick Dunhue, who was responsible for health and safety at the store, also satisfied himself that the environment was safe. The staff were notified that the store would re-open on 6 December. The claimant was not due to work on that day.

3.4. When the stockroom staff attended for work on 6 December, they found the conditions unpleasant with wet damaged stock and a bad smell. The management were taking steps to deal with this by bringing in

humidifiers and surgical masks and they destroyed the wet stock (which had been bagged and boxed) once the insurance company allowed them to.

3.5. There was a Whatsapp group for the stockroom staff which included the claimant, Ashlea (the Operations Manager), Tiago and Grace (other stockroom workers). Although there was discussion on the Whatsapp group about the conditions in the stockroom after the flood, including the smell giving rise to headaches and coughing, all the staff who were due to work attended for work. In the Whatsapp exchanges, the claimant expressed concern that the wet carpet was not being replaced and pointed out the risk to people with respiratory issues which could result from the old carpet (Disclosure 1). The claimant confirmed to the tribunal that he, himself, did not have any respiratory conditions.

3.6. The claimant's next working day was 8 December. The claimant found out from the Whatsapp group that the carpet was not being replaced. The information from Grace was that the conditions were unacceptable particularly for people with asthma or breathing problems. He then said that he was not happy to work in those conditions and said he would need to be placed somewhere else. He did not notify the store manager but put this on the Whatsapp group.

3.7. The claimant's contract states that he must notify his Manager if he is going to be absent. There was some discussion in the hearing regarding the identity of the claimant's manager but the claimant's witness statement refers to Patrick Dunhue as his 'manager'. In evidence, Patrick Dunhue said that expected to be notified himself of any staff absence. The claimant was told by Ashlea that Patrick Dunhue had said he wouldn't be paid if he did not come in. The claimant did not attend for work. The claimant did not notify Patrick Dunhue of his absence.

3.8. Patrick Dunhue called the claimant to see what the problem was and was told by the claimant that he would return to work but not the stockroom. He said he was prepared to work on the shop floor but Patrick Dunhue said that he had not been trained for that and there was no requirement for more staff on the shop floor. The claimant denies asking to work on the shop floor. His account is that he would do the stockroom duties but not in the stockroom. He accepted the only other place in the store would have been the shop floor (Disclosure 2).

3.9. The claimant's colleagues updated him with the steps that were being taken by the respondent and encouraged him to come in to look for himself as the conditions had improved. Grace told the claimant he should come in and then decide if he was prepared to work in those conditions. She also said that she the conditions were not ideal but they had got used to them. The claimant replied that he would not come in 'after he spoke to me like that', referring to his conversation with Patrick Dunhue.

3.10. The claimant wanted to raise his concerns with HR but was unable to find their email address online. He therefore sent an email to 'care@superdry.com' late on Sunday night 9 December. He then sent the same email to HR at 09:22 on Monday morning 10 December. The email set out his account of the flood, his understanding of the conditions of the stockroom, his communication with management and his dissatisfaction with the situation. He referred to the Health & Safety at Work Act and set out his concerns regarding the risk of mould growing and the implications of that for the health and safety of the staff. He complained about being demonised for raising the issue and requested anonymity. The email did not specify that he was raising a grievance. He followed up with a telephone call to HR shortly afterwards (Disclosure 3).

3.11. HR referred the email to Ian Pogue, the health and safety manager and copied in Shannon Rees and Charlotte Goodson. Shannon Rees replied immediately and explained the steps that had been taken. She conceded that the conditions were not ideal but were workable. In evidence, she explained in evidence that the conditions, while not being ideal, were safe. In particular, the temperature was not ideal as it had to be regulated by fans as the air conditioning was out of action but that there was no health and safety risk to the staff.

3.12. Although the claimant had requested anonymity and Shannon Rees had not mentioned his name when following up with the store, it was not difficult for Patrick Dunhue to realise who had made the complaint. Patrick Dunhue told Shannon Rees that the claimant had not actually visited the site and had based his conclusions on hearsay.

3.13. Later on 10 December, the claimant called HR again asking for proof that the store was safe to return to. Charlotte Goodson told Patrick Dunhue about this and said that the claimant had been persistent and rude to HR staff. The claimant's account was that he was told that he should contact his manager in the first instance. He felt that this was inappropriate because the grievance related to his manager. Charlotte Goodson stated that the claimant did not mention this to her.

3.14. Patrick Dunhue called the claimant later that day. He was not aware at the time that the claimant had included his handling of the matter as part of his complaint. There are differing accounts of the conversation: Patrick Dunhue states that he asked the claimant to come into the stockroom to see the conditions for himself and that the claimant insisted on first receiving written proof that the store was safe. The claimant's account is that Patrick Dunhue said he would treat the absence as unauthorised and that the claimant was not a team player and that the claimant should think about whether he wanted to continue working with the respondent. We find that both accounts are credible as there is no direct conflict between the two. We find that the claimant said he would come back to work if he was told in writing that the store was safe.

3.15. By the next day, 11 December, the claimant had not received the email he was expecting. He followed up by email to HR on 11 December asking for written confirmation of the advice and details of the person giving the advice. Charlotte Goodson replied by email, telling him that Patrick Dunhue had confirmed that the store was considered safe and that he should discuss any matters with him directly, including pay for the days he had not been at work.

3.16. At about the same time, Charlotte Goodson was advising Patrick Dunhue on the wording of an email he then sent to the claimant later that afternoon explaining the steps that had been taken and confirming that the store was considered safe. He set out his expectation that the claimant would attend for work and he offered to meet with the claimant on 14 December to discuss matters going forward.

3.17. The claimant replied to Patrick Dunhue complaining that Charlotte Goodson's email did not reflect what she had said on the phone. He did not explain what he had expected her to include in her email. He did not say expressly that he would not come to work as a result. Patrick Dunhue replied saying that he would come to the store on 12 December at the start of the claimant's shift to discuss matters with him.

3.18. We see from the claimant's phone log that he made numerous calls to Charlotte Goodson after working hours on 11 December. She did not answer the calls but sent him an email noting that he had called her and telling him to wait until office hours the next day.

3.19. Later that evening, he sent an email to Charlotte Goodson asking to be put in contact with the member of the team responsible for health and safety because Charlotte Goodson was not prepared to give her personal sign-off as she told him she did not, herself, have the relevant expertise.

3.20. The claimant did not attend for work or for the meeting with Patrick Dunhue on 12 December and did not notify Patrick Dunhue that he would not be coming. He stated to us that it was implicit from the exchange of emails that he had not received the assurance he required and therefor the condition of his return was not met.

3.21. On 12 December, he called HR and spoke to Rosie Black, a member of the HR team. He told her of the situation and she said she would call back. She called back to tell the claimant that there was an investigation in process and that he should speak to his manager (Disclosure 4).

3.22. In response to the claimant's non-attendance, Patrick Dunhue invited him to a probationary review meeting to consider allegations of unauthorised absence (not attending work or the meeting on 12 December) and unreasonable behaviour. The meeting was referred to in the body of the email as a 'disciplinary' meeting and included a

provision that the meeting would go ahead in the claimant's absence if he did not attend. The claimant was informed that termination of his employment was a possible outcome. The following day, the invitation email was re-sent with the word 'disciplinary' removed, making it clear that the meeting was a probation review meeting.

3.23. Shortly after that email was sent, Ian Pogue sent a detailed email to the claimant setting out the conclusions of his assessment of the working conditions. Ian Pogue also confirmed that, as a gesture of goodwill, the claimant would be paid for the two earlier days of non-attendance 8 December and 10 December.

3.24. On 13 December 2018 the claimant called Hammersmith & Fulham Council and notified them of the situation (Disclosure 5). They attended the following day and inspected the store. They concluded on 7 January 2019 that they were satisfied with the condition of the stockroom.

3.25. Prior to the probation review meeting on 14 December, the claimant raised a formal grievance about the working environment and the way his complaints had been dealt with (Disclosure 6).

3.26. The meeting took place on 14 December conducted by Patrick Dunhue with Lee Kinkela (Assistant store manager) as a note-taker. The claimant covertly recorded the meeting and a transcript from the recording was before the tribunal as well as the summary notes prepared by Lee Kinkela. The claimant was late for the meeting due to transport difficulties but Patrick Dunhue agreed to wait for the claimant to turn up. The claimant's chosen representative was on holiday so another colleague attended as his companion. At the meeting, Patrick Dunhue put questions to the claimant by way of investigation into the unauthorised absence and into the high volume of calls to HR (the unreasonable behaviour allegation). The claimant declined to answer many of Patrick Dunhue's questions. During the meeting, Patrick Dunhue alleged that the claimant's behaviour to him and to HR had been aggressive. In evidence, Patrick Dunhue accepted that 'aggressive' was not the correct term. His behaviour was better described as 'difficult'. The claimant did not object at the time to Patrick Dunhue conducting the meeting, although he later complained about this.

3.27. At the end of the meeting, Patrick Dunhue told the claimant that he was terminating his employment and that he could appeal to HR. The claimant refused to sign all the notes of the meeting and he left the premises. The termination of probation was confirmed in writing on 17 December 2018 on the grounds of unauthorised absence, unreasonable behaviour when communicating to various departments within the business and not following absence reporting procedures.

3.28. On 17 December the claimant's grievance dated 14 December was processed by HR and he was sent a holding email. He was then invited

to a meeting on 31 December to deal with his grievance and to deal with the appeal against the termination of his employment. He was invited to set out what resolution he was seeking for his grievance. He replied that he wanted the word 'aggressive' removed from the record, a permanent job and compensation of £5,000.

3.29. The meeting was conducted by way of teleconference call by Shannon Rees with Hannah Yeatman (HR) as a notetaker. This was the first time Shannon Rees and the claimant had met although Shannon Rees had some knowledge of the prior events with the claimant. A few days after the meeting, the claimant raised an objection to Shannon Rees being the decision maker. The respondent rejected this complaint. On 4 January 2019, Shannon Rees wrote to the claimant informing him that the grievance was not upheld.

Law

4. The relevant law is as follows:

Protected disclosures

4.1. A qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the designated types of wrongdoing set out in section 43(1) ERA including breach of health and safety obligations.

4.2. Public interest requires a section of the public to be affected but this can include work colleagues (**Chesterton Global Ltd v Nurmohamed** [2015] IRLR 614).

4.3. A worker must not be subjected to a detriment on the grounds he has made a protected disclosure (section 47B ERA).

4.4. A dismissal on grounds that the employee has made a protected disclosure is automatically unfair (section 103A ERA).

Health and safety

4.5. An employee has 'health and safety' protection if he is carrying out activities in connection with preventing or reducing risks to health and safety at work, having been designated to carry out such activities, or if took (or proposed to take) appropriate steps to protect himself or other persons from circumstances of danger which he reasonably believed to be serious and imminent.

4.6. An employee must not be subjected to a detriment on the grounds of health and safety set out above (section 44 ERA).

4.7. A dismissal on the grounds that the employee has been involved in health and safety activities or for taking steps in response to serious and imminent danger will be automatically unfair (section 100 ERA).

4.8. The burden of proof is on the claimant to show that he made protected disclosures and that he falls within the scope of the health and safety provisions.

Determination of the Issues

5. We unanimously determine the issues as follows:

Time limits

5.1. The events forming the basis of the claimant's claim ended at the latest on 4 January 2019. The last day for presentation of his claim is 4 April 2019. (He participated in ACAS Early Conciliation for one day on 4 January 2019). He did not present the amended claims in writing until 8 November 2019, although he had intimated the gist of the claims on 18 July 2019, following a case management hearing on 12 July 2019 before Employment Judge Snelson.

5.2. The relevant test is whether it was reasonably practicable for the claimant to present his claims within the time limit. He has told us that he was busy with his academic studies and he was not aware of the other claims when he submitted his original claim, until he took advice later in the year.

5.3. We find that this explanation does not meet the test of 'not reasonably practicable'. There was no physical impediment to him complying with the time limit, as he had done so with the original claim. We find that he is an intelligent and resourceful person who illustrated an understanding of the legal issues during his correspondence with the respondent. He had access to the internet and used it for his own research. We therefore do not accept that he would not have had access to the relevant information.

5.4. We therefore find that the claims are out of time.

5.5. If we are wrong about this, we make the following findings in relation to the substantive claims.

Public interest disclosure

5.6. Did the claimant make qualifying disclosures? We find in relation to each disclosure as follows:

5.6.1. *Disclosure 1*: we find that this constitutes a protected disclosure. The disclosure constitutes information and at that time he had reasonable grounds for believing that the conditions in the stockroom after the flood posed a risk.

5.6.2. *Disclosure 2*: by this stage, the claimant knew that the other staff had gone back to work and that steps had been taken to deal with the carpet and other issues and he had not attended the site himself. We therefore find any belief that the health and safety of the claimant or his colleagues was at risk was not reasonable. We find that this is not a qualifying disclosure.

5.6.3. *Disclosure 3*: the email is information but any belief that the health and safety of the claimant or his colleagues was at risk was not reasonable as the claimant relied on hearsay (later updated to say the situation had improved) and no personal inspection by him. We find that this is not a qualifying disclosure.

5.6.4. *Disclosure 4*: There was no evidence before the tribunal on which to make a finding. We find that this is not a qualifying disclosure.

5.6.5. *Disclosure 5*: This is a disclosure of information but we find that any belief that the health and safety of the claimant or his colleagues was at risk was not reasonable. We find that this is not a qualifying disclosure.

5.6.6. *Disclosure 6*: There was no disclosure of new information relating to the conditions in the stockroom. The gist of the claimant's grievance was about the way it had been dealt with. We find it was an allegation that matters have not been dealt with to his satisfaction. In any event, we find it is unreasonable. We find that this is not a qualifying disclosure.

Health and Safety

5.7. We do not accept that the claimant had a reasonable belief that there was a serious and imminent danger in the stockroom. The claimant relies on mould on the carpet. We find that he had no evidence to support an allegation of serious and imminent danger, certainly not to himself. He had no evidence that there was any mould and no evidence of what serious and imminent danger the presence of mould would pose.

5.8. We do not accept that the claimant was victimised for raising his concerns. On more than one occasion he was invited to raise further concerns should they arise.

Detriments

5.9. We have found that disclosure 1 is a qualifying disclosure. We must then consider whether the claimant has been subjected to a detriment on the grounds that he made that disclosure or on health and safety grounds.

5.10. Dealing with the detriments identified by the claimant, our findings are as follows:

5.10.1. *Detriment 1*: we find that this is not a detriment. We find that Patrick Dunhue's comments were part of a normal management interaction;

5.10.2. *Detriment 2*: we find that this is not a detriment. There is no evidence that the claimant's background was looked into and we do not accept that the claimant was being placed in a bad light. The comments regarding his status were factually correct;

5.10.3. *Detriment 3*: we find that Patrick Dunhue was simply stating the factual position as he saw it and that this is not a detriment;

5.10.4. *Detriment 4*: we find that it was appropriate for Ashlea to ask the claimant not to use the Whatsapp group chat to discuss the stockroom conditions and his position. He was free to contact his colleagues on these matters through other means. We find no detriment;

5.10.5. *Detriment 5*: we find that the email of 9 December was not expressed to be a grievance but we find that, in any event, the respondent followed the informal route provided under its grievance procedure. The claimant did not object at the time to being referred to his manager other than to comment about his discomfort. In the event, the claimant chose not to participate in the procedure;

5.10.6. *Detriment 6.1*: we find that this is not a detriment. The respondent was entitled to call a probation review meeting;

5.10.7. *Detriment 6*.2: we find that the meeting was not a detriment. The reference to 'disciplinary' was corrected the next day. The meeting was not a detriment but an opportunity for him to put his case;

5.10.8. *Detriment 6.3:* the claimant was allowed an alternative representative and the meeting went ahead despite his lateness. We find that this is not a detriment;

5.10.9. *Detriment 6.*4: the allegation of 'unreasonable behaviour' was explained at the meeting but we find that the allegation was a detriment and the description of the claimant as aggressive was a detriment. However, we find that this was not due to the protected disclosure or any health and safety issue. We are satisfied that Patrick Dunhue was reacting to the situation before him and the claimant's conduct towards HR and his conduct at the meeting;

5.10.10. *Detriment 6.5:* the respondent was unable to discuss the allegations of unreasonable behaviour at the probation review meeting due to the claimant's failure to engage with the meeting. We find that this is not a detriment.

5.10.11. *Detriment 6.6:* the allegation of unauthorised absence was a factual matter following the claimant's failure to attend a meeting called by his manager for 12 December. The claimant did not attend or notify his manager that he would not be attending. His explanation that his agreement to attend work was conditional is not accepted but, in any event, does not explain his failure to attend the meeting, which would not have been in the stockroom.

We find that if this allegation amounts to a detriment, it was not on the grounds of any protected disclosure or any health and safety issue but on the basis of the claimant's unauthorised absence;

5.10.12. *Detriment 6.7:* we find that there is no detriment. When the claimant challenged the notes, the correction was made;

5.10.13. *Detriment 6.8:* there is no evidence that the claimant was ejected from the building. He was allowed to fill his water bottle which is inconsistent with the claimant's allegation. We find that there was no detriment in the way he left the building;

5.10.14. *Detriment 6.9:* we find no detriment in the respondent retracting the allegation of aggressive behaviour. This is the outcome the claimant requested;

5.10.15. *Detriment 6.10:* we find that the claimant had the opportunity to explain the frequency of his calls to HR at the probation review meeting and chose not to engage. The issue relating to payroll arose subsequently. We do not find that this is a detriment.

5.10.16. *Detriment 6.11:* we find that it is a detriment to categorise the claimant as unreliable and not suitable for reinstatement. However, find that this was due to his unauthorised absence and not because he made any disclosures or due to any health and safety issue.

5.10.17. *Detriment 6.12:* we do not accept that the appeal process was unfair or that Shannon Reed was an inappropriate person. The claimant made no objection at the time. We do not find this to be a detriment.

5.10.18. *Detriment 613:* we do not find that these comments amount to a detriment.

5.11. If our findings that any of the alleged detriments above are not detriments are wrong, we find that none of the respondent's conduct set out above was due to the protected disclosure made by the claimant or any health and safety issue.

Automatic unfair dismissal

5.12. We find the reason for dismissal to be his unauthorised absences in the context of a seasonal temporary employee working during the respondent's busiest trading period. The respondent reasonably concluded that he was not sufficiently reliable because he had failed to attend work or comply with the absence reporting requirements. The respondent also reasonably concluded that the claimant's actions in repeatedly calling the HR team, including several calls within a half hour period out of office hours, was not reasonable.

5.13. The claimant was given opportunities to resolve the situation so that his employment could continue but he decided not to take these.

5.14. To the extent that the claimant relies on procedural flaws in the respondent's process, we remind ourselves that this is not an ordinary unfair dismissal and any procedural flaws are not relevant unless they are by reason of the disclosures made by the claimant or the health and safety issues.

5.15. In conclusion, we do not accept the claimant's submission that the termination of his employment was linked to any health and safety issue or to any protected disclosure he made. We also reject his submission that he was subjected to any detriments on health and safety or protected disclosure grounds.

5.16. The claimant's claims therefore fail and are dismissed.

Employment Judge Davidson

17 Dec 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19/12/2019

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FOR EMPLOYMENT TRIBUNALS