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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms J Mee	**AND**	Trendstream Ltd

Heard at: London Central **On**: 6-8, 11 November 2019
12 November 2019 in Chambers
13 November 2019

Before: Employment Judge Glennie
Mrs J Cameron
Ms S Plummer

Representation
For the Claimant: Ms S Garner, of Counsel
For the Respondent: Mr W Clayton, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. **The following complaints are well founded:**

   1.1 Breach of contract and/or unlawful deduction from wages in relation to non-payment of commission.

   1.2 Constructive unfair dismissal under s.98 of the Employment Rights Act 1996 subject to any issues as to remedy, including in particular the prospect that the Claimant would have resigned in any event and, if so, when.

   1.3 Victimisation contrary to s.27 of the Equality Act 2010 in respect of detriments 27.3; 27.4; 27.6.2; and 27.7; and the constructive dismissal; but not otherwise.

2. The following complaints are dismissed:

2.1 Automatic constructive unfair dismissal.

2.2 Detriments by reason of making a protected disclosure.

3. Remedies will be determined at a hearing on 30 April and 1 May 2020.

REASONS

1. By her claim to the Tribunal the Claimant, Ms Mee, made the following complaints:

1. Breach of contract.
2. Unlawful deduction from wages (in respect of the same matters as the breach of contract claim).
3. Constructive unfair dismissal involving:
   (a) Automatic unfair dismissal under s.103A of the Employment Rights Act 1996.
   (b) "Ordinary" unfair dismissal under s.98 of the Employment Rights Act.
4. Detriments on the ground that she made a protected disclosure.
5. Victimisation contrary to s.27(2) of the Equality Act 2010.

2. The Respondent, Trendstream Ltd, resists all of those complaints.

3. With the agreement of the parties, the Tribunal announced its judgment on 13 November, having concluded its deliberations, and reserved its reasons to be sent in writing. The Tribunal is unanimous in the reasons that follow.

Preliminary Issues

4. A separate preliminary hearing was held on the first day of this hearing before Employment Judge Stout to determine issues as to redaction of documents.

5. This Tribunal then determined in the Claimant's favour an application to rely on a supplementary witness statement. It did so on the grounds that this statement largely addressed documents that had been included in the bundle after exchange of witness statements and did little more than make observations about those documents that could equally be made by way of submissions, thus causing no prejudice to the Respondent.

The Issues

6. The issues were defined in the agreed agenda for the preliminary hearing held on 7 August 2019 in the following terms:

1. Breach of Contract
   (a) Was the Claimant contractually entitled to receive commission? Was the said commission based on 100% of the Red Bull deal value wages properly payable to C within s.13(3) of the ERA? Namely, did C have a legal entitlement under her employment contract to the wages?

2. Constructive Unfair Dismissal
   (a) Did the matters pleaded at paragraphs 27 and 30 of the particulars of claim amount to a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
   (b) What was the alleged last straw relied on by C?
   (c) Did C affirm the contract after the last straw?
   (d) If not:
      (i) Did C accept the repudiatory breach?
      (ii) Did R's alleged repudiatory breach play a part in Cs resignation?
      (iii) If C was constructively dismissed, was that dismissal fair or unfair having regard to s.98(4) of ERA?

3. Automatic Unfair Dismissal – Protected Disclosure

Focussing on R's reasons for its actions, was the reason or principal reason for C's dismissal that she had made a protected disclosure?

4. Detriment Under Section 47b of the ERA 1996 and Section 27(1) EQA 2010
   (a) Do any of the matters contended at paragraph 27 of the particulars of claim amount to detriments for the purposes of either s.47b of ERA or s.27 of EQA?
   (b) If so, did R subject C to any of the pleaded detriments?
   (c) If so, were any of those done on the ground that C had made a protected disclosure or done a protected act?

Evidence and Findings of Fact

7. The Tribunal heard evidence from the following witnesses:
   (1) The Claimant.
   (2) Mr James DeLacey, Vice President Head of Corporate, and the Claimant's Line Manager.
   (3) Mr James Franks, Finance Director.

8. The Tribunal was also referred to a witness statement from Ms Natalie White, Head of People, which dealt exclusively with issues regarding documents and disclosure. Ms White was not called to give evidence at this hearing. Other individuals who are mentioned in the course of the hearing will be referred to by initials and it is hoped that the parties will be able to understand those references.

9. In his closing submissions, Mr Clayton argued that the Claimant's credibility was damaged by having lied in a meeting on 13 November 2018 (which will be described below); giving a false explanation for that on 26 November 2018; failing to give the full reasons for requesting a sabbatical; and at one stage instructing her solicitors that she had no further relevant documents on a particular point when in fact she did. Mr Clayton contended that, given these matters, the Tribunal should prefer the Respondent's evidence where there was a conflict with the Claimant's.

10. The Tribunal took these points on board, but ultimately found that it was preferable to consider, and resolve, the conflicts of evidence that arose individually rather than by applying an overall preference for one party's account over the other.

11. The Respondent's business is in consumer market research, carrying out activities such as audience profiling, surveys, and data analytics. It employs approximately 230 people worldwide: in January 2019 it employed around 136 people in its London office.

12. The Claimant joined the Respondent on 22 February 2016 as an Account Manager at a salary of £38,000 plus commission, although there was no written statement of how the latter would be calculated. She was subsequently promoted to Senior Account Manager and the salary element increased to £43,890. (The Claimant agreed that, by the end of her time with the Respondent, her gross remuneration including commission was around £100,000). The Claimant's job involved managing the relationship between clients and the Respondent. She would be the client's point of contact and would be involved in renewals of contracts and seeking to sell further services, as well as ensuring that projects were delivered on time.

13. Two other matters of background regarding the Claimant were referred to in the course of the hearing and are material to mention at this stage. One is that she has a history of recurring anxiety and depression, for which she takes medication. The other is that for some years, including prior to and during her employment with the Respondent, the Claimant has done freelance work as a fitness instructor. She finds that this helps with her mental health and additionally she earns some money from this activity, of which the Respondent was aware.

14. The Claimant's evidence was that from about November 2017 she was subjected to what she described as bullying and harassment from a colleague, SC. She said that this peaked in February 2018 in the course of a business trip to Paris.

15. Mr DeLacey was aware of this problem as he referred to it in an email to his Line Manager, SH, on 22 March 2018 at page 101. His evidence about this matter was that around this time the Claimant and SC got together and, although they still did not see eye to eye, they managed. He described the situation, however, as one of "quite a rooted animosity". SC left the Respondent's employment in the late summer or early autumn of 2018. Mr DeLacey's

evidence was that the Claimant was still after that struggling to get over the issue even though SC was no longer with the business – a point to which the Tribunal will return in due course.

16. The Claimant was off sick from work for about 2 weeks in April 2018, suffering from anxiety and exhaustion. In a report of 1 May 2018 at page 110 an OH Advisor recommended a phased return to work involving reduced hours for three weeks. The Claimant's evidence was that on her return the reduction was essentially theoretical because the work was there to be done, and she did it.

17. The Tribunal accepted the Claimant's evidence about this. It is plausible that this occurred, given that it was common ground that the Claimant worked hard and was committed to her job. Mr DeLacey was also hard working and committed: he tended to be involved with work outside of normal hours and expected others to be dedicated to the job.

18. The Claimant saw the Occupational Health advisor again on 4 July and the report from that date said that she had complied with the reduced work schedule and was now feeling better. The Claimant's evidence was that she had not in fact complied with the reduced schedule, as explained above, but that she was feeling better by the time she saw the advisor. Although Mr Clayton submitted that what the Claimant's said to the advisor on this occasion damaged her credibility, the Tribunal did not regard it as significant. The important point by then was that she was feeling better, and it would have mattered little whether and to what extent she had followed the phased return to work previously.

19. Mr DeLacey conducted the Claimant's mid-year review in July 2018, commenting favourably on her performance. In an email of 11 July at page 125 to LO (also of HR, copied to Ms White and to his own Line Manager SH) Mr DeLacey recommended that the Claimant's role should be changed to that of Strategic Account Manager with a salary of £55,000 from August. He further suggested that there should be the opportunity of moving to Key Account Manager with a salary of £59,000 in January 2019.

20. In the same email, Mr DeLacey stated that he was also intending to recruit an Account Manager or Managers with a range of possible salaries. He wrote this:

> "The most junior candidates will mostly be in a salary bracket of £33-37,000k, mid level hires will be c.£38-45, and more experienced recruits will be commanding high £40s to early mid £50k. On this back drop, and taking into consideration [the Claimant's] performance, capability, experience, IP and management of all corp accounts (Inc. US plus logos recently inherited from media), £55k levels well for now and on the premise, she can go up to £59k in Jan '19".

21. On 23 July 2018 at page 126 LO sent an email to Mr Franks, referring to Mr DeLacey's proposals for a salary increase for the Claimant, and saying that she would propose that there be an increase to £58,000 rather than £59,000 in January 2019. LO commented that there had been other incidences where the

Respondent had made salary adjustments in order to bring employees into line with the market rate and to recognise their contribution to the business, adding that Mr DeLacey certainly believed that this was applicable to the Claimant.

22. On 24 July 2018 the Claimant was notified that her salary would be increased to £55,000 with effect from 1 July, and on 14 August it was announced that with effect from July she was promoted to Key Account Manager.

23. The commission structure was under consideration during the summer of 2018. Up to that point, Account Managers had been paid commission assessed on 50% of the value of the sales made. The proposal was that this should be increased to 100% as from 1 October that year.

24. At some point the Claimant raised with Mr DeLacey the possibility of being paid commission in respect of the renewal of a contract within her portfolio with Red Bull at the new rate, even though the deal would be completed before the end of September. She said that she had worked particularly hard on this contract, with which Mr DeLacey agreed. He was in favour of the idea and checked this with SH, who was also agreeable to it.

25. All of this occurred at some time before 19 September 2018. On this date Mr DeLacey sent an email to the Claimant at pages 138s-t which read as follows:

> "This is to confirm that you will be compensated using the new commission model for Red Bull, Audience Tracker 2, won in Sep '18".

26. A little over an hour later on the same day NL of the Finance Department wrote to Mr DeLacey an email at page 128s which read:

> "I believe this deal was closed in Sept therefore will not be accessible under the new scheme…….. This should have been checked/verified with Finance/HR prior to telling [the Claimant] especially as the new scheme hasn't been finalised and agreed by the Reps".

27. To this Mr DeLacey replied:

> "I raised this with [SH] a while back and it was approved, and based on what the new AM commission model would look like, happy to discuss further and to ensure we follow through with our commitment".

28. NL replied in terms indicating that she would try to speak to Mr DeLacey that day, although there was no evidence before the Tribunal as to whether they did in fact speak, or what was said if they did.

29. The Respondent's evidence about this situation was as follows. Mr Franks stated that Mr DeLacey did not have the authority to agree to use of the new commission structure, and nor did SH. Any such variation would have had to have had his approval. Mr DeLacey said that he understood this now, and that he had become aware that the position was as set out in the September 2018 commission policy at page 60. This included the following:

> "Approvals for commission must be obtained in the first instance by your Manager and the Finance Director. No commission payment will be processed on payroll without HR and Finance approval".

30. The Tribunal accepted the Respondent's evidence on this point, considering that Mr Franks would not have said that Mr DeLacey and SH could not approve the commission if he knew they could, and that conversely Mr DeLacey and SH would not have agreed to it if they knew that they were not able to do so. Furthermore, NL's reaction as set out above had been in accordance with what Mr Franks stated the policy to be.

31. On 26 September 2018 Mr Franks sent an email to SH at page 138v with the subject "Red Bull commission" in which he wrote:

> "Can we discuss this as this undermines everything we have been working towards."

There was no evidence before the Tribunal as to whether or not such a discussion took place or, if it did, what was said in the course of it.

32. The Claimant's evidence was that, on the basis of Mr DeLacey's email of 19 September, she was expecting to be paid commission at the new 100% rate on the Red Bull deal. The Tribunal found that she was entitled to expect this. Her Line Manager had put it in writing that she would be paid at that rate. If Mr DeLacey and his Line Manager SH both believed that they had the authority to agree to this, the Claimant could not be expected to know that they did not.

33. On 15 October 2018 at page 145 LO sent an email to SH, copied to Mr Franks, that contained the following:

> "There are some specifics that should be flagged at this time prior to making a final decision regarding her [i.e. the Claimant] commission payment.
>
> There is a legal risk under the guise of what is referred to as "implied custom and practice".
>
> In essence what this means is that if a business, for whatever reason, negates from policy, it can set a precedent for others to claim for unpaid commission …
>
> Also, [the Claimant] was contractually under different T&Cs at the time the commission deal was closed, therefore, legally speaking [the Respondent] should make the payment under these terms. There is a potential to argue breach of contract.
>
> These are just some points to be taken into consideration, if you would like to discuss the potential impact further do please swing by for a chat".

Seemingly, at this point, no final decision had been made about the Claimant's commission payment.

34. The Claimant further stated, and the Tribunal accepted, that she first realised that there was an issue with this commission payment when she checked her commission statement on 18 October 2018 while on a business trip to the USA. She found that her commission on the Red Bull contract had been paid at the old 50% rate.

35. As at 17 October Mr DeLacey had evidently been expecting that the commission would be paid at the 100% rate, because in reply to an email from NL at page 152 he wrote:

> "Red Bull commission – how has this been calculated based on moving to the new commission model, just want to have a sense check and to ensure the new model is reflected".

36. Then on 18 October 2018 at page 145 SH sent an email to Mr DeLacey:

> "We have a situation on our hands that needs to be dealt with here, we are putting the company in a compromising legal position with the commission for the [Claimant].
>
> This needs to be resolved – please communicate with [LO] for when you are available to discuss"

37. It was not apparent from the evidence whether any conversation took place between LO and Mr DeLacey, but later on 18 October the former sent an email to the latter stating that, as the deal was signed in September, it was paid at the old rate. Still on 18 October, at page 147 Mr DeLacey sent an email to SH, copied to LO and Mr Franks, indicating that he had already made contact with LO and that:

> "There was an agreement in principal back in July when I made the enquiry that the business would be open to offer [the Claimant] commission using the new commission model. If we are now saying this is no longer feasible after all and owing to "legal" complexities then needless to say we have to acknowledge and comply with policy. I will manage expectations accordingly with [the Claimant].

38. Then at page 148, about half an hour later, Mr DeLacey sent an email to LO, SH and Mr Franks, addressed primarily to LO in which he said the following:

> "Thanks for reaching out. I have seen [the Claimant's] commission slip for Red Bull and it's paid using the current model and therefore fully compliant.
>
> I have spoken with [the Claimant] this morning and who has asked me what the chances are of being compensated based on the new commission model – I have informed her this will not happen in view of T&Cs.
>
> In turn, I believe this is all sorted".

39. So far as this last email is concerned, the Tribunal noted that Mr DeLacey did not say in his evidence that he in fact told the Claimant that "this would not happen" i.e. that she would not be paid at the 100% rate. When cross-examined on the point the Claimant stated that Mr DeLacey did not say this, but rather that he would speak to SH and Finance when he was back in London. She further stated that on subsequent occasions Mr DeLacey said that he was looking into the matter.

40. The Tribunal accepted the Claimant's evidence about this. In paragraph 35 of his witness statement Mr DeLacey acknowledged at least one subsequent conversation about this issue where he said that the Claimant referred to the 100% as a "token of good will" and accepted that she had no contractual right to it. He did not, however, suggest that he replied that the matter was "sorted" in terms whereby should would not be paid at the higher rate. As will be explained, the Claimant continued to press the issue and Mr DeLacey tried to obtain the payment for her – all of which is consistent with the Claimant's account of the matter not being closed on about 18 October 2018.

41. On 31 October 2018 the Claimant sent an email to Mr DeLacey acknowledging his of 19 September 2018 stating that she would be paid on the new commission structure, referring to the commission statement that she had received on 18 October, and asking "can you explain in writing the reasons for the business backtracking and why this was not communicated before I received my Sept commission calculations". She commented that, apart from the substantive issue, there seemed to be poor communication, and she asked to know what the business would be doing to rectify the matter.

42. Mr DeLacey sent an email to Ms White on 12 November 2018 at page 155 referring to the commission issue in which he said this:

"I will be putting forward a case for the business to reconsider its decision to compensate [the Claimant] and based on the new commission model, as provisionally agreed. While I understand and back the business's rebound, given the time it took to get a response regarding our position, the net result is detrimental in respect to managing expectations, and keeping our high performers engaged and incentivised."

43. Meanwhile, on 31 October 2018 Mr MM had joined the Respondent as an Account Manager. He had been recruited from another organisation where he was earning a salary of £62,500 plus commission and the Respondent agreed with him a salary of £65,00 (£10,000 more than the Claimant was earning at that point) plus commission. He was to take on a large number of smaller accounts within the team in which the Claimant worked, and the Claimant was to continue managing a smaller number of higher value accounts.

44. The Respondent's case, and Mr DeLacey's evidence, was that neither of the Claimant nor MM was senior or junior to the other. In particular, MM was not assisting the Claimant. The Tribunal accepted that MM was not employed as the Claimant's assistant, although it probably was of assistance to her in a general

sense that he took on some of the workload. The Claimant's job title suggested that she was senior to MM, as did Mr DeLacey's email of 11 July 2018 at page 125. Ultimately, however, it was not necessary to determine this point, as the Claimant's dissatisfaction with the situation would have arisen whether she was correctly viewed as senior to MM, or as being at the same level. In the former case she would have complained that she was senior but earning less; in the latter case that she was at the equivalent level, but earning less than MM.

45. The Claimant's evidence was that while in the US, Mr DeLacey had intimated to her "that MM was being paid slightly more than she was" (it seems that, given the chronology, this would have to be that he was going to be paid slightly more). In cross-examination Mr DeLacey said that he was not aware of having spoken to the Claimant about this before she raised the issue with him, as will be described below. The Tribunal found it probable that Mr DeLacey had said something (perhaps without realising) that had given the Claimant the idea that MM was to be, or might be, paid more than she was.

46. The Claimant's evidence continued that on 12 November 2018 a colleague showed her evidence that MM was being paid a salary of £65,000. On the same day she spoke to Mr DeLacey about this. The Claimant and Mr DeLacey agreed the following about this conversation.

(1) The Claimant said that MM was being paid more than she was.
(2) Mr DeLacey was concerned about who had told the Claimant about MM's salary.
(3) Mr DeLacey said that pay rates in the Respondent's organisation were not affected by gender.

47. The Claimant's evidence was that Mr DeLacey accepted that MM was paid more than she was and sought to explain this by reference to his level of experience. Mr DeLacey stated that he did not comment on MM's salary. The Tribunal found the latter to be more likely, given Mr DeLacey's concern about pay information having been shared with the Claimant.

48. On the evening of 12 November Mr DeLacey sent a text to the Claimant at page 156 which read as follows:

> "Re: M's salary leak, I am concerned how this managed to come out".

49. Later Mr DeLacey sent the Claimant an email at page 157 which read as follows:

> "I'd like us to connect first thing in the morning please regarding office knowledge of employees' salaries. The matter is a serious issue but particularly given how recently the affected employee joined".

50. The "serious issue" was knowledge of MM's salary. In his witness statement Mr DeLacey expressed concern about the Claimant having been told MM's salary, but none about the disparity itself.

51. The following morning, 13 November, Mr DeLacey sent another email to the Claimant at pages 158-159 in which he said this:

> "In short, I have updated Natalie in HR and following the news yesterday 12/11 concerning leaking and sharing of employee salaries. This is a serious matter that affects HR, and personally the employee whose details have been exposed. Given the affected employee sits in corp, it is my responsibility to follow this matter up alongside HR and in view of the potential circumstances. Please let me know when you have a moment today to meet up, or otherwise can use a portion of our weekly one to one session to discuss".

Again, the Tribunal noted that Mr DeLacey's concern was about the "leak" of information.

52. In paragraph 21 of her particulars of claim the Claimant referred to text messages and emails in the plural in a way that suggested that there was more than one of each of these, apart from the email of 13 November. Mr Clayton was correct in submitting that this was an exaggeration of what had actually taken place.

53. Mr DeLacey and the Claimant met on 13 November 2018. On this occasion the Claimant said that she had invented her account of someone telling her MM's salary, in order to trick Mr DeLacey into revealing what that salary was. Her case to the Tribunal was that her original account was true and that she said she had invented it because she was afraid that she would get the person who told her the information into trouble. The Tribunal accepted the Claimant's account on this point. It was not challenged in cross-examination, and we found her explanation to be plausible.

54. Following this conversation Mr DeLacey sent an email to Ms White, copied to LO, at page 158 in which he said that he had discovered that the episode was "orchestrated" with a view to finding out whether new hires such as MM were on higher salaries. He continued as follows:

> "I asked why she misled me. Put simply, she feels a high level of distrust towards the company since 2017 and which in turn led her to behave this way. Pertinently, she highlighted legacy issues such as:
> (1) Conflict episodes with SC.
> (2) Meritocracy, i.e. recognition of performance/contribution vs peers who have been promoted.
> (3) Red Bull commission.
> (4) Commission model as a whole.
>
> Notwithstanding, I informed her that her action was ill considered and disappointing – she acknowledges this and apologised".

55. Under the heading "learnings" Mr DeLacey made some comments that indicated a degree of sympathy for the Claimant's position, saying that an accumulation of matters had led to the gradual increase of distrust and

disengagement among some staff, and he mentioned another individual to whom this applied. He also said that matters that were out of his control had had an impact on him.

56. Ms White replied to Mr DeLacey, also on 13 November, at page 160. She said that, in spite of the reasons given, the Claimant's behaviour was entirely unacceptable and needed to be addressed formally. She said that it was unacceptable for the Claimant to act in this way to glean information on highly sensitive data such as salaries. She continued:

> "As a Manager, you have chosen to bring new members of your team in at an agreed salary level, based upon experience and market rates, which should have no bearing on [the Claimant] or for her to be privy to".

Ms White then said that she wished to arrange a meeting with the Claimant and Mr DeLacey to ensure that the former was aware of how serious the matter was, and to move forward. She said that she appreciated that there were some underlying issues but that the correct approach was for the Claimant to speak to HR. Ms White added that there were things that could be done to support Mr DeLacey.

57. The Tribunal noted that in this email Ms White expressed concern only about the Claimant's conduct and related issues, and not about any disparity between her pay and MM's pay.

58. On a different matter, on 18 November 2018 the Claimant received an email at page 164 regarding an application she had made for training as a yoga trainer. It was apparent that this was a response to an application that she had previously submitted, whether on that day or earlier, and the email sought payment of an application fee of £100. The course was to take place in Sri Lanka over a period of three weeks in February and March 2019.

59. Then on 20 November 2018 LO sent a letter to the Claimant at page 165 asking her to attend a meeting to discuss concerns related to her conduct in respect of the dissemination of information related to another employee's salary. LO wrote as follows:

> "The business has become concerned regarding the nature of a conversation you had with your Line Manager … where you intentionally misled your Line Manager in respect of information you stated you attained regarding an employee's salary.
>
> [The Respondent] treats such matters extremely seriously and considers this to fall below the standards GWI expects of its employees. Therefore, I am writing to arrange a meeting to discuss this issue in more detail and to provide you with an opportunity to explain your actions in full. The business will consider any explanations or mitigating factors put forward before deciding whether or not it is appropriate to move forward with any formal resolution".

60. The meeting took place on 26 November, attended by the Claimant, Mr DeLacey and LO. The Claimant maintained that her original account to Mr DeLacey was a fabrication, and she spoke about her lack of trust in the Respondent in a way that was consistent with what Mr DeLacey had recorded in his email of 13 November to Ms White. Mr DeLacey said that when the Claimant was asked to explain why she had tried to mislead him in this way her response was convoluted and she "struggled to articulate herself". The Tribunal found this unsurprising, given that the Claimant was trying to explain why she had fabricated something that was in fact true.

61. It was common ground that at the meeting LO said that no formal action would be taken in respect of the matter. On 4 December 2018 at page 210 the Claimant sent an email to LO asking when she would receive a letter stating that no formal disciplinary action would be taken. LO replied on the same day stating that the letter would be sent in due course and could be expected that week. On 9 January 2019 the Claimant sent a further email at page 209 to LO stating that she had not yet received the letter. LO replied that "this was actioned before Xmas and on file" and said that she would resend the letter. LO did so under cover of an email on 10 January 2019, also at page 209. The Tribunal noted that there was no email prior to that in the bundle indicating that the letter had been sent, and so the Claimant was probably correct in saying that this was when she first received it.

62. The letter itself at page 166 was dated 4 December 2018 and read as follows:

> "I refer to our meeting held 26 November 2018 relating to conduct in respect of dissemination of information related to another employee's salary. I am pleased to confirm that GWI has decided that no formal disciplinary action will be taken against you on this occasion.
>
> We will continue to monitor your conduct on an on-going basis to ensure a similar instance will not occur in the future.
>
> We must also advise you that a repeat of similar misconduct, or any other instance of misconduct of any kind, is likely to lead to formal disciplinary action being instituted against you.
>
> We hope that our discussion has been beneficial so that such further formal action will not be necessary".

63. Returning to November 2018, on 29 November the Claimant paid the sum of £3,100 on account of the yoga course in Sri Lanka.

64. Then on 4 December 2018 Mr DeLacey conducted the Claimant's appraisal for the second half of that year. Mr DeLacey's comments at page 269 were largely positive although overall, the appraisal was not as good as had been that for the first half of the year. In particular Mr DeLacey wrote as follows:

> "Areas where [the Claimant] would do well to focus on, and in the interest of personal and professional development, are work life balance, and the effects of continuous anger on her behaviour and actions. This has on occasions impacted sales performance, led to inconsistencies in focus, and contravened GWI workplace values.
>
> On this backdrop, the [Claimant's] rating average is 2.4.
>
> During the next quarter, I will be working with [the Claimant] to identify ways to help manage work life balance while maintaining productivity levels and looking at ways to help overcome her affective experiences to optimise job performance and decision making.

65. With regard to the refence to "continuous anger", the Claimant's case was that this was a reference to the pay differential issue, while Mr DeLacey maintained that he was referring to the conflict with SC. The Tribunal concluded as a matter of probability that Mr DeLacey was referring to both of these matters. Although SC had left the business some months earlier, the Claimant had referred to the conflict with her in the conversation with Mr DeLacey on 13 November, and so it was apparent that she still had this issue in mind. The reference to contravening work place values, however, seemed more appropriate to what had transpired in relation to the pay disparity issue than to any interpersonal conflict that had taken place months previously.

66. It was common ground that at this appraisal discussion the Claimant told Mr DeLacey that she needed an 8-week sabbatical from work.

67. On the same day as the appraisal Mr DeLacey sent an email to LO stating that the appraisal had been positive, but that the Claimant wished to take 8 weeks leave in the New Year in order to "rest up". In cross-examination with reference to this period, Mr DeLacey stated that he knew that the Claimant was taking medication for stress and anxiety.

68. The Claimant then said in paragraph 87 of her witness statement that for a week she had no reply to her request for a sabbatical. She therefore asked Mr DeLacey for an update and said she would have to leave her job if the request was not granted. This was confirmed in an email that Mr DeLacey sent to LO on 12 December 2018 at page 180, in which he said that it sounded as if the Claimant would give notice in the event that she was not granted the 8 weeks unpaid leave.

69. In her oral evidence on this point the Claimant said that she would not have resigned if the sabbatical had been granted. She added that this would have enabled her to recuperate and address issues with her work life balance and that she could have seen what the options were available to her to cope with stress.

70. LO then informed the Claimant that her request for an 8-week sabbatical was refused but that the Respondent would allow an extra five days in addition to her annual leave.

71. On 13 December 2018 the Claimant sent an email at page 142 addressed primarily to Mr DeLacey but also to SH and LO in which she wrote the following:

> "Following multiple conversations regarding the Red Bull commission and my request back in October for a written explanation why this commission (based on the latest commission model) was promised and was never given, I have yet received this – are you able to share please?
>
> I know we spoke about alternatives and you have mentioned several times the potential to attain the Red Bull commission as a bonus at the end of 2018. I would like to know if this option is still be explored; if not, why and are there alternative options?"

72. Mr DeLacey replied on the same day at page 143 as follows:

> "As discussed, the reasons have been already provided in one to ones.
>
> As for the potential to explore alternatives, as discussed I have been coordinating with HR and who will be reviewing this over the appraisal process".

73. To this, still on 13 December, at page 144 the Claimant wrote the following:

> "As mentioned we did have multiple discussions but my concern is the reasons were never confirmed nor formalised, hence my request for a written explanation. This explanation would be very much appreciated and to reiterate from my previous email this commission issue is disappointing; I would like to understand how the business thinks it is morally acceptable to confirm in writing that something is going to be provided and then backtrack without any communication".

74. On 21 December 2018 the Claimant sent an email to Mr DeLacey containing her resignation. The Claimant gave the necessary one month's notice and included an enquiry about the use of her outstanding annual leave, but did not put anything in writing about the reason for her resignation. In her witness statement the Claimant said that the following were the factors that caused her to resign:

(1) The Respondent's failure to justify or formally respond to her in relation to the commission entitlement for the Red Bull deal.
(2) The differential between her salary and MM's salary, and the way that she had been treated following the meeting on 12 November 2018.
(3) Mr DeLacey's comments in her December 2018 appraisal, which she described as unjustifiably negative.
(4) The rejection of her sabbatical request.

75. The Claimant continued that as a result of these matters she lost trust and confidence in the Respondent. The Tribunal accepted the Claimant's evidence about the factors that caused her to resign when she did, although as the Tribunal has recorded above, the Claimant's evidence in cross-examination was

that she would not have resigned if the sabbatical had been granted. That is not the same as saying that this was the sole reason why she did resign. Removing or avoiding one factor out of four would have been enough to prevent the Claimant's resignation at that point, but the Respondent did not remove that factor, and so all four remained in play. The Claimant was clearly still concerned about the Red Bull commission issue as she had raised this again as recently as the 13 December. As at 21 December she had still not received written confirmation that no formal action would be taken in respect of the issue concerning MM's salary. Mr DeLacey's comments in the end of year appraisal had been sent to the Claimant on 12 December. All three of the factors in addition to the sabbatical could fairly be regarded as current at the time that the Claimant resigned.

76. The Claimant booked her flights to and from Sri Lanka on 22 December 2018. She decided to go about a week earlier than was required for her attendance at the training course.

77. Finally, it was evident from an entry in the Claimant's GP records that by 9 January 2019, and so before her departure for Sir Lanka, she had arranged a new job, to start when she returned from Sir Lanka. The Claimant's evidence was that this was as a personal trainer with Virgin Active and that she was earning about £1,000 a month from this position.

The Applicable Law and Conclusions

78. The Tribunal found it convenient to consider the issues in a somewhat different order from that set out in the agreed agenda, addressing the commission claim first, then the victimisation and protected disclosure complaints, and finally the complaint of constructive unfair dismissal.

Breach of contract (commission)

79. It was common ground that Mr DeLacey told the Claimant that she would be paid for the Red Bull deal under the new commission scheme, that SH approved this, and that both of these believed that they were entitled to do so. The Tribunal has also found that it was the Respondent's policy that all commission payments required HR and Finance approval.

80. Mr Clayton made a number of submissions on this issue. First, he submitted that consideration is essential for a promise to have contractual force and that past consideration is insufficient (propositions that Ms Garner did not dispute). He contended that the Claimant had not expected to be paid under the new scheme when she made the sale to Red Bull, and that she had not altered her position in reliance on the statement that she would be paid under the new scheme.

81. The Tribunal accepted Ms Garner's submission on this point, which was that, as with all the accounts in her portfolio, the Claimant retained the Red Bull

account and was working on it, or at least remained in charge of the account, after the promise was made that she would be paid under the new commission scheme. It was not, therefore, the case that the Claimant was relying solely on what she had done before Mr DeLacey agreed that she would be paid under the new scheme: she also gave consideration by continuing to manage the account.

82. Mr Clayton also submitted that Mr DeLacey did not have actual or ostensible authority to agree to paying the Claimant under the new scheme. As the Tribunal has found, he did not have actual authority, as the Respondent's policy was that all commission payments had to be approved by Mr Franks.

83. The Tribunal found the position as regards ostensible authority to be different. It was true, as submitted by Mr Clayton, that the Claimant agreed in cross-examination that she knew that Mr DeLacey did not have the power to award her a salary increase, and that "he would have to get approval from elsewhere". That concession concerned salary, rather than commission on a single deal, and in any event Mr DeLacey had obtained approval from elsewhere, namely from SH. The Tribunal considered that a line manager would have ostensible authority to agree to a one-off arrangement of this sort (in other words, that an employee who he managed would have no reason to think that he was not authorised to do this). This was all the more so when the arrangement had been approved by his line manager, and when Mr DeLacey and SH both believed that they were authorised to do this. It seemed to the Tribunal to be unrealistic to say, in effect, that the Claimant should have realised that Mr DeLacey was not authorised to make the arrangement when he himself believed that he was.

84. Finally on this aspect, Mr Clayton argued that, if there was a breach of contract in relation to the commission arrangement, the Claimant had affirmed the contract by continuing to work after being made aware that she was not going be paid according to the new scheme. The Tribunal found that the Claimant had not affirmed the contract in this way. The Claimant's email of 31 October 2018 showed that she had not given up the point: Mr DeLacey's email of 12 November 2018 to Ms White showed that nor had he. At the meeting on 13 November 2018 the Claimant again raised the commission issue. She raised it again on 13 December 2018 and Mr DeLacey replied in terms that suggested that he still retained some hope of HR reviewing the situation and "exploring alternatives".

85. All of this caused the Tribunal to conclude that the Claimant had not accepted that the commission would not be paid, and Mr DeLacey was continuing to hold out some hope that it would. In those circumstances, the Claimant's continuing to work for the Respondent could not be taken as evidence of an affirmation.

86. The Tribunal therefore concluded that the Claimant was contractually entitled to be paid commission for the Red Bull deal under the terms of the new commission scheme. The claim in that regard therefore succeeded as a matter of breach of contract and/or as an unlawful deduction from wages.

Detriments for making protected disclosures / victimisation

87. Section 27 of the Equality Act 2010 makes the following relevant provisions about victimisation:

> *(1) A person (A) victimises another person (B) if a subjects B to a detriment because –*
> *(a) B does a protected act…..*
>
> *(2) Each of the following is a protected act –*
> *(a)*
> *(b)*
> *(c)*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

88. Section 47B of the Employment Rights Act 1996 provides that:

> *(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.*

89. Section 43A of the 1996 Act provides that a "protected disclosure" means a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H (there being no issue as to the latter element). The material parts of section 43B make the following provisions about qualifying disclosures:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following*
> *(a)*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*

90. The Claimant relied on her complaint to Mr DeLacey about the disparity in pay between her and MM as a protected disclosure for the purposes of the detriment complaint and/or as a protected act for the purposes of the victimisation complaint.

91. The Tribunal first considered the complaint in terms of section 27 of the Equality Act. As recorded in the findings of fact above, in the conversation of 12 November 2018, the Claimant stated that MM was being paid more than she was, and Mr DeLacey replied that the pay rates were unaffected by gender. The Tribunal found that, to have replied in the way that he did, what the Claimant said must have been such that Mr DeLacey understood the complaint as including the suggestion that gender was relevant to the disparity. We therefore found that the

complaint amounted to at least an implied allegation that the Respondent was failing to comply with the equal pay provisions of the Equality Act. The complaint was, therefore, within the terms of section 27(2)(a).

92. The Tribunal then considered whether the allegation was false, and made in bad faith. It is an unusual feature of the facts of this case that, having made the complaint, the Claimant subsequently said that she had fabricated the account of being told about MM's salary. The Tribunal found that this did not mean that the allegation (that MM was paid more than the Claimant) was false. In fact, it was true, and Mr DeLacey knew that it was true.

93. The Tribunal also found that the allegation was not made in bad faith. The Claimant invented the story of having fabricated being told about the disparity because of Mr DeLacey's concern about how the "leak" had occurred. She had, however, made the complaint in the first instance because she was dissatisfied with what she had been told about the disparity, and she knew that MM was in fact being paid more than she was.

94. The Tribunal also considered whether the Claimant's subsequent assertion that she had invented the account of being told about MM's salary meant that her complaint was in some way nullified or withdrawn. We concluded that it did not. Mr DeLacey still knew that MM was in fact being paid more than the Claimant, and even if he believed that she was trying to trick him into revealing the truth, that would only mean that she suspected that which he knew to be the case.

95. The Tribunal therefore concluded that the complaint was a protected act within the meaning of section 27.

96. We then considered whether the complaint also amounted to a protected disclosure within the meaning of sections 43A and 43B of the Employment Rights Act. Essentially for the reasons given above in relation to section 27 of the Equality Act, the Tribunal found that there was a disclosure of information and that, in the reasonable belief of the Claimant, that information tended to show that the Respondent was failing to comply with a legal obligation to which it was subject.

97. The Tribunal further found, however, that the Claimant did not have a reasonable belief that the disclosure was made in the public interest. In submissions on this point Ms Garner relied on there being a culture of lower pay for female employees, stating that the Claimant was of the view that it was likely that other women would be unequally paid as compared to men. The Tribunal concluded that this might well have become the Claimant's view by the time of the hearing, but that as a matter of probability, the Claimant did not hold this belief at the time of making the disclosure. In paragraph 76 of her witness statement the Claimant said that she "believed that [the Respondent] was unlawfully treating females differently to males by paying males a higher salary than females for doing similar work", but there was nothing in what she had said at the time of her complaint to Mr DeLacey to suggest that her concerns went beyond her own situation.

98. Although it might be said that there is always a degree of public interest in breaches of legal obligations, the legislation clearly requires more than that as, otherwise, there would be no need of the requirement about public interest. The Tribunal concluded that, at the time of making the disclosure, the Claimant did not as a matter of fact believe that it was made in the public interest. If she had held such a belief, it would not in the Tribunal's judgment be a reasonable one, as the subject matter of her complaint was of concern to her and the Respondent, but did not engage any wider public interest.

99. The Tribunal then turned to the matters relied on as detriments, and considered whether each amounted to a detriment, and if it did, whether each was done because the Claimant had done a protected act in making her complaint about the pay disparity.

100. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**, the House of Lords stated that a detriment existed if a reasonable worker would or might take the view that the treatment concerned was in all the circumstances to his or her disadvantage. An unjustified sense of grievance could not amount to a detriment.

101. The detriments relied on were set out in paragraph 27 of the Particulars of Claim. Ultimately, Ms Garner did not rely on detriments 27.5, 27.6.1 and 27.8. For ease of reference, the Tribunal will give its conclusions in the following sub-paragraphs, retaining the same numbering as in paragraph 27.

102. The Tribunal concluded as follows with regard to the question whether the matters relied on amounted to detriments:

102.1 The detriment relied on at 27.1 was that the Claimant was harassed and intimidated by Mr DeLacey by being "interrogated" about who had provided her with MM's salary details, by text messages and emails (both plural) and by the threat of the matter being escalated to HR. The Tribunal has accepted the Claimant's evidence that the reason why she said she had invented the original account was that she was concerned about the person who had told her getting into trouble. This was not the same as the Claimant feeling harassed or intimidated, whether by a threat of the matter going to HR or otherwise. Furthermore, there were 2 emails and a single text on the subject. The contents of these, and of the conversation between the Claimant and Mr DeLacey, have been described in the findings of fact above. The Tribunal did not find the text or emails to be threatening in tone or content, and found that the Claimant's case in her Particulars of Claim to the effect that she was "interrogated" and that Mr DeLacey followed this up "repeatedly" was overstated. We found that what occurred in this regard did not amount to a detriment.

102.2 Detriment 27.2 was that the Claimant was pressured to reveal the name of the person concerned, was afraid to reveal this and was forced to conceal her revelation. The Tribunal found that it was

overstating the case to describe the Claimant as "fearful" or to describe her as being "pressured". For the reasons given in relation to the first detriment, we did not consider that the way in which the Claimant was asked for the name of the person was intimidating or threatening. The Claimant decided that she did not want to name that person, essentially in case they got into trouble for telling her the information. The evidence did not suggest that the Claimant felt intimidated of fearful. She continued working with Mr DeLacey for around another 5 weeks after this, and shortly before her resignation pressed him again about the commission issue. The Tribunal found this to be inconsistent with the Claimant feeling seriously intimidated or fearful. We concluded that these matters did not constitute a detriment.

102.3 The detriment in paragraph 27.3 was that of the Claimant being required to attend a disciplinary investigation meeting. The Tribunal concluded that this amounted to a detriment. Although (as demonstrated in the present case) a disciplinary investigation does not necessarily lead to disciplinary action, it is generally in itself a worrying and stressful process, and any employee would strongly prefer that this did not take place.

102.4 Paragraph 27.4 referred to the disclosure being treated as misconduct, the Claimant being warned that "a repeat of similar misconduct" was likely to lead to formal disciplinary action, and being told that she would be monitored to "ensure a similar instance would not occur in the future". It is the case that LO's letter of 4 December 2018 contained these words. The Tribunal concluded that this amounted to a detriment. An employee would reasonably feel concerned about a threat of disciplinary action and about being "monitored". The Tribunal accepted that the Claimant was concerned about these matters.

102.5 Detriment 27.5 was not relied on.

102.6 In relation to paragraph 27.6:

102.6.1 Detriment 27.6.1 was not relied on.

102.6.2 Detriment 27.6.2 was the failure to respond formally to the Claimant in relation to the pay differential between her and MM. It was the case that the Respondent did not respond on this. The Tribunal found that this failure amounted to a detriment. Although the Claimant had claimed to have invented the account of being told MM's salary, both she and Mr DeLacey knew that there was a difference. Presumably, anyone in HR who looked at the information available would also have known that there was a difference. The Tribunal considered that, knowing that there was a disparity, the Respondent could not reasonably ignore the Claimant's concerns (apparently that

there might be a disparity, rather than that she knew there was) on that issue. The Claimant had raised a concern, and it was in the Tribunal's judgment a detriment not to address it.

102.7 The detriment in paragraph 27.7 concerned Mr DeLacey's comments in the Claimant's end of year appraisal in December 2018. To the extent that Mr DeLacey was referring to the pay issue when he wrote about the Claimant's "continuous anger" and her contravening workplace values, the Tribunal found that this was a detriment, as the Claimant had reason to be concerned about this and there had been no attempt to resolve it. It was not, in the Tribunal's judgment, a detriment to refer to the Claimant's anger about the SC issue, as Mr DeLacey was entitled to express the view that the Claimant should have put this behind her once SC had left.

102.8 Detriment 27.8 was not pursued.

103. The Claimant also relied on the constructive dismissal (if established) as a detriment. The Tribunal will explain its conclusions on the constructive dismissal complaint below, but records here that, if there was a constructive dismissal, that amounted to a detriment. Mr Clayton did not suggest otherwise.

104. The Tribunal then considered whether the matters that it has identified as detriments occurred because of the protected act. In **Nagarajan v London Regional Transport [1999] ICR 877** the House of Lords held that the test is fulfilled if the protected act has a "significant influence" on the employer's decision making; and in **Igen v Wong [2005] IRLR 258** the Court of Appeal held that a significant influence was an influence that was "more than trivial".

105. Also with regard to the issue of causation, section 136 of the Equality Act provides as follows:

(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 proves that A did not contravene the provision.

106. The Tribunal had regard to the two-stage test explained by the Court of Appeal in **Igen v Wong** and **Madarassy v Nomura [2007] IRLR 246**, both decided under the earlier anti-discrimination legislation. In the present context, the Tribunal would first consider whether, in the absence of an explanation from the Respondent, it could properly find that the protected act had a significant influence on the detrimental conduct. (Again, the Tribunal will deal with the issue of detriment by way of constructive dismissal below). For the Tribunal to properly make such a finding, there has to be something in the facts beyond the detriments and the protected act that could enable the Tribunal properly to find that the latter materially influenced the former. That something else need not, in itself, be very significant, but it must be present. If the Tribunal could properly

make such a finding at the first stage, the burden is on the Respondent to prove that the detriments were not materially influenced by the protected act.

107. The Tribunal found that the Respondent's failure to address the substance of the pay disparity issue, or to give the Claimant any explanation of their position on it, provided the "something more" that would enable the Tribunal to find that the protected act materially influenced the detriments, in the absence of an explanation. As the Tribunal has already observed, we did not consider that the Respondent was entitled to ignore the substance of the Claimant's concern, even though she had made an (untrue) retraction of her statement about being told that MM was paid more than she was. The terms of that retraction showed that she remained concerned about at least a potential disparity, as she claimed to be trying to find out whether MM was paid more. The Respondent knew that he was, and the failure to address the matter or give the Claimant any explanation of the situation was, the Tribunal found, something that could properly provide the basis for a finding that the protected act influenced the detriments. The failure to address the substantive issue could suggest that there was a wish to ignore it and to dissuade the Claimant from pursuing it.

108. The Tribunal found that the Respondent had not discharged the burden of proving that it did not victimise the Claimant. On the Respondent's own case, the decision maker in relation to detriments 3 and 4 above was LO, who was not called to give evidence. The disciplinary investigation, the threat of future action and the "monitoring" all related on the face of the matter to the Claimant's supposed attempt to trick Mr DeLacey into revealing MM's salary. It remains the case, however, that at no point did the Respondent tackle the underlying issue of the pay disparity that in fact existed, whether by investigating the Claimant's concern, or trying to explain the situation. Given this, and the absence of any evidence from LO as to the basis of her decision making, the Tribunal inferred that the protected act itself played some part, beyond the trivial, in the decisions in these respects. At this stage of the analysis, the Tribunal found that the Respondent's failure to address the substantive issue in any way did indeed suggest that there was a wish to ignore it and to dissuade the Claimant from pursuing it.

109. Detriment 6.2 was a more general failure on the part of the Respondent. The reasoning given above applies equally to this detriment: the Tribunal inferred from the failure to address the substantive issue of the pay disparity that the protected act played a more than trivial part in the decision to do so.

110. Mr DeLacey was the individual responsible for detriment 7. The Tribunal has found that his reference in the appraisal to the Claimant's "continuous anger" and contravening workplace values related, at least in part, to her protected act. The Tribunal again concluded that the protected act played a more than trivial part in Mr DeLacey's decision to include these matters in the appraisal. The reference to "continuous anger" was particularly significant, as it could not be said that the Claimant was angry about her supposed attempt to trick Mr DeLacey: she was angry about the pay disparity that she had raised.

111. The Tribunal therefore concluded that the victimisation complaint was well founded with regard to the detriments pleaded in paragraphs 27.3, 27.4, 27.6.2 and 27.7 of the Particulars of Claim, but not in respect of the other detriments. The complaint of detriments on the ground of making a protected disclosure was not well founded.

Constructive Dismissal

112. A constructive dismissal occurs where an employer has committed a breach or breaches of contract sufficiently serious to entitle the employee to treat herself as dismissed, and where the employee resigns in response to the breach or breaches without having previously affirmed the contract.

113. In the present case, the Claimant relied on breaches of the implied term as to trust and confidence, which is generally understood as being a term that the employer will not, without reasonable cause, act in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence as between employer and employee. The matters that she relied on as amounting to breaches were:

113.1 The matters relied on as detriments set out in paragraph 27 of the Particulars of Claim.

113.2 The failure to pay the Red Bull commission under the new scheme (paragraph 30.2 of the Particulars of Claim).

114. The Tribunal referred again to its conclusions about the detriments. For the reasons previously given in relation to detriments 27.1 and 27.2, we found that these did not amount to or form part of, a breach of the implied term.

115. Equally, the findings made about detriments 27.3 and 27.4 led the Tribunal to conclude that these contributed to a breach of the implied term, when considered with detriment 27.6.2. The Claimant had raised a concern about a pay disparity which in fact existed. The Respondent's only action in response to this was to commence a disciplinary process which led to her being warned about her future conduct. Nothing was done or said about the disparity or the Claimant's concern. The Tribunal did not overlook the fact that the Claimant had given an untrue explanation of having invented her original account, and so to some extent had contributed to the situation. The Tribunal concluded, however, that taken as a whole, the Respondent's conduct in relation to this aspect contributed to a breach of the implied term.

116. The Claimant did not rely on 27.5 as a detriment because she accepted that Mr DeLacey had not been responsible for the rejection of her request for a sabbatical. She nonetheless relied on this refusal as an aspect of the breach of the implied term. Mr DeLacey's evidence was that the business did not agree to the request (paragraph 58 of his witness statement) and that "the simple reality" was that the Respondent "does not and did not have a practice of granting employee sabbaticals".

117. The Tribunal considered that these statements amounted to little more than re-stating that the Respondent refused the request. We accepted Ms Garner's submission that there was really no evidence about why it was refused, that there was no discussion of the request with the Claimant, and no reason given for the refusal. Taking all these matters into account, we found that this also contributed to a breach of the implied term, even allowing for the fact that the Respondent had offered an additional week's annual leave. An employee who requested a sabbatical might well lose confidence in an employer who declined the request without discussion or giving reasons.

118. Detriment 27.6.1 relates to the commission issue. In paragraph 30.1 of the Particulars of Claim the Claimant relied on the Respondent's failure to pay the commission according to the new scheme as an element of the breach of the implied term. The Tribunal found that this contributed to that breach. An employee might well lose confidence in an employer when her manager agreed to her request to be paid at a particular rate; she was not then paid at that rate; her manager told her that HR would review possible alternatives; and the employer failed to give a formal response to her requests for an explanation.

119. With regard to detriment 27.7, to the extent that Mr DeLacey was critical of the Claimant for being angry about the pay disparity issue, the Tribunal considered that this contributed to a breach of the implied term as the substantive point about the disparity remained unaddressed. In the circumstances, it was unreasonable to be critical of the Claimant for being angry about this, and an employee who was criticised in this way might well lose confidence in the employer.

120. Detriment 27.8 was not relied on as such and, in the present context, added little to the issue as to refusal of the sabbatical.

121. Taking all of the above matters together, the Tribunal concluded that the Respondent had acted in a way that was at least likely to destroy or seriously damage the relationship of trust and confidence. We accepted the Claimant's evidence that it did in fact have this effect in her case. There was no further matter relied on as giving rise to a reasonable cause for the Respondent to act as it did. We therefore found that the Respondent had breached the implied term of trust and confidence. Such a breach is generally understood to be sufficiently serious as to entitle the employee to treat herself as dismissed, and we found this to be so in the present case.

122. The Tribunal next asked itself whether the Claimant had resigned in response to the breach. On the basis of the Claimant's evidence that she would not have resigned if the sabbatical had been granted, Mr Clayton submitted that her real reason for seeking a sabbatical was to attend the yoga training course; that she had committed herself to this by 29 November 2018; and that her mind was made up at that stage to leave the Respondent's employment.

123. As the Tribunal has recorded above, we concluded that the refusal of the sabbatical was in itself something that contributed to a breach of the implied term, with the result that Mr Clayton's point was not as significant as it might

have been had we reached the opposite conclusion. The precise reason or reasons why the Claimant requested a sabbatical did not directly bear on this. In any event, as explained in the findings of fact above, the Tribunal found that all four of the factors relied on by the Claimant as causing her to resign were effective; and we have found that all four contributed to a breach of the implied term.

124. The Tribunal therefore found that the Claimant resigned in response to the Respondent's breach of contract.

125. Mr Clayton's point about the yoga training course, however, may be relevant to an issue that has not yet been canvassed in terms and which may arise at the remedy hearing. The Tribunal may have to consider whether there was a prospect that, even in the absence of a breach of the implied term, the Claimant would have resigned in order to attend the yoga training course and/or in order to become a personal trainer. If there was such a prospect, the Tribunal would have to consider factors such as how likely that was, and when it might have occurred.

126. Although, as explained above, Mr Clayton relied on affirmation in relation to the commission issue, he did not make any further submission about this in the context of the constructive dismissal complaint. The Tribunal did not find that the Claimant had affirmed the contract: she resigned promptly (i.e. within about 8 days) of being told that her sabbatical request was refused and of sending what proved to be her final communication on the subject of the Red Bull commission.

127. The Tribunal therefore found that the Claimant was constructively dismissed. There remain the questions whether that dismissal was automatically unfair; whether it was unfair within section 98 of the ERA; and whether it was an act of victimisation.

128. Given the Tribunal's finding that the Claimant did not make a protected disclosure, the dismissal cannot have had as its sole or principal reason the making of a protected disclosure, and the complaint of automatically unfair dismissal under section 103A of the ERA must fail.

129. Under section 98(1) of the ERA the burden is on the Respondent to show the reason, or principal reason for the dismissal (which in the context of a constructive dismissal, means the reason for the acts or omissions that amounted to a breach of contract), and that the reason is one falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. If that burden is discharged, the question whether the dismissal was fair or unfair falls to be decided under subsection (4).

130. It is often difficult, although it is not impossible, for an employer to discharge the burden arising under section 98(1) in a case of constructive dismissal, as the Tribunal will already have decided that its acts or omissions amounted to a serious breach of contract. Similarly, it is often difficult, although it is not impossible, for a Tribunal to find that an employer acted reasonably in

constructively dismissing an employee. Mr Clayton did not make any submissions on these points, and the Tribunal concluded that the Respondent had not discharged the burden in relation to the reason for the dismissal, and that there was in any event no basis on which it could find that the Respondent had acted reasonably in relation to the matters constituting the constructive dismissal.

131. There remain the question whether the constructive dismissal also amounted to an act of victimisation. Again, the issue is directed to the acts and omissions found to have constituted the breach of contract. The Tribunal reminded itself of the provisions of section 27 of the Equality Act and the requirement that the protected act must have a "more than trivial" influence on the detriments.

132. The Tribunal has found that the Claimant was subjected to detriments 27.3, 27.4, 27.6.2 and 27.7 because she did a protected act, in the "more than trivial influence" sense. Each of these, in addition to the refusal of the sabbatical request and the failure to respond on the commission issue, contributed to the breach of contract. This being so, the Tribunal concluded that the protected act had a more than trivial influence on the detriment of the constructive dismissal, by virtue of having had a more than trivial influence on four of the individual detriments that contributed towards that.

133. The Tribunal therefore concluded that the constructive dismissal also amounted to an act of victimisation.

134. As arranged at the hearing, a further hearing to determine remedies is fixed for 30 April and 1 May 2020. If any further case management orders are sought for that hearing, the parties should endeavour to agree these in the first instance and make an application, preferably jointly, to the Tribunal. The parties are reminded that any issues as to whether the Claimant would have resigned in the absence of a breach of contract, and if so when, remain outstanding.

135. Should the parties manage to reach a settlement before the hearing, they should inform the Tribunal as soon as possible.

Employment Judge Glennie

Dated: 05 Feb 2020

Judgment and Reasons sent to the parties on:

06/02/2020

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For the Tribunal Office