EMPLOYMENT TRIBUNALS

Claimant: Miss J Saunders

Respondent: Pavers Ltd

Heard at: Leeds **On:** 10 August 2020
13 August 2020
(in Chambers)

Before: Employment Judge Jones
Ms Y Fisher
Mr K Lannerman

REPRESENTATION:

Claimant: In person (Assisted by Ms Sally Clarkson)
Respondent: Mr Adam Graham

JUDGMENT

The Tribunal unanimously holds:

1. Although the proceedings were brought after the end of the period of three months from the date on which the act to which the complaint related, the proceedings have been brought within a period that is just and equitable to allow the claim to proceed.

2. The respondent victimised the claimant in not affording her the benefit of a pay increase in April 2019, which was a detriment because the claimant had done the protected act of bringing discrimination proceedings.

REASONS

Introduction

1. The respondent is a national footwear retailer. It has 11 stores in the UK and Ireland and employs approximately 1,600 people.

2. The claimant is employed by the respondent as the retail manager at its Batley Mill store. On 1 April 2019 the claimant did not receive a pay rise. This was unprecedented, an increase having been awarded in each year of her employment up until then. At that time proceedings were ongoing in the employment tribunal. The claimant had bought proceedings against the respondent for disability discrimination, on 24 December 2018. She believes that she was not awarded a pay rise in April 2019 because she had brought those proceedings. If she is right, that would be an unlawful act of victimisation.

3. The claim was presented on 10 February 2020. The question arises as to whether the claimant may bring this claim because of the time limit provisions for pursuing such claims.

The issues

Time limits

4. Was the decision not to award an annual increase in pay, conduct which extended over a period, the last part of which extended into the primary time limit?

5. If not, was the claim presented within such further period the Tribunal considers is just and equitable to allow the claim to proceed.

Victimisation

6. It having been accepted that the bringing of discrimination proceedings in 2018 was a protected act, was the decision made on behalf of the respondent not to award a pay increase in April 2019 because of that protected act? If so was it a detriment?

Evidence

7. The Tribunal heard evidence from the claimant and read a witness statement she had submitted from Ms Elaine Avison.

8. The respondent called Mrs Sharon Widdowson, area manager for the North East region.

9. A bundle of documents running to 244 pages was submitted. At the commencement of the hearing the claimant asked for permission to submit an additional bundle. The Tribunal would not allow all the documents to be added, but proposed that any document she wished to cross-examine upon should be shown to Mr Graham first. He did not object to those selected.

10. In closing submissions the claimant referred to emails from her legal advisor. The Tribunal informed her that these had not been disclosed and could not be relied upon unless permission was obtained. It explained the principle of legal professional privilege. The claimant waived her privilege and asked to submit the email chain. Mr Graham did not object, provided the entire correspondence being submitted. The claimant was recalled and cross examined by Mr Graham on the correspondence.

Background/Facts

11. The claimant commenced employment on 7 March 2006 as a manager in the respondent's store in Batley Mill. The terms and conditions of employment, which were signed by her on 28 July 2006 and on behalf of the respondent on 22 June 2006, provided for a salary and a retail manager's bonus, but no contractual entitlement to a pay rise. Nevertheless, the respondent has awarded discretionary increases to the salaries of its employees every year. The claimant received pay rises of between 2% and 3% for each year until April 2019. The respondent had disputed that the claimant had always received a pay increase. Paragraph 17 of the response alleged that this had been down to poor performance. This was not borne out on examination of the available documentation.

12. On 24 December 2018 the claimant presented a complaint in the Employment Tribunal for disability discrimination. The claim was subject to a number of hearings, the first of which required clarification of ill-defined complaints.

13. On 8 April 2019 Employment Judge Lancaster struck out all disability discrimination claims for discrimination by way of breach of the duty to make adjustments, harassment and unfavourable treatment because of something arising in consequence of disability on the ground they had no reasonable prospect of success, and made a deposit order in respect of a complaint of direct disability discrimination. The claimant was required to pay a deposit of £365 as a condition of being permitted to pursue that complaint. The claimant did not pay the deposit and the claim was therefore struck out on 23 May 2019.

14. At the end of March 2019, by telephone call, Mrs Widdowson informed the claimant that she would not be receiving an annual pay rise the following month. The claimant asked why and was informed that it was down to poor performance of her KPIs. The claimant requested details of what the poor performance was but received no response.

15. On 17 April 2019 the claimant sent Mrs Widdowson an email requesting confirmation that her bonus had been calculated by reference to sales, shoe care, handbags, UPT and team evaluations. In a second email the following day she corrected this. The query was not in respect of her bonus but in respect of the decision to award no pay rise. She requested confirmation as to which KPIs the decision had been based upon. Later that day she expressed her opinion, by email, that the decision not to award her a pay rise was an act of victimisation for having brought proceedings.

16. On 19 April 2019 Mrs Widdowson emailed the claimant to say that she would be visiting the store on the Friday and would discuss the matter then. On 23 April 2019 the claimant replied and said that if the decision could not be changed she would require the reasons setting out in writing by whoever had made the decision. She stated that if the facts had been based on poor performance they should be easily supported, based upon KPIs at the time.

17. Mrs Widdowson visited the store on 26 April 2019. The claimant approached her late in the day, 20 minutes before closing time, because the subject of pay had not been broached. She asked her about the decision not to award a pay rise and was informed that it had been the decision of Tina Pinder, the head of human resources. Mrs Widdowson said it had based on poor performance. The claimant asked what poor performance and was told it was Tina's decision. Mrs Widdowson denied this conversation but we consider it more likely that the claimant's account is correct. That is because the claimant sent an email on 30 April 2019 recording the fact that she had not been given any more detail on 26 April and asking when the response in writing would be received. Furthermore, on 1 May 2019 Mrs Widdowson forwarded that email to Ms Pinder, informed her the claimant wanted something in writing and asked Ms Pinder for an update. She added, "*we did discuss it was based on performance, the staffing issues, impact of those on store standards, covering the store, etc.*".

18. The claimant did not receive any written explanation to her request for the decision not to award her a pay rise.

19. On 28 June 2019 the claimant submitted a grievance. She stated that she had not been given written reasons for not having been awarded a pay rise even though it had been requested twice. She stated she believed she was on a par with previous years in respect of performance, did not understand the reason for the decision and expressed the belief that it was because she had brought proceedings under the Equality Act.

20. By an email to Ms Pinder, for the purpose of responding to the grievance, Mrs Widdowson stated, on 2 July 2019:

> "*The conversation I had with Jackie wasn't just focussed on financial KPIs as although they were in red it was a mixed midway performance within the area. I explained to Jackie that we looked at mitigating circumstances and why a store performed or not and if they were in the manager's control/influence.*
>
> *The differing factor, compared to other stores, is that the store had numerous people issues throughout the year which came to a head in July/August/Sept last year and resulted in some of the team leaving the business. The store was supported from other management on the area as much as it could be, at one point management even came down from Scotland. £3.7k was reallocated into the store last financial year. The people issues also, at times, had an impact on store standards and across most areas of store operation. The management/leadership of her team and missed potential was also taken into consideration, which is part of Jackie's role and responsibilities as store manager.*"

21. In a letter dated 19 July 2019 Ms Pinder wrote to the claimant and referred to a 2014 grievance she had brought. She stated there was no automatic contractual right to an increase in pay. She said that Mrs Widdowson had discussed the decision with the claimant and no further information would be provided on the subject. The claimant responded to point out that that was not the subject matter of the 2014

grievance and that Mrs Widdowson had not been involved at the time. She sent a number of documents about the 2014 grievance.

22. On 15 August 2019 the claimant wrote to Ms Pinder and asked for a response to her grievance and a grievance meeting. She observed that it was seven weeks since the grievance was made and that ACAS advised that a response should be provided as soon as was reasonably practicable.

23. On 20 August 2019 Ms Pinder replied saying she had responded on 19 July and that a grievance hearing would be arranged by Sarah, who would be in touch. A meeting was arranged for 18 September 2019, which the claimant attended.

24. On 23 September 2019 the outcome to the grievance was sent to the claimant by letter. Ms Samuels-Meeds, Retail Area Manager, did not uphold the complaint. She informed the claimant that her performance in 2018 had not been deemed satisfactory enough to warrant a pay increase as she had only achieved one of her seven store KPIs. She informed her that the performance was measured on whether or not the store manager met their store's KPIs, and that it was not measured against other store managers. Ms Samuels-Meeds stated that the claimant's attitude to the business and the products sold during the meeting was very negative and she was concerned at the claimant's lack of knowledge of how she was performing against the store's KPIs that year. She said this demonsted a lack of commercial awareness and ability to drive sales.

25. The claimant appealed the decision by email of 4 October 2019 addressing the points raised in the outcome letter. She stated there was no defined benchmark for how many KPIs were needed to achieve a pay rise, so as to enable a manager to strive for it as a target. She stated that Mrs Widdowson had said that Ms Pinder had made the decision.

26. In respect of a comment made that they were expected to help out other stores, she said Batley had helped out nine times during the year, she personally helping out twice, but had not been able to drive due to her dyspraxia. She stated that managers were measured against each other every day. She stated her dyspraxia caused memory problems which meant that she could not rattle off the KPIs on cue, and that had nothing to do with the grievance and the reason she had not been given a pay rise but had simply been used to criticise and embarrass her.

27. An appeal meeting took place on 23 October 2019. Mr Mark Granger, Director of Operations, dismissed the appeal. He stated that there was no set formula with regards to how to achieve a pay increase, but that pay increases were based on a number of criteria including store KPIs, behaviour and attitude, and other factors such as supporting the region by covering other stores. He rejected the suggestion that Tina Pinder made the decision but stated it had been Sharon Widdowson. He stated that Sharon Widdowson had had discussions with the claimant in respect of performance in visits during the year which were recorded in documents. In respect of measuring stores against one another, he stated that did not play any part in deciding whether to make managers' pay awards but that the company assessed how the store had performed based on the previous year's performance in order to create KPIs for the following year. He concluded:

> "*Following my investigations and reviewing the above I can confirm that I uphold the decision that you should not receive a pay award in 2019. I do not think achieving only one of your seven KPIs is a satisfactory basis on which to receive a pay award*".

Steps of claimant to obtain legal advice

28. On 17 April 2019 the claimant contacted an adviser at Disability Law Services, an organisation which specialises in advising in respect of discrimination claims and disability law. It had helped her in respect of her earlier disability discrimination claim. She informed her adviser that she had not received a pay rise in contrast to the staff on the sales floor, the supervisor and Assistant Manager.

29. On 14 May 2019 the claimant contacted her adviser and provided further details. She informed him that she had asked for the decision in writing. She said she was happy to put in a grievance, as had been suggested on the telephone. She pointed out that the store had come 10th out of 22 in respect of sales targets and the remainder of the KPIs listed the store at tenth as well. She asked for advice as how to proceed.

30. The adviser responded on 17 May 2019 and said that he would put together the wording of the grievance. He set out the provisions of section 27 of the Equality Act 2010. He informed the claimant to look after the drafting of the grievance and he would lay out the facts to establish victimisation.

31. The claimant sent him a copy of the draft grievance on 21 May 2019. She sent a chasing email on 29 May 2019 and her adviser responded on 30 May 2019. He suggested some tidying up of the wording and that the claimant specifically state there had been victimisation.

32. On 1 August 2019 the claimant contacted her adviser. She explained that she had not had an explanation in writing.

33. On 30 August 2019 the claimant's adviser responded and apologised because he had been busy. He asked for a copy of Ms Pinder's email which the claimant had referred to.

34. The claimant responded on 14 August 2019 and enclosed Ms Pinder's email. She explained the context of the 2014 grievance. She sent a further email on 20 August 2019 informing her adviser that she had not received a response in respect of her grievance.

35. On 25 August 2019 her adviser replied. He informed the claimant that the time limit for bringing a claim was three months less one day, so that the opportunity to challenge the decision not to award a pay rise had passed, but he said it could be challenged indirectly by the refusal to entertain the grievance. He suggested the wording of a final email.

36. The claimant responded on 25 August 2019. She said she was not aware that there was a time limit on further discrimination: she would have thought that could happen at any time.

37. On 27 August 2019 the claimant sent a further email to her adviser and asked him if she should issue a claim then as the grievance was three weeks away. In response, on 27 August 20919 her adviser said he would do a bit of research and get back to her. There is no indication he did.

38. On 3 October 2019 the claimant emailed her adviser to inform him that the grievance had not succeeded and she had until the following day to lodge an appeal. She informed her adviser that the stance of her employer was that it was as a result of the KPIs, but in her view that had never been relied upon for the annual pay rise. She asked for advice on an appeal. Her adviser replied to her later that day. He recommended an appeal.

39. The claimant emailed on 4 October 2019 to provide further information. She stated:

> "*Re the Tribunal, surely the discrimination hasn't taken place until I have a final decision regarding a pay rise. Should I have taken my case to Tribunal without seeing a grievance through, then a Tribunal would have said the issue was still unresolved?*"

The claimant asked for advice in respect of the appeal.

40. In response her adviser stated, on 4 October 2019, that the Tribunal would expect the claimant to raise a grievance but that the time limit still applied if the grievance was not resolved at that point, but he then said:

> "*Don't worry about it, the point you make is a good one. So yes, go to the ET after your appeal is decided*."

41. On 12 December 2019 the claimant informed her adviser by email that her appeal had been dismissed. She asked him if he could draft the ET1 because in her earlier claim she had been criticised by the respondent's solicitor.

42. On 17 December 2019 her adviser agreed and asked for the documents to be sent through.

43. On 22 December 2019 the claimant emailed again setting out the details and history. The claimant chased her adviser on 10 January 2020 for an update and was informed on 15 January 2020 that he was working on drafting a claim and he would have it to her that week.

44. On 4 February 2020 the claimant again chased her adviser for the draft.

45. On 6 February 2020 the adviser replied and said that he needed further documents and asked for them to be sent. He said they had until 10 February 2020.

46. The claimant responded on 6 February 2020 with further information.

47. On 7 February 2020 her adviser contacted her to apply for early conciliation, and said that had to be done before 10 February 2020.

48. The claim was issued on 10 February 2020.

The Law

Victimisation

49. By section 27(1) of the Equality Act 2010 (EqA), a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.
50. By section 27(2) of the EqA a protected act includes the bringing proceedings under that Act.

51. The House of Lords held that the essential issue is whether the employer consciously or subconsciously subjected the claimant to the detriment because he had done the protected act. It is not a simple "but for" test, nor is it a question of motive, see **Nagarajan v London Regional Transport [1998] 1 AC 501** and **Chief Constable of West Yorkshire v Khan [2001] ICR 1065**.

Unlawful conduct in work

52. By section 39(4) of the EqA an employer must not victimise an employee in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service or by subjecting her to any other detriment.

Burden of proof

53. By section 136 of the EqA 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.

54. The Court of Appeal has approved and revised guidance to the application of the burden of proof in previous legislation and the following extracts are pertinent:

- *In deciding whether the claimant has proved such facts [to discharge the burden] it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves…*

- *The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could.*

- *In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts.*

- *When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.*

- *To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground.*

- *That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment.*

- *Since the respondent would generally be in possession of the facts necessary to provide an explanation the Tribunal would normally expect cogent evidence to discharge that burden. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire, procedure and/or any Code*",

see **Wong v Igen Ltd [2005] ICR 931** and **Barton v Investec Henderson [2003] ICR 1205**

55. The decision of the Court of Appeal in **Ayodele v Citylink,** approved the previous authorities, albeit under similar but differently worded provisions in the Discrimination Acts, and confirmed they remained relevant to the approach to the burden of proof under section 136.

Time limits

56. By section 123(1) of the EqA proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.
57. By section 123(2) of the EqA conduct extending over a period is to be treated as done at the end of the period;

58. The higher courts have provided guidance upon the principles to be taken into account in determining whether it is just and equitable to allow a claim to proceed, notwithstanding the primary period has expired. The court must take into account anything which is relevant, see **Hutchinson v Westwood Television Limited [1977] IRLR 69**, and this could include those factors which are considered in the exercise of the discretion of personal injury claims by virtue of section 33 of the Limitation Act 1980, see **British Coal Corporation v Keeble [1997] IRLR 336**.

59. In **Robertson v Bexley Community Centre [2003] IRLR 434**, the Court of Appeal stated that it was for the claimant to persuade the Tribunal that it was just and equitable to extent time, and that the exercise of the discretion was the exception rather than the rule. However, in **Chief Constable of Lincolnshire Police v Caston** the Court of Appeal expressed caution about those remarks and Sedley LJ said, "*There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*."

60. The Tribunal will always consider the prejudice to a party of a decision to extend time or to refuse the extension, see **Miller v Ministry of Justice [2015] UKEAT 0003/15**. Prejudice to a respondent will include the loss of the limitation defence and also forensic prejudice which may arise from having to meet a case which has been brought later than was expected so that the quality of evidence is corroded by faded memories or loss of documents.

Discussion and Conclusions

Time Limit

61. The decision not to grant a pay award to the claimant was made at the end of March 2019 by Mrs Widdowson to take effect on 1 April 2019. That was a one-off act although it had continuing consequences; the claimant's pay would continue to remain at the same rate in contrast to all other managers in the North East who had been long serving. Four new managers had not received a pay rise but that was because their starting salary took into account the forthcoming increase.

62. The institution of a grievance and its appeal did not have the effect of converting the one-off act into conduct extending over a period. Had the claimant complained that the outcome to the grievance and appeal themselves were acts of victimisation, the position would have been different. We would then have accepted that there was conduct extending over a period which ended when the appeal was determined and communicated to the claimant. In that event the claim would have been brought within time and within the primary time limit.

63. As the case concerns only the decision not to award the pay rise and not the outcome of the grievance and appeal, it is therefore outside the primary time limit and so it is necessary to consider whether it has been presented within such other period that is just and equitable to allow the claim to proceed.

64. In that respect, we accepted the evidence of the claimant that she was not aware of the time limit in the weeks after the decision was made in early April. Although she had brought a previous claim she had not become alive to the significance of time limits. We are satisfied that the claimant's state of mind is reflected by the email to her adviser ofn25 August 2019 in which she expressed the view that further discrimination could take place at any time, and in her email of 4 October 2019 in which she stated discrimination would not have taken place until any final decision was made in respect of the pay rise. As she saw it, the final decision would not have been made until the outcome of the grievance was determined, because that could have overturned the original decision.

65. Mr Graham made the point that the adviser had correctly identified the time limit in his email of 25 August 2019. He had stated that the time to bring the claim had passed. However, he then qualified the comment by suggesting that the decision could indirectly be challenged by way of the refusal to entertain the grievance. It was this that promoted the claimant to make a remark about further discrimination and to ask, on 27 August 2019, whether she should issue her claim then. The response from her adviser was that he would get back to her and undertake some research. It is noteworthy that the adviser had not informed the claimant of the time limit within the primary period, which would have been by 30 June and then, having identified the correct time limit on 25 August 2019, gave the claimant the impression that there was an alternative time limit if she challenged the decision by way of the grievance.

66. We find the claimant believed she was pursuing a proper course in seeking to determine the matter by way of a grievance rather than seeking to litigate. She made that point in her email of 4 October 2019 in which she said to her adviser that if she had brought the claim without seeking a grievance then the Tribunal would inform her that the decision was as yet unresolved. Her adviser led her to believe that that was a good point. Moreover, after the appeal had been determined the claimant was led to believe that the time limit would only expire on 10 February 2020, that would be three months less a day after she was informed of the outcome of the appeal.

67. To summarise, we are of the opinion that the claimant sought to exhaust the internal grievance process to overturn the decision which had been made, and she genuinely believed that the Tribunal might have criticised her had she not done that, as there remained the opportunity for the employer to correct the decision. It is worth noting that the legislature has marked a policy of encouraging alternative dispute resolution without resort to the Courts and Tribunals, as is apparent from the ACAS early conciliation provisions and the jurisdiction to increase awards or reduce them for failure to comply with the ACAS Code of Practice on grievance and disciplinary proceedings. The was not advised properly; either within the primary time limit that she should issue a claim, nor at later stages. The claimant was led to believe that she was pursuing the right options and should exhaust the appeal of the grievance first.

68. The delay is a significant one. It is nearly 7½ months after the primary time period has expired. That has to be seen in the context of a time limit that Parliament has set of three months from the date of the act complained of.

69. It was not suggested that the evidence had in any significant way been adversely affected by reason of the delay. The respondent had been put on early notice of the claimant's concerns, and the fact she believed that it was an act of victimisation. It had every opportunity therefore to collate the evidence in the early weeks following the making of the decision and to examine it at the grievance and appeal hearing. It was not suggested that any witness who might have given relevant evidence was no longer available or that their recollections had been significantly impaired by the delay; nor was it suggested that any documentation had become unavailable because of the failure of the claimant to bring the claim earlier.

70. The respondent contributed to the delay to the extent that it did not deal with the grievance diligently. The initial response of the Head of HR was to deflect the

claimant from pursuing the grievance by suggesting that she had been informed of the decision and referring her to a grievance made in 2014. In fact, the claimant had not been given a reason for the decision notwithstanding she had asked for it to be reduced to writing. There was then some considerable delay, involving repeated requests by the claimant for the respondent to consider her complaint by way of a grievance, and a further delay in holding the meeting with the claimant and communicating the decision to her. She had to chase the decision on appeal. No explanation was provided by the respondent as to why a simple grievance should have taken this long. We can see no reason why the respondent should not have informed the claimant in writing why the decision had been made.

71. For the reasons set out below, the outcome to the grievance and appeal, and as communicated by Mrs Widdowson in the early stages, were not the main reasons the respondent is now advancing. In other words, even on the respondent's own account, it had failed to inform the claimant of the reasons she had not received a pay award. That is significant; there was not only an unacceptable delay in setting out the explanation in writing but when it came it was incomplete and misleading.

72. Having taken all factors into account we are satisfied it would be just and equitable to allow the claim to proceed, notwithstanding the delay. We recognise that there is hardship to the respondent of having to defend a claim it would otherwise be able to defeat by a time limit defence; but the hardship to the claimant of not being able to pursue a claim is greater. She would be denied the right to secure a declaration of her legal rights and compensation against the respondent. We have taken into account the submission of Mr Graham that the respondent should not be held responsible for the claimant's advisor's advice. However, for the claimant to have to launch an action against her advisors would be an additional hardship and the respondent would receive a windfall.

<u>Victimisation</u>

73. The claimant was not entitled to a contractual increase in pay, but it was accepted that a discretionary pay award had been made to the claimant for many years annually and that, at this time, pay awards were made to all but the newly appointed manager. Not to grant a pay award to the claimant was therefore plainly a detriment.

74. It is not disputed that the claimant had done a protected act in bringing proceedings in late 2018. Those proceedings faltered because the claimant did not have a real understanding of the legal principles about disability discrimination. It is fair to say the claims were largely misconceived or had little reasonable prospect of success.

75. The question for the Tribunal to determine is whether the respondent, by its managers, made the decision not to award a pay rise because the claimant had brought them.

76. We are satisfied that there are facts from which we could decide, in the absence of any other explanation, that the decision not to award the pay rise was

because of the protected act. The facts which lead us to that conclusion are as follows:

(1) In the North East all other managers in the 22 branches for which Mrs Widdowson was responsible received a pay rise, save for four new managers. In the ordinary course of events a new manager does not receive a pay award. None of the managers who received a pay award had brought discrimination proceedings against the respondent. The claimant had.

(2) The claimant received a bonus which was performance related in April 2019. This was a separate scheme of remuneration based on Pavers Points. The majority of it was related to the performance of the company as a whole. However, of the £1,400 bonus she received, a sum of between £200 and £400 related to the individual manager's performance. The criteria were explained. It was anomalous to disallow an annual increase because of poor performance on the one hand whilst award a performance related bonus, albeit related to separate criteria, on the other.

(3) The respondent repeatedly refused to provide a written explanation for why the award had not been made, notwithstanding the claimant requested one repeatedly. Mrs Widdowson said that was because it was felt the claimant would pick at it and find fault. She drew this conclusion from the fact the claimant had raised a grievance against her in July 2019, with the consequence that she stepped back temporarily from some of her managerial role. She felt that the claimant had been challenging and rude to the HR department, a matter we consider below. We did not consider these are adequate justifications to refuse to provide the written explanation for not granting a pay rise. It is a part of management to ensure that if poor performance is identified it is spelt out so that the employee can improve and work upon the weaknesses which led to the criticism. We would have expected Mrs Widdowson to have accepted the invitation to set out clearly her reason for not awarding the pay rise, but she failed to do so. Furthermore, the respondent, by its HR Manager, sought to deflect the claimant from pursuing the grievance.

(4) The claimant had always received a pay award, contrary to the suggestion of the respondent that she had not received an award in 2014 because of poor performance.

(5) The claimant drew attention to criticisms in writing of her performance in 2016 but she nevertheless received a pay award then. Therefore, for her not to receive a pay award at a time when she had brought proceedings raises the inference that the bringing of proceedings, and not poor performance, was behind the decision not to award her the increase.

77. It is therefore for the respondent to satisfy us that the bringing of proceedings played no part whatsoever in the decision not to make the pay award. The reasons it

is said the pay award was not made are set out in the witness statement of Mrs Widdowson, in particular paragraph 25 as developed in paragraph 32.

78. Seven reasons are advanced for the decision:

(1) That the claimant and the store performed against her and its financial KPIs;

(2) There had been negative time-consuming and detrimental people issues in the store that year;

(3) That the store's standards in general were below expectations;

(4) That the claimant was subject to disciplinary proceedings in respect of potential gross misconduct offences;

(5) That otherwise potentially talented employees had left the store and the respondent because of the claimant's management and treatment of them;

(6) That the claimant offered little positive support to the remainder of the area;

(7) That issues at the store required a high amount of external support.

79. As to the first, the claimant pointed out that the peculiarity was that her store had performed tenth out of 22 by reference to the financial KPIs. Those KPIs were specific to the store and not the individual. Those managers who had been responsible for stores with lower KPIs had not been penalised for that by way of not receiving a pay award.

80. In response to that, Mrs Widdowson stated that the KPI performance was not the determinative factor at play. At paragraph 31 of her witness statement she says:

> "*In respect of Ms Saunders it was not the failure to achieve her KPIs that was the most persuasive and influential reason that caused me to take the decision not to award her with a pay rise. These played a part, but the decision was in the main taken due to the numerous negative issues that had arisen in the store which had impacted on the store and the wider area that year*."

81. Poor performance by way of KPI's is the sole reason advanced in paragraph 16 of the grounds of response. It was the only reason given in the grievance outcome and the conclusion to the grievance appeal. In the evidence of Mrs Widdowson, in contrast, it has been relegated to a secondary factor.

82. It is fair to point out that Mrs Widdowson had emailed her colleague, Ms Pinder, on 2 July 2019 to say that the differing factor, in comparison to other stores, was the people issues that the Batley Mill store had had throughout the year, in particular coming to a head in July, August and September. She also received to an

additional cost of £3.7k being reallocated to the store and there being missed potential.

83. However, none of that explanation ever surfaced in either the grievance or the appeal hearing. Rather, Ms Samuel-Meeds stated that it was the KPIs which had been the reason for the decision. To emphasise the point, she stated that the claimant seemed to have a poor understanding of them during the grievance hearing and demonstrated a negative attitude to the store and its products. It is difficult to see why these were relevant factors given that it was not Ms Samuel-Meeds' opinion which was relevant, but the reasons of Mrs Widdowson. Those reasons as set out above were not referred to in Ms Samuel-Meeds' letter.

84. Furthermore, in the appeal, although Mr Granger emphasised in the first bullet-point that the decision about a pay increase included factors other than KPIs, and included attitude and supporting the region by covering for other stores, he concluded that the reason for the decision had been the poor performance by reference to KPI's. He said that achieving one of the seven KPIs was not a satisfactory basis on which to receive a pay award. Yet paradoxically, many other managers who had performed less favourably by reference to KPIs had received a pay award.

85. The second reason, 'extremely time-consuming and detrimental people issues', encompasses the remainder of the seven reasons put forward. These are explained in greater detail in paragraph 32.

86. At paragraph 32.1 Mrs Widdowson stated that a grievance had been raised by a supervisor in the store (who we shall name as "A") on 26 July 2018. "A" had complained of a lack of support and training, being spoken to in an unacceptable way, the claimant having been nasty to her, the claimant spending a lot of time off the shop floor taking time out to do her hair, and the claimant failing to allow her to do light and amended duties in accordance with her GP certificate.

87. Mrs Widdowson stated that following a very detailed investigation the grievance of "A" had been upheld. She summarised that the training provided had not been sufficient, that the claimant had spoken in an unacceptable way to "A" and had been nasty to her, that the claimant had spent excessive time away from the shop floor doing her hair and had failed to implement the adjustments suggested.

88. Examination of the letter of the grievance of "A" does not support that. Rather, the only area in which the grievance was upheld related to shortcomings in training. Ms Shakesby, HR Officer, said:

> "*In conclusion I haven't found sufficient information to support points 3 and 5 of your point. Point 1 needs further action…points 2 and 4 require further action to be taken by the company*."

89. In respect of points 2 and 4, being spoken to unacceptably, being nasty and taking time off the shop floor to do her hair, "A" was informed that they needed further investigation and action might be taken if deemed relevant, but she might not learn the outcome of that because of issues of confidentiality. It is to mischaracterise the outcome of the grievance to suggest that it had been upheld.

90. A similarly misleading impression is presented in paragraph 32.2 of the statement of Mrs Widdowson in respect of those matters which served as misconduct allegations. They concerned providing a till code to other members of staff, a disproportionate amount of time spent in the back office including doing activities which did not relate to work. A further allegation of speaking to people in a sharp and abrupt tone is referred to at paragraph 27 of the response form.

91. The letter setting out the outcome, of 10 September 2018, does not state that the complaints were well-founded, as suggested in paragraph 32.2 of the statement of Mrs Widdowson. Rather, the decision refers to the claimant's explanation in respect of the three allegations. It is not clear what happened to the fourth. It stated no sanction was to be imposed with no explanation at all as to what had been found proven. Mr Malhotra, the disciplining officer, recorded that time was spent in the back office because dyspraxia meant the claimant was struggling with paperwork and administration. It is not a fair reflection of the outcome as recorded in the letter, to suggest that each allegation was well-founded.

92. Mrs Widdowson explained there were negative and aggressive behaviours which influenced her decision, as reflected by a deterioration in attitude between 11 September 2018 and 20 September 2018, and a number of “increasingly aggressive and rude emails” to members of the HR team. A number are included in the bundle. Mrs Widdowson suggested they themselves would have warranted action for gross misconduct.

93. The Tribunal considered the emails. They are not rude and aggressive. The claimant raised concerns on 11 September, 14 September and 20 September 2018. These were about the actions of some staff at a neighbouring store, M & Co., members of staff of the respondent and a security guard who had discussed disciplinary proceedings against the claimant. These were matters which should have been confidential. One of the new members of staff at M & Co., who we shall refer to as “B”, had previously worked in the Batley Mill store and had had a disagreement with the claimant. The claimant believed she had consciously attempted to mislead her in respect of a request for her hours to change, and that this had led to that former employee to pursue a vendetta after becoming employed by a competitor store.

94. Having raised legitimate concerns in these emails with the HR department, no meaningful response was provided. She chased up the matter with Mrs Widdowson and HR. The Tribunal do not consider the tone or content of these emails disrespectful, disobliging or offensive. They could not conceivably have founded the basis for any potential gross misconduct allegations, as Mrs Widdowson suggested.

95. Mrs Widdowson referred to a number of employees having left the store, including an Assistant Manager who stayed for only a matter of weeks and told her she was unhappy with how the claimant had behaved. No further particulars or details of this dissatisfaction were provided by Mrs Widdowson. The claimant established that they had only worked together for a total of three days.

96. The other sales assistant who had left was employee “B”. “B” had submitted a reference to a school after her employment with the respondent had ended,

purportedly on behalf of the respondent. The claimant received a phone call from the school to confirm the reference, which had been on the respondent's headed paper. The claimant refused as she had not provided the reference and believed that B had created it herself.

97. A further concern raised by Mrs Widdowson was that a decision was made to train an Assistant Store Manager in another store. This had been the subject of the claim which was subject to a deposit order, because the claimant had said that not allowing her to train this member of staff had been an act of direct discrimination. The claimant has pointed out that the store was struggling because of a loss of staffing at that time and the training of an Assistant Manager would add a further burden.

98. In respect of the criticism the claimant had not assisted other stores, the claimant challenged that suggestion. She stated that she had offered to attend on days off and change holidays, which is evidenced in emails, and provided in the grounds of appeal of the grievance. The Batley Mill store had helped other stores about nine times during the year, and she personally had helped out at stores on two occasions but had difficulty driving due to her dyspraxia. This point was never addressed in the outcome to the grievance appeal nor in Mrs Widdowson's statement.

99. As to the cost of having to provide additional staff, the claimant stated that this arose not only because of the difficulties to which Mrs Widdowson referred but also because a manager in the store had left earlier, on maternity leave and another supervisor had been promoted to a higher post in Tong by Mrs Widdowson.

100. In respect of the cost incurred of appointing another manager to assist from Scotland and the commitment of the claimant to other stores, the evidence is contradictory. The Tribunal was not provided with any satisfactory answer by the respondent to the points raised by the claimant about these matters.

101. In respect of the quality of the store generally, Mrs Widdowson relied upon a visit which she had made to the store shortly after a sale had commenced in July the previous year. The claimant was by then on leave but Mrs Widdowson felt that the store had not been adequately prepared for the sale and she left a list of items which required improvement. In the appeal Mr Granger made reference to reports prepared after store visits with action points which he suggested reflected poor performance. One of these was presented to the Tribunal by the claimant but the action points were not specific to her but the store in general.

102. The explanations advanced by Mrs Widdowson and the handlers of the grievance painted an unsatisfactory picture. It did not seem to the Tribunal that the shortcoming in KPIs was a significant factor in the decision to refuse a pay award, because so many other stores had a poorer performance. It was therefore peculiar for it to have been relied upon so heavily in response to the grievance and the appeal and as the only reason advanced in paragraph 16 of the grounds of response.

103. If the reason was multifactorial, as suggested in this hearing, we would have expected that to have been set out in the outcome to the grievance; and in the

grounds of resistance. Although these matters had been alluded to in a private email between Mrs Widdowson and the Head of HR, that was some weeks after the decision had been made and after the claimant had been raising an allegation of victimisation. The respondent's explanation would have had far more credence if the different reasons which Mrs Widdowson now says influenced her decision had been set out in writing in April or early May 2019.

104. If performance was as troubling as suggested we would have expected to see a specific performance management plan and coaching forms which the respondent uses for such purposes. Action points for the store as a whole was not a proper means for redressing significant shortcomings of a manager.

105. It is for the respondent to establish that the protected act played no part in the decision to subject the claimant to this detriment. It is not necessary for the protected act to be the only or principal cause for the detriment provided it is significant and contributes to the decision.

106. It is fair to acknowledge that there were aspects to the explanation of the respondent which raised cause for concern about the claimant's management: issues raised by three members of staff in a short timeframe might have suggested a pattern of unsatisfactory management skills. Had these matters been the basis for the decision, upon careful analysis they may have discharged the burden.

107. The problem is that these were not the reasons advanced in the grievance and appeal or in the response form. That undermines the suggestion that they are the real reason for the decision. Mrs Widdowson raised additional matters which are not substantiated or are exaggerated. Having regard to the many unsatisfactory aspects of the explanation provided and those factors which led to the burden of proof shifting, including the fact the claimant had always received a bonus, the fact Mrs Widdowson could not recall not awarding any manager a bonus save for newcomers, the fact the claimant had received a bonus notwithstanding she had performed poorly in the past, the fact that KPIs were not the significant reason for the decision contrary to the repeated refrain that they were, and fact the respondent repeatedly resisted giving a written answer and finally gave a misleading one, the respondent has failed to establish that the bringing of the discrimination proceedings was not a significant factor in refusing the claimant a pay increase.

108. In the circumstances the complaint of victimisation is made out.

Employment Judge Jones

Date: 1 September 2020