EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs R D'Rozario	AND	Aldi Stores Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol by CVP ON 26 to 30 April and 4 May 2021

EMPLOYMENT JUDGE J Bax
MEMBERS Ms J Le Vaillant
Mr C Williams

Representation

For the Claimant: **Mrs R D'Rozario (in person)**
For the Respondent: **Ms F Powell (solicitor)**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. **The claim of unlawful deductions from wages is dismissed upon its withdrawal by the Claimant.**
2. **The claims of direct race discrimination are dismissed.**
3. **The Claimant suffered a detriment for making a protected disclosure in relation to the rota for her shifts on 17 and 31 October 2019. Otherwise, the claims that she suffered detriments are dismissed.**

REASONS

1. In this case the Claimant, Mrs D'Rozario, claimed that she had been subjected to detriments for making protected disclosures, been discriminated against on the grounds of her race and that there had been an unlawful deduction from wages.

Background

2. The Claimant notified ACAS of the dispute on 8 October 2019 and the certificate was issued on 25 October 2019. The first claim was presented on 31 October 2019. The second claim was presented on 8 September 2020.

3. At a Preliminary Hearing on 19 March 2019, before Employment Judge Bax, the Claimant confirmed, in relation to her first claim, that she was relying on 6 alleged protected disclosures and 5 allegations of detriment as a consequence. She also confirmed that she was bringing a claim of direct race discrimination and relied upon two incidents involving Mr Duffield on 20 and 21 July 2019. She also brought claims in relation to sick pay she had not received. The claim was listed for a final hearing commencing on 16 November 2020. At a further Case Management Hearing on 10 September 2020, the final hearing was postponed and relisted in February 2021.

4. After the Claimant presented her second claim, the Respondent applied for the claims to be consolidated. On 27 November 2020, Employment Judge Gray conducted a Telephone Case Management Preliminary Hearing in relation to both claims. The final hearing was postponed and relisted for 6 days. The Claimant relied on a further protected disclosure and 4 further allegations of detriment between 23 April 2020 and potentially October 2020. The Claimant was given permission to amend her claim to include an allegation of detriment for not paying the Claimant full sick pay for the period 4 August to 30 August 2020 and transferring the Claimant to another store on 3 October 2020, having been notified that it would happen at the end of July/beginning of August 2020. The amendment was granted subject to the Respondent being able to argue that those claims were presented out of time.

The issues and preliminary matters

5. At the start of the hearing the issues identified in the case management orders dated 19 March and 27 November 2020 were discussed and the Claimant confirmed that they were the issues requiring determination. It had appeared to the Respondent that the Claimant was seeking to bring additional claims in relation to sick pay whilst she was suspended/on special paid leave in 2020. The Claimant confirmed that she was not bringing a claim for unlawful deductions from wages, but was saying if she succeeded in that claim of detriment a consequence of the detriment was a loss of pay. It also appeared to the Respondent that the Claimant was making an additional claim for holiday entitlement between 14 and 30 September 2020. The Claimant clarified that she was not bringing a claim for that period and that it referred to sick pay between 4 August and 30 August 2020 as set out at paragraph 3.1.3 of the list of issues in Employment Judge Gray's case summary dated 27 November 2020.

6. The Claimant confirmed that the legal obligation she was saying had been breached was the Food Information Regulations 2013 at articles 14 and 24.

7. The Respondent confirmed that it disputed that all the alleged disclosures were protected. In relation to disclosures 1 to 4 identified in the Case

management summary dated 19 March 2020, it was disputed that the Claimant provided information or that there was reasonable belief that it tended to show a breach of obligation or danger to health and safety or that it was in the public interest. In relation to disclosures 5 and 6 it was denied that there was a reasonable belief in the public interest. In relation to disclosure 7, identified in the case management order dated 27 November 2020, it was disputed that there was a reasonable belief that it tended to show a breach of legal obligation or a criminal offence or that it was in the public interest.

8. The Respondent also confirmed that it would argue that the detriment claims identified at paragraph 3.1.1 (sending the letter dated 23 April 2020) and 3.1.4 (transferring the Claimant) of the case management summary dated 27 November 2020 were out of time.

9. The Respondent also sought to include 4 additional pages to the bundle, which it wanted to include due to matters raised in the Claimant's witness statement and had not appreciated were relevant. The Claimant said that she doubted the authenticity of one of the pages, but was able to deal with the documents. It appeared that the documents were potentially relevant. On the basis that the Claimant was able to challenge the documents with the Respondent's witness, she was content for them to be added to the bundle.

10. The Claimant was given permission to add an additional page to the bundle consisting of an e-mail she had received from an Environmental Health officer. The Claimant also sought disclosure of a report from the Environmental Health Officer. It did not immediately appear that the report would be relevant to the issues in the case. The Respondent confirmed that it did not dispute the content of the e-mail sent to the Claimant and the Claimant confirmed that she did not therefore need a copy of the report.

11. The Claimant, if successful in her claim intended to seek an award for personal injury. There was not any medical evidence in relation to such a claim and it was agreed that the hearing would determine liability only and if appropriate directions would be given for remedy.

12. During cross-examination, the Claimant confirmed that she had subsequently been paid the correct sick pay for 1 to 7 August 2019. She also confirmed that she had been allowed to roll over the holiday between 8 and 25 August 2019, when she had been sick, into the holiday year 2020 and then into 2021. She said that there was not a financial claim in relation to an unlawful deduction from wages and that there were only detriment claims, for making protected disclosures, in relation to these matters. The Claimant withdrew the claim of unlawful deduction from wages, and it was dismissed on that basis.

13. The Claimant also clarified that her complaint in relation to sick pay in the second claim was that Mr Haynes did not forward her second sick note to pay roll and therefore she was not paid the correct amount of sick pay and that this was a detriment for making a protected disclosure. During cross-examination the Claimant accepted that the amount she was paid after raising a concern was correct and confirmed that she had not suffered a loss of pay.

The evidence

14. We heard from the Claimant. We also heard from, on behalf of the Respondent, Clinton Duffield (store manager), Aaron Haynes (Area Manager), Maria Brown (Store Operations Director for Swindon region), Anna Longdon (Area Manager) and Tim Rogers (Finance and Administration Manager).

15. We were provided with a main bundle of 725 pages. Any reference in square brackets set out as [p(xx)], in these reasons, is a reference to a page in the bundle. We were also provided with an additional bundle by the Claimant of 56 pages and references in square brackets set out as [p(xx)C] is a reference to that bundle.

16. There was a degree of conflict on the evidence.

The facts

17. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

18. The Respondent is a supermarket chain. The Claimant identifies as an Asian female. At all material times the Claimant lived in Amesbury.

19. The Respondent has an equal opportunities policy [p286-7], in which was included, “Any employee who harasses or discriminates against another employee … will be liable to summary dismissal under Aldi’s disciplinary procedure.

20. On 23 February 2015 the Claimant commenced employment with the Respondent as a store assistant in its Westbury store. The Claimant continued to be employed by the Respondent at the date of the Tribunal hearing.

21. On 24 July 2015, the Claimant became a Deputy Store Manager. The job description for the Deputy Store Manager role included, “Carries out spot checks on product quality, removing any products which are not suitable for sale”, and “Is responsible for stock rotation and decides if all goods in the

store are complying with Health & Safety and Due Diligence regulations. If necessary, they can take products off sale."

22. Store Managers and Assistant Store Managers are also required to carry out spot checks on quality and to remove products not suitable for sale.

23. The Claimant's contract of employment [p192-195] had the following provisions:

    - Clause 1: "…The Company is entitled to employ you in any of its trading stores in the UK."
    - Clause 4: "While deputising it is your duty to run the store in an orderly manner including following legal obligations regarding due diligence, Food Safety and Hygiene and Health and Safety. You are to take full responsibility of the Store Manager in all areas of the job description."
    - Clause 13: …"Sick pay is not paid for the first 3 days of any single period of absence; … During the first 2 years of continuous employment you will receive full pay for a total of 1 week absence due to sickness during any 12 month period. After you have completed two years' continuous employment with the Company you will receive full pay for a total of 4 weeks' absence due to sickness during any 12 month period…"

24. The Employee Handbook provides in relation to sick pay [p473-474]:
    - Company sick pay entitlement will be calculated based on your daily average in the last 3 months unless this is lower than your contracted daily rate. It is calculated by taking your gross pay for the previous 3 calendar months divided by 65.01 (as this is the number of working days in a 3 month period) and multiplied by the number of days sick. Statutory Sick Pay will be offset against this daily average.
    - Company Sick Pay will only be paid on receipt of a doctor's note. Statutory Sick Pay after the first 7 days of absence will only be paid on receipt of a doctors' note.
    - Once your sick pay has been used up, you will only receive Statutory Sick Pay for any further absence
    - Statutory Sick Pay is not payable for the first 3 days absence in a period of entitlement, unless the first day of sickness is less than eight weeks after a previous period of sickness.

25. The employee handbook, in relation to Due Diligence says "Rotation of all products must be exercised accurately. Goods that are out of date or below standard must be removed from sale." Under point 10, of examples of conduct which could lead to a discipline, up to and including dismissal, it said, "Violating Health and Safety rules, or contravening the due diligence policy." [p311]

26. Outside of the disciplinary policy and procedure, the Respondent has Formal Performance management meetings. There is no disciplinary sanction applied to such meetings, but it is a meeting for which a written record of the discussion is kept. It is an informal step before any disciplinary action is taken. The employee is informed of the performance concern and shown the evidence to support it. An explanation as to required improvement is provided and the employee is warned that further under performance in that area may result in a disciplinary meeting. The Employee is then invited to sign the form to say that they have understood. We accepted Mr Duffield's evidence that if an out of date product had been missed for a long time, that many managers might be responsible and in such circumstances rather than using the Formal Performance Meeting, due to the difficulty of pin-pointing who was responsible, all of the managers would be spoken to.

27. Date checking and stock rotation is the responsibility of all staff and management within the store. Date checking is a way of ensuring that perishable products are not on sale after the expiration date. Stock rotation is a way of ensuring that the products with the shortest dates are more prominent.

28. The date check was completed every evening shift by the manager in charge, who would check a section of the store. They check that products of the same date are removed from the shelf and products with the next days' date are reduced. Managers are solely responsible for this and they sign the due diligence diary to confirm it has been actioned.

29. On 1 May 2017 the Claimant moved to the Salisbury store.

30. At the time the Claimant worked at the Salisbury store, Mr Duffield asked the managers to take a photograph of any out of date item they found and then pass it to him so that he could investigate why it had been missed.

31. If out of date stock had been missed, the manager concerned would be spoken to. If only a couple of items had been missed items, ordinarily an informal conversation would be held. If there were more items an immediate performance management meeting would be held. If there were further instances of missed items, further informal conversations or performance management meetings would be held. Formal disciplinary action was considered when, despite informal conversations and formal performance management meetings and taking into account the number of missed items and the frequency that they were missed, the issue was not rectified.

32. The Claimant asserted that from 2018 the Salisbury store had serious issues with stock rotation. She relied upon the Health and Safety Audit on 5 July 2019, which had identified some pea snacks which had a best before date in September 2018. The Claimant also relied upon a list of 1099 out of date products, which included cases of multiple products, she had compiled

between 17 February 2019 and 1 May 2020. We accepted Mr Duffield's evidence that because the stock is checked manually there are occasions when a product is missed in amongst the thousands of products on sale and that although there should not have been out of date items on the shelves it only was a serious issue if the same manager repeatedly missed items or that a large number of items had been missed on one occasion. We accepted his evidence that he did not consider an average of 3 items a day was a significant issue. We were reinforced in that conclusion by the external Environmental Health Officer's investigation into the Claimant's complaint dated 6 July 2020, who said she was unable to progress the complaint despite finding 3 out of date products during her visit [p725]. We accepted that there was an ongoing issue with out of date stock being missed, but that it was not serious.

33. The Claimant undertook her date checks on her own. Other managers would work together to undertake the date checking and stock rotation responsibilities. We accepted Mr Duffield's evidence that on a number of occasions he had offered to assist the Claimant or that other managers would assist her, however she refused that assistance and said that she was happy to carry out the checks on her own. The Clamant worked 5 evening shifts a week and therefore she always undertook the date check on her shift.

34. We accepted the Respondent's evidence that the managers, including the Claimant, in the Salisbury store had performance reviews in 2018, but that the records had been lost. We also accepted that the Claimant and most of the other managers did not have performance reviews in 2019 due to time pressures in the store.

35. On 8 September 2018, the Claimant attended a formal performance meeting for failing to comply with due diligence and missing cases of stock on the chill date check. The Claimant signed the record accepting that there were areas of performance which required improvement [p201]. The Claimant accepted that she was told that cases of stock had been found but disputed before the Tribunal that it could have been cases because she had only been provided with one photograph of the stock as part of disclosure during the Tribunal proceedings. It was noted that the evidence relied upon in the meeting record included photographs. It was more likely that the Claimant had missed cases of stock on this occasion. The Claimant disputed that she had been shown the evidence in the performance meeting. We accepted Mr Duffield's evidence that the evidence of the performance issue should have been provided at the time of the discussion and the record of the meeting detailed the documents attached. We considered that it was more likely than not that the Claimant had been shown the photographs.

36. In December 2018, Mr Duffield attended a formal performance meeting about areas of concern regarding his completion of the due diligence diary [p310].

37. On 12 February 2019, Ms Rowe, deputy manager wrote in the handover diary, “DATE ROTATION IS SHOCKING.”

38. On 18 February 2019 the Claimant wrote in the handover diary, “Note in your drawer regarding date rotation need to have a word with that person [p205]” The Claimant explained that she had left photographs in Mr Duffield’s drawer and had written on it that this person did not rotate stock properly and out of date stock was hidden at the bottom. The Claimant accepted in cross examination that she did not say that it was a serious concern because someone might buy it. Mr Duffield did not recall seeing anything in his drawer but said in his witness statement that he spoke to the Claimant a few days later when she said she had found issues and showed him a diary entry and pictures. We accepted the Claimant’s account that she left the photographs in Mr Duffield’s drawer. The Claimant believed that the photographs showed that out of date products, if consumed by customers, could be dangerous.

39. As a result of being provided with the photographs, Mr Duffield spoke to the managers who had been responsible and explained the serious nature of potential issues that could arise from out of date stock. He also increased the level of supervision in the store manager date checks each week. Any out of date products found would lead to a conversation with the manager who had missed them. Out of date products were not found by mystery shoppers after that time.

40. On 5 July 2019, Ms Townsend, Health and Safety Manager, undertook an annual store audit and found 5 items in the chillers which had use by dates of 4 July 2019. The Claimant should have removed those items when she undertook the date check on 4 July 2019. Ms Townsend also found many pea snacks on sale after their best before dates, some were dated September 2018, March 2019 and May 2019, but it was not suggested that the Claimant had been responsible for missing those items.

41. After completing her audit, Ms Townsend telephoned Mr Haynes and told him that she had found some out of date products in the store. We accepted Mr Haynes’ evidence that he spoke to Mr Moroney, Assistant Store Manager, and that as a result of that conversation, Mr Moroney undertook a full date check that evening and found a further 11 out of date items which should have been removed on 4 July 2019 by the Claimant.

42. After the Health and Safety audit, Mr Haynes implemented a diary/log of products found from daily supervision date checks and any issues found were investigated. It was decided that multiple issues found in a short space of time would lead to a performance conversation and subsequent

disciplinary hearing if issues persisted. Mr Duffield would undertake morning checks and Mr Haynes continued to undertake weekly checks of the store.

43. On 9 July 2019, Mr Moroney, undertook a formal performance meeting with the Claimant and recorded that Ms Townsend had found at least 16 out of date products, although we accepted that 11 of them were found by Mr Moroney on his date check on 5 July 2019. The Claimant signed to say that she understood the areas of performance which required improvement. The Claimant's evidence, which we accepted was that when she was asked to sign the document, she said that she did not want to because there was an issue of out of date products in the store. She was told that she did not have a choice because head office had ordered it. The Claimant's evidence was that she believed she was providing information that out of date products had been found on several occasions. She also said that she believed it was in the public interest because it involved the chilled products she had missed.

44. When Mr Duffield next saw the Claimant, he spoke to her and asked if there had been a reason for missing the products. The Claimant said that she had not been rushed. She was also asked whether she was happy completing date checks on her own, as other managers had help, but she confirmed she was happy to do it on her own. The Claimant told Mr Duffield that it had been caused by poor stock rotation and he interpreted that as not accepting responsibility.

45. On 12 July 2019 the Claimant undertook a date check and found some ham which was 6 days out of date.

46. On 13 July 2019, Mr Duffield completed a date check and found multiple units of 6 products which had not been removed from sale or reduced by the Claimant the night before. Mr Duffield decided that because there had been two occasions in a short period of time and that the Claimant had been unwilling to accept responsibility that he had no alternative than to recommend that she attended a disciplinary hearing. The significant factors were the number of items and that the incidents were in close proximity to each other.

47. On 16 July 2019 the Claimant found some gammon which was 14 days out of date and took a photograph. The Claimant accepted in evidence that a number of managers, including her on multiple occasions, would have missed that this product was out of date. The Claimant's evidence was that she showed Mr Duffield the photograph the same day and said that "it was a serious concern because it was 14 days out of date it could be dangerous to customers". Mr Duffield recalled being shown the photograph, but not the day it was shown. He could not recall whether the Claimant said it was dangerous and that he thought the conversation took place after he had told the Claimant that he had recommended her for a disciplinary hearing.

48. The employee rota for 16 July 2019 [p44C] showed that the Claimant and Mr Duffield were not in work at the same time, and therefore it was unlikely the conversation took place on that day. The Claimant, in the grievance meeting referred to having provided photographs in February 2018, but the issue continued. When she discussed the photographs from 16 July 2019, she was then was referred for a disciplinary, following which Mr Duffield asked for her to WhatsApp the photographs to him, to which she said, 'what was the point, nothing has been done about It'. In the grievance outcome letter [p227] it was recorded that the Claimant had shown the photographs during the original conversation about referring her to a disciplinary hearing and Mr Duffield had then asked for them to be sent to him. What the Claimant said on 4 September 2019 was more consistent with the conversation taking place at the same time as she was told that she was being recommended for a disciplinary hearing. We considered that it was more likely than not that the conversation took place on 20 July 2019. It was more likely that the Claimant was referring to a general issue that out of date products were still being missed when she made the remark about 'what was the point'. We accepted the Claimant's evidence that she told Mr Duffield that it was a serious concern because the meat could be dangerous to customers. We did not accept that the Claimant had referred to elderly customers. The Claimant's evidence, which we accepted, was that she was concerned that if a customer ate the meat that they might get food poisoning.

49. On 18 July 2019, Mr Duffield found a case of fishcakes dated 17 July 2019, which had not been removed by the Claimant the night before.

50. Mr Duffield spoke to the Claimant on 20 July 2019 about the out of date stock which had been missed on 12 July 2020 and the Claimant suggested that it was caused by poor stock rotation. The Claimant showed Mr Duffield the photograph she had taken on 16 July 2019 as set above. Mr Duffield then spoke to the Claimant and informed her that he would have to recommend that she attended a disciplinary hearing. The Claimant's evidence was that Mr Duffield said that there was no issue of stock rotation in store, rather it was her crap job for which dates were found. Mr Duffield disputed that he told the Claimant that it was her crap job and when he informed the Claimant of the dates of missed products and she responded by saying fine. The Claimant did not refer to 'crap job' in her subsequent letter of grievance or during the grievance hearing. The first reference to 'crap job' was during the grievance appeal meeting. We were not satisfied that Mr Duffield told the Claimant it was due to her crap job; if he had the Claimant would have referred to it before she did and she was mistaken in her recollection. It was not put to Mr Duffield that he said that there was no issue with stock rotation, and we were also not satisfied that he said it. The Claimant was asked to send Mr Duffield the photographs she took on 16 July 2019, but refused to do so.

51. After being told about the out of date gammon, Mr Duffield identified that about 8 managers had missed that it was out of date and then spoke to them.

52. The Claimant's evidence was that she had a feeling that the lack of performance review, being told she had done a crap job and being referred for a disciplinary hearing was because of her race. The Claimant was unable to point towards any specific incident or words used by others to explain her feeling.

53. We accepted Mr Duffield's evidence that he had referred the Claimant for a disciplinary hearing because: (1) She had a formal performance meeting in relation to checking stock on 9 September 2018; (2) She had a further formal performance meeting on 9 July 2019 after 16 out of date products had been found; (3) On 13 July 2019 he had found 17 items that had not been reduced or removed; and (4) that the Claimant had been unwilling to accept responsibility. We accepted that there had been two apparent instances of multiple out of date items being missed in quick succession and that no other Manager had been in the same situation in the Salisbury store. We also accepted that Managers in other stores in the region had been subjected to disciplinary hearings for missing large numbers of out of date stock and that those employees had predominantly been white [p305-306] Two Deputy Store Managers (white Polish and White British) had been given warnings for missing fewer items than the Claimant.

54. The Claimant suggested that Mr Duffield's statement dated 21 July 2019, recommending her for a disciplinary hearing had been altered after the end of the grievance process to include that items had been missed on 18 July 2019. We rejected that suggestion. In the grievance outcome letter, a clear reference was made to a date check completed on 18 July 2019 and we accepted that was a reference to Mr Duffield finding out of date stock on that day.

55. On 21 July 2019, the Claimant raised a grievance, in which she said that on 20 July 2019, Mr Duffield made her aware that he was sending her for a disciplinary meeting regarding her poor performance on date check. She said that she felt wrongly and unfairly treated and that she would prove she had done her job properly and it was not her poor performance on date check [p207].

56. On about 27 July 2019, the Claimant showed Mr Duffield photographs of a case of out of date Camembert.

57. On 29 July 2019, the Claimant's grievance was acknowledged, and Mr Haynes informed that the Claimant that he was investigating her grievance and invited her to attend a meeting on 4 September 2019.

58. The Claimant attended work on 1 August 2019, brought in the safe and went home after 18 minutes because she was not feeling well. The Claimant sent Mr Duffield a fit note from her GP on 3 August 2019, which recorded her absence as 'depression for a work related issue'. Smart Time was not changed in store to show that the absence was paid sickness absence and payroll did not receive the GP note until after the end of the month. After the end of the month the stores Smart Time record is closed and cannot be amended. Mr Duffield was unable to recall when he forwarded the GP note, but thought he would have sent it to Bea Schofield, Area Manager, because area managers dealt with the payroll department and Mr Haynes was on leave. The doctor's note was signed as received, by someone, on 12 August 2019 [p262] which was consistent with Mr Duffield having forwarded it to Bea Schofield. Anita Williams confirmed it was received by pay roll in October 2019 [p272]. We were not satisfied that Mr Duffield failed to send the sick note until October 2019, it was more likely that he sent it to Bea Schofield in early August 2019. When payroll was informed that there had been a sick note, the record was changed to paid sickness and the Claimant was allocated 3 days company sick pay for the period of 1 to 7 August 2019, because the first 3 days were waiting days. Payroll made an error in the amount paid to the Claimant, which was subsequently corrected by a payment of a further day's sick pay. The Claimant accepted that she had not suffered a loss of earnings because she had been paid the amount due to her, but said that Mr Duffield deliberately failed to change smart time or send her doctor's note because she made a disclosure and that had caused there to be a delay to her sick pay to October 2019.

59. The Claimant was on holiday in India from 8 August to 25 August 2019. The Claimant saw a local doctor on 8 and 12 August 2019, who diagnosed that she was suffering from acute depression and advised complete rest from 8 August to 24 August and certified on 25 August 2019 that she was fit to resume work [p216-218]. The Claimant's oral evidence was that on her return from India she gave Mr Duffield the notes from the Indian GP and asked for her holiday to be credited back and reclassified as a period of sick leave, however she was told that you don't get sick pay whilst on holiday. Mr Duffield could not recall any discussions about changing holiday leave to sick leave or being provided with a sick note. In the Claimant's letter dated 9 December 2019, to Mr Haynes, she did not mention crediting back her holiday entitlement and changing it to sick leave. Further in her letter to Mr Haynes dated 7 September 2020 [p478] about crediting back her holiday entitlement she said, after referring to the preliminary hearing on 19 March 2020, "*Hence I'm writing to you to use my holiday entitlement from 8th August 2019 till 25th August 2019 from last year total of 12 days holiday, when I was sick. The sick note has already been provided to Aldi's solicitor Ms Fiona Powell. If you wish you can obtain that from company's solicitor. So far nothing has been done to resolve this issue*." The Claimant's letter of 7 September 2020 is inconsistent with her having provided Mr Duffield with the sick note in September 2019. It was notable that the first reference to her having done so was during her oral evidence. Mr Duffield had no

recollection of the discussion. Further the Claimant's letter was consistent with her providing the sick note, for the first time, to the Respondent's solicitor. On the balance of probabilities, we were not satisfied that the sick note was provided to Mr Duffield in September 2019 or that the conversation took place.

60. The Indian GP's note was sent to the Respondent's solicitor during mid-2020. On 16 September 2020, Mr Haynes confirmed to the Claimant that the Respondent would honour her holiday request from the previous year and that she could roll over the holiday entitlement for the period from 8 to 25 August 2019. The Claimant was unable to use the holiday in 2020 and Mr Haynes agreed that she could roll it over again to 2021.

61. On 4 September 2019, the Claimant attended a meeting in relation to her first grievance. We accepted Mr Haynes' evidence that he was considering whether the decision to recommend the Claimant for a disciplinary hearing was reasonable and not whether any disciplinary allegations were made out or whether the disciplinary hearing should happen. The Claimant disputed the accuracy of the notes and said that she had referred to elderly customers being put at risk. Elderly customers were not referred to in the notes. The Claimant did not refer to food poisoning or elderly customers in her appeal against the grievance outcome. We accepted Mr Haynes evidence that he made his notes at the time on his computer and that they were an accurate reflection of what was said. At the meeting it was explained to the Claimant that the grievance and disciplinary processes were separate During the meeting the Claimant showed Mr Haynes a number of photographs of out of date stock or stock which was not properly reduced. She also said that she had done nothing wrong. The Claimant said it was unfair that she was referred to a disciplinary hearing when other managers had missed out of date products and raised that rotation was poor. The Claimant showed Mr Haynes the photograph taken on 16 July 2019 and said that 'the meat found on this date is so dangerous' and also referred to reputational damage to the store. When the Claimant raised the meat found on 16 July 2019, she had in mind that there were out of date products and it was a serious health and safety issue. She also had raised the concerns as part of showing that the decision to recommend her for a disciplinary hearing was unfair, as this formed part of her grievance case.

62. After the meeting Mr Haynes spoke to Mr Duffield about the Claimant's grievance [p223-4].

63. On 11 September 2019, the Claimant was provided with the grievance outcome. Mr Haynes reiterated that the grievance and disciplinary processes were separate investigations. The Claimant had said she had raised the grievance because she disagreed with the decision to recommend her for disciplinary proceedings and had provided evidence to show it was unfair. Mr Haynes set out details of the out of date stock the Claimant had found, and that the Claimant was saying that she should not

take the blame for a larger issue. He had been told by Mr Duffield that Mr Duffield had conversations with staff members about stock rotation issues arising and referred to it in multiple store meetings and that he had also asked Mr Moroney to speak to the staff member involved in the incident the Claimant had raised. Mr Duffield also said that in the last couple of months date checks and stock rotation had improved. Mr Haynes rejected the Claimant's grievance that the referral was unfair and said he would consider whether there were grounds for a disciplinary. He also informed the Claimant that he intended to retrain staff on the importance of stock rotation and increase the supervision of the Store Manager and Area Manager in relation to date checking.

64. On 12 September 2019, the Claimant appealed against the grievance outcome. In her letter the Claimant said, *"In the grievance meeting I stressed my genuine Whistle blowing concern on grounds of health and safety towards the customers where the photographs taken showed raw meat of date found on shelves more than 14 days and was wasted on that date of discovery."* [p229] The Claimant said that she believed that the out of date meat was dangerous to customers.

65. On 24 September 2019, the Claimant attended the grievance appeal meeting with Ms Brown. Ms Brown set out at the beginning that she would not be making a decision about whether any disciplinary action should be taken, but whether the decision to recommended that disciplinary action was taken was unfair or discriminatory. During the meeting the Claimant accepted that the out of date stock she had missed was probably there. She said that the referral was unfair, because when she found the stock on 16 July 2019 other managers must also have missed it and queried why she was the only manager being referred and she felt that she was being discriminated against because she had raised a serious concern. The Claimant disputed that she was at work on 13 and 18 July 2019. She also said that, when she was told that she would be referred for a disciplinary hearing, she had done a crap job. In the meeting the Claimant said that she had raised concerns about violating law and health and safety issues [p243]. She also discussed the out of date stock she had found and in particular that the meat found on 16 July 2019 was a serious concern and that the Respondent could be fined and that elderly people might not see it. The Claimant had in mind that the raw meat was 14 days out of date and should not be on the shelf because it could cause food poisoning. The Claimant also had in mind that the Food Information Regulations 2013 had not been properly complied with. The Claimant also provided 143 pictures of out of date stock.

66. After the meeting Ms Brown spoke to Mr Duffield and Mr Haynes as part of her investigation. She was informed by Mr Duffield that he had offered the Claimant more time and support and that when date issues were reported to him, he held conversations with the managers. Ms Brown concluded that performance discussions had not always been documented, and the level

of documentation varied between stores, which an area requiring improvement. Ms Brown concluded that the Claimant was not being held solely accountable for the issue and that the store manager and area manager were addressing issues that arose and that the area manager was conducting his own independent checks of the store.

67. On 11 October 2019, the Claimant was sent the outcome of her grievance appeal. The Claimant was informed that it was important that the grievance and disciplinary proceedings were kept separate. The Claimant was informed that management of the issue of out of date stock was being undertaken at the store, but there was not consistent evidence of the performance management meetings. It was evident that there was an ongoing issue, but that the Claimant was not being held solely accountable. Disciplinary proceedings could be recommended against any member of the team if there was significant enough reason to do so and depended on the individual circumstances and in this case the Claimant had not been unfairly treated. She concluded, after reviewing the documentation provided by the Claimant, that there was an issue in relation to dates on stock and steps had and would be taken to ensure it was improved immediately. The Claimant was informed that it was expected every member of management took full responsibility for date compliance as it was a serious legal requirement and if she had concerns about her ability to conduct checks within the timeframe she should speak to a senior manager. It was confirmed that the Claimant would not face disciplinary proceedings.

68. We accepted Ms Brown's evidence that the Respondent investigated the out of date stock that the Claimant had referred to, but it was much more difficult to find out what happened later on, rather than on the same day it was discovered. We also accepted that Ms Brown was concerned about paperwork not being consistently completed. We also accepted that Ms Brown considered that the Claimant was not in the same situation as her colleagues, due to the number of items she missed on two occasions in quick succession. We accepted that Ms Brown wanted to draw a line in the sand and make clear to the Claimant that she was responsible for her dates and move forward.

69. Until 6 October 2019, Mr Moroney completed the rota for the Salisbury store. We accepted the Claimant's evidence that she had not been scheduled to work on the first Sunday of each month due to religious reasons and that because she had to pick up her son from college each Thursday she was not scheduled to start work on that day before 1500. For October 2019, the Claimant was scheduled to attend a meeting on Sunday 6 October 2019 to discuss the measures to be taken to address the date control issue. She was also scheduled to attend work before 1500 on Thursday 17 and 31 October 2019. The rota for October was produced 4 weeks in advance. The Claimant's evidence was that she asked Mr Duffield on several occasions to change the rota for those days when it was produced. Mr Duffield confirmed that he was aware that the Claimant

needed to pick up her son and could not start work before 3 but denied he had been aware that the Claimant could not work on the first Sunday of each month. In cross-examination Mr Duffield was asked by the Claimant why he had not changed the rota when she had asked 4 weeks before, he responded "I am unable to answer that". He later said if she had brought it to their attention early enough, they would have changed it. On 6 October 2019, the Claimant sent Mr Duffield a text message saying that she could not attend the meeting that day. Mr Duffield's response said that was the first he was aware of the Claimant not being able to work the first Sunday and he was a little disappointed she had only informed him that day, but that he would go over the notes with her. We accepted Mr Duffield's evidence that because Mr Moroney had completed the rota until October that he was not aware the Claimant did not work the first Sunday each month and that he had not been informed that the Claimant could not attend the meeting until the day in question. On the balance of probabilities, the Claimant spoke to Mr Duffield about her shifts on 17 and 31 October 2019 and explained that she could not attend at the start times. The Claimant raised this shortly after she received the rota on a couple of occasions.

70. The Claimant worked on 7 and 8 December 2019. She was scheduled to finish at midnight on 7 December and start at 1000 on 8 December 2019 and as such did not have at least an 11-hour break between shifts. Mr Duffield and Mr Haynes had signed the due diligence book to confirm that the rota was in compliance with the Working Time Regulations. We accepted Mr Duffield's evidence that he thought that the shift pattern was correct at the time of signing and that it might have been that the shifts were subsequently changed. We accepted Mr Haynes' evidence that rest breaks were extremely important and a break which was too short was never acceptable and that a mistake might have been made.

71. From about July 2019, the Claimant continued to take photographs of out of date stock or stock beyond its best before date. We did not accept that she showed those photographs to Mr Duffield on each occasion, but was collecting them for her own use. The Claimant, as part of these proceedings collated the photographs into a schedule [p288]. Five of the Claimant's colleagues also identified out of date stock on 1 October 2019, 11 October 2019,19 December 2019, 21 January 2020 and 24 January 2020, which they drew to Mr Duffield's attention.

72. On 24 March 2020, the Claimant spoke to Mr Duffield on the telephone when he explained that they needed a manager who was able to close the Amesbury store for a number of shifts and asked whether the Claimant could do it. The Claimant asked whether anyone else could go and was told that no one else lived locally and it was better that she went. The Claimant agreed to go. Later that day Mr Duffield confirmed that Amesbury would honour all of her shifts. The Claimant responded by saying she had been

advised to stay in Salisbury until her Tribunal case had concluded and asked for someone else to be sent. Mr Duffield made other arrangements.

73. On 11 April 2020, Mr Haynes wanted to speak informally with the Claimant. The Amesbury store did not have enough management hours and the Salisbury store had too many. The Amesbury store did not have enough management cover for the closing shifts. The Claimant lived in Amesbury and undertook the late shifts and therefore her working pattern and home location meant that she appeared to be the best fit to resolve the staffing problem. Mr Haynes had also been made aware of concerns which had been raised by Mr Duffield. Mr Duffield had informed him that the Claimant had been attending work late and that he had spoken to her. Mr Haynes had checked the timecard statements and found that the Claimant had been late on 22 occasions between 13 January 2020 and 29 February 2020 and wanted to discuss what was happening with her. Another manager had reported that the Claimant was showing a lack of effort on shifts and had been rude and short with staff. He had been provided with the concerns in writing, which included that the Claimant kept changing her break time and that she was spending her time in the warehouse on her telephone and not working. We accepted Mr Haynes' evidence that if he thought the concerns were serious, the Claimant would have been referred for a disciplinary hearing, whereas all he wanted to do was informally discuss with her what had happened. Mr Haynes had also been told that the Claimant was taking photographs of out of date stock, rather than reporting it to management.

74. The Salisbury store introduced a new cash control procedure, with which the Claimant was uncomfortable. Mr Duffield explained it to the Claimant, following which she signed the management notice [p506]. A few days later the Claimant wrote on the back of the notice that she would not be held accountable for any till which was adjusted whilst she was not on shift. Mr Haynes had been told that what the Claimant had written was being openly questioned by other managers. Mr Haynes also wanted to discuss why she had changed her mind about providing temporary cover in Amesbury as it was the start of the Covid-19 pandemic lockdown and the Respondent needed flexibility from its staff.

75. On 20 December 2019, the Claimant informed Mr Haynes that she would not talk to him about anything to do with her Tribunal case. Mr Haynes did not consider the matters he wanted to discuss on 11 April related to her claim. On 11 April 2020, Mr Haynes was working in the Salisbury store and blocked out time in his diary to speak to the Claimant at lunchtime/early afternoon [p644]. When he asked the Claimant if he could have a quick chat, she responded by asking whether it was to do with her claim and that he could not have a formal meeting with her without giving notice. It was explained it was conversation between personnel leader and employee. Mr Haynes explained that it was an informal meeting, but that it could be recorded if the Claimant wanted it to be. The Claimant then refused to speak to him and said that if he wanted to meet, he needed to put it in writing so

she could have an opportunity to review evidence and respond. The Claimant became angry and said that her career had been ruined and she had never received a complaint. The Claimant said that she would refuse to meet with Mr Haynes about any store topic without notice being given. The Claimant denied that the meeting occurred, however Mr Haynes set out in detail what had occurred in his letter dated 23 April 2020 and his oral and written evidence was consistent and supported by his diary entry and having signed into the store. We preferred the evidence of Mr Haynes.

76. Mr Haynes went on holiday on 13 April 2020 and as area manager had a very busy schedule before he left arranging cover for while he was away and as such was unable to write to the Claimant before he left.

77. On 14 April 2020, Ms Peacey wrote in the handover diary, "Rotation on chill very poor".

78. On 19 April 2020, the Claimant wrote a letter to Mr Haynes in which she set out that she had previously set out to him details of poor stock rotation and out of date products and he had said he would implement training and increase supervision. She also referred to the grievance appeal meeting outcome letter in which Ms Brown had said that steps had been taken to immediately improve the situation. The Claimant also said, "*As a whistle blower I would like to inform you that it is illegal to sell or display any food after its use by date. According to Food Safety and Hygiene Regulations. 2013 selling ant food past it's use by date is deemed to be a criminal offence. 11th Feb'20 till 20th April 20 approximately 337 products were found OOD, more than 190 products were still on sale in the store 117 Aldi beyond past its use by dates. All information is available with its original dates when it was OOD in the wastage log in your system."* The Claimant said that she had in mind that there was a health and safety issue, which we accepted. We also accepted that the Claimant was also trying to protect herself from any further issue raised by the Respondent regarding her date checking.

79. Mr Haynes returned from holiday on 20 April 2020. The first opportunity he had to write to the Claimant about what he wanted to discuss on 11 April 2020 was on 23 April. In his letter [p518] he set out what had happened on 11 April and that he had wanted to informally discuss some concerns he had received about her performance and attitude in the store. He also said that he did not consider a letter was the appropriate forum and was reluctantly doing so because the Claimant had refused to meet him. He set out a summary of the matters he wanted to discuss. In relation to taking evidence of out of date products he said that it was not something she was required to log and keep evidence of but instead she should notify the managers in the store. Further that she had been told by Mr Duffield that the correct way was to notify management and that she could support the store by recommending new ways to improve the issue. Mr Haynes also set out the situation in relation to the Amesbury store and that Amesbury only

had 4 deputy store managers when it should have 5 and that Salisbury had 6, that her shift patterns fitted with what was required and she lived locally. He said he wanted to discuss this, in line with her contract and the needs and demands of the business. the Claimant was asked to meet on 1 May 2020. Mr Haynes also referred to the Claimant's letter dated 19 April 2020, erroneously referred to it as dated 21 April, and said that he would propose dealing with the complaints as a formal grievance and would write to her separately.

80. We accepted Mr Haynes' evidence that he considered the matters raised in the Claimant's letter dated 19 April 2020 were very serious, which was why he had referred to it in his letter on 23 April 2020. We also accepted that he had drafted the points raised in his letter before he had tried to meet the Claimant on 11 April 2020 and that he was going to raise the issues with her in any event. At this time Mr Haynes was also trying to manage his stores during the first lockdown due to the Covid-19 pandemic.

81. The Claimant received Mr Haynes' letter on 30 April 2020. The same day she raised a grievance. She referred to the points raised by Mr Haynes and that she had brought a claim for whistle blowing and race discrimination in the Tribunal. She said that she had enough evidence to prove his concerns were not true. She referred to having a responsibility to collect evidence and would stop if Mr Haynes wrote and told her to. She asked if he could arrange a grievance hearing. Mr Haynes interpreted the letter as a grievance against him. The Claimant gave evidence that her grievance was not against Mr Haynes, but the evidence provided by Mr Duffield.

82. The grievance was referred to Ms Brown, who decided that it was appropriate for another independent area manager, Mr Harrison, to hear the grievance.

83. Mr Haynes managed all four stores in the vicinity, and it was not considered appropriate that he managed the Claimant whilst her grievance against him was being investigated. Deputy Managers work closely with Area Managers on a day to day basis in relation to store business. It was considered that moving the Claimant beyond those stores would require her to travel too far away. Ms Brown was concerned that it was an unusual situation with a grievance against the area manager and involved the store manager and referred to alleged discrimination and victimisation. Ms Brown considered it was best that the parties were separated so that her grievance could be investigated and avoid a potential breakdown in the relationship between the Claimant and Mr Haynes. Ms Brown thought that the Claimant felt unfairly treated and that she had been unhappy in her position at the store, and she could not fairly be sent to work in other stores. She considered that the fairest way to investigate was to put the Claimant on special paid leave so that she did not have to work with Mr Haynes. Ms Brown did not consider that the letter of 19 April 2020 had anything to do with her decision and that due to the very specific, abnormal situation this was the only way in which

the grievance could be addressed. On 2 May 2020, Ms Longdon, area manager, explained to the Claimant that she was being put on special paid leave and it was not a punishment or step in any disciplinary process, but had been done to enable the investigation to be carried out.

84. On 2 May 2020, the Claimant wrote to Mr Richardson, Regional managing Director about not having received a reply to her letter dated 19 April 2020. We accepted that she had not realised that Mr Haynes had made an error as to the date of her letter. She set out details of out of date stock and that her store manager, Mr Duffield, had made more allegations against her. On 7 May 2020, the Claimant received a response from Mr Richardson who said that given the nature of the allegations it would be investigated as a matter of serious concern and Kat Penhale, Store Operations Director, would conduct an investigation in date management. On 2 July 2020, Ms Penhale wrote to the Claimant and informed her that 2 area managers had conducted 11 individual and independent audits of the store over a four week period, checking a minimum of 50 lines. Further area manager checks were made of all special food products. Full date checks had been carried out in the fresh areas, including by Ms Penhale. A Health and Safety Manager had also carried out an unannounced audit during which no date check or rotation issues were found. Ms Penhale informed the Claimant that the audits did not lead her to be concerned with the date checking in the store and she confirmed that she would maintain close supervision.

85. On 18 May 2020, the Claimant attended a grievance meeting with Mr Harrison. At the meeting the Claimant confirmed that her grievance was not against Mr Haynes, but the evidence provided by Mr Duffield. In relation to the lateness concern, the Claimant explained that on some days she had issues and had written a letter to Mr Duffield in January explaining that she might have issues within arriving on time. The Claimant said that she did not understand what the lack of effort was and denied being rude to staff. She explained that there was a general issue in the store with date checking. In relation to temporary cover at Amesbury the Claimant said that she was not asked if she would go but was told that she must, and after the conversation she had sent him the text. In relation to cash control, she said that she agreed to sign on the basis that she would be responsible for cash differences when she was on shift, and therefore she had written on the back of the memo. The Claimant said that she was being unfairly treated. She queried why she was on paid leave when the grievance was not against Mr Haynes.

86. On 2 June 2020 the Claimant was sent the outcome of her grievance [p576-581]. It was explained that there had been tardiness issues from the Claimant and other staff members which were being dealt with by the store manager. It was understood that she had building works going on. It was concluded that, given the Claimant should lead by example, it was appropriate that management raised the issue with her. Mr Harrison had seen the statements from the Claimant's colleagues and concluded that it

was appropriate for management to raises issues in relation to lack of effort. It was understood that the date checking issue was of great concern to the Claimant. Ms Penhale had been investigating and the Claimant was told that there would be an unannounced health and safety audit and that store manager and area manager supervision would be increased. Mr Harrison was satisfied that the store was taking appropriate precautions. In relation to the temporary cover at Amesbury it was for a week and she had been approached as a quick solution. In relation to a transfer Mr Haynes had considered that the Claimant was the best fit and her contract of employment required her to work within any of their trading stores. It was concluded that it was reasonable for management to want to discuss the issues. In relation to the safe control element there had been a breakdown in communication which would have been resolved if she had spoken to Mr Haynes. Other than the safe control element, the grievance was rejected.

87. On 4 June 2020, the Claimant appealed against the grievance outcome in which she said she was being victimised for continuing to take evidence of out of date stock.

88. On 6 July 2020, the Claimant was sent an e-mail from an environmental Health Officer at Wiltshire Council, after she had reported her concerns about out of date items. The e-mail confirmed that the Salisbury store had been visited and three out of date items found. The store had been able to demonstrate that they had systems in place to ensure stock was rotated and out of date stock removed. No complaints had been received from the public and customer return records did not suggest out of date food was being returned. She was informed that the complaint could not be progressed any further.

89. On 10 July 2020, the Claimant attended the grievance appeal hearing and was accompanied by her husband. Ms Brown heard the appeal. The Claimant said that others, including Mr Duffield, had also been late. She explained that she had been renovating her house and no one had a conversation with her about her lateness. She also explained that every manager takes photographs to show to Mr Duffield. In relation to covering the Amesbury store she said the other store managers refused to go and she was forced and that she did not like to work in her local store.

90. After the grievance meeting Ms Brown spoke to Mr Haynes and Mr Harrison. On 28 July 2020, Ms Brown wrote the grievance outcome appeal letter, which was delivered on 31 July 2020. Ms Brown concluded that Mr Haynes had wanted to meet informally on 11 April 2020 to discuss his concerns and that the Claimant had requested that it was formalised, which he did in his letter dated 23 April 2020 and the Claimant's letter of 19 April 2020 had no impact on that. She had been told that a number of the concerns had been discussed with the Claimant by Mr Duffield previously. After the issue with her car, Mr Duffield had said he discussed the late arrival with the Claimant. It was confirmed that lateness had been an issue in the

store and eight other members of the team had been spoken to informally by the Area Manager and that the Claimant was not the only one. It was concluded that it was appropriate that the feedback that there had been a lack of effort by the Claimant was discussed with her informally to resolve the issue. There was not a requirement for the Claimant to be checking and reporting date issues during her shifts as they were confident that they had put in place correct measures, including area and store manager checks and supervision. A diary had been put in place in which products found in date checks were recorded. The Claimant's concern in this area was appreciated. Mr Haynes and Mr Duffield were not aware of any other managers refusing to work in Amesbury, there had been occasions they had been unable to due to days off, but there was no evidence of a refusal. Another Salisbury Deputy Manager had also provided cover at Amesbury. It had been denied that the Claimant was forced to go. In relation to the transfer, it was a requirement of her contract to be flexible to work in the local stores. There was a current need for additional management in Amesbury and there was excess management in Salisbury, the store was closer to her home and it required evening shifts which matched her required shift patterns more than any other deputy manager in the Salisbury store. It was considered that an evening manager would be of real value to the Amesbury store. Further due to her increased level of management experience over other deputy store managers, it was believed that the Claimant would help the team in Amesbury to provide structure and stability. Although there were other managers in Salisbury, their shift patterns were required in the Salisbury store. The request was in line with her contract and was reasonable. The decision in the grievance hearing was upheld. The Claimant was informed that Ms Brown wanted her to work in the Amesbury store and she asked her to contact Mr Haynes to arrange her shifts.

91. The Claimant was signed off sick from 4 August 2020 to 17 August 2020. Mr Haynes provided the Claimant's GP note to payroll and she was paid company sick pay for that period. The Claimant provided Mr Haynes with a second GP note covering a sickness absence from 18 to 30 August 2020. The second sick note was not actioned by payroll. We accepted Mr Haynes' evidence that he could not say whether it was a mistake by him or whether it was missed by payroll. On 28 September 2020, the Claimant e-mailed Mr Haynes and said that she had not received the correct sick pay. Mr Haynes contacted payroll and the error was rectified. The Claimant was informed in a letter dated 12 October 2020 that there was a further payment due to her for her August sickness absence. The Claimant accepted in cross-examination that she had been paid correctly when the initial error had been rectified. We accepted Mr Haynes evidence that this had occurred when he was dealing with Covid-19 issues and that there had been a mistake. Mr Haynes evidence, which we accepted was that the Claimant's letter dated 19 April had no effect on what happened.

92. In the grievance appeal outcome letter dated 28 July 2020, which the Claimant received on 3 August 2020, she was informed that she would be

transferred to the Amesbury store. The Claimant was signed off sick for the rest of August and was on leave in September. The Claimant started work in the Amesbury store on 5 October 2020. We accepted the Respondent's evidence that Salisbury store had 6 deputy managers and the Amesbury store had 4 and that the stores should have had 5 such managers. The Amesbury store required another deputy manager to undertake late shifts and the Claimant only undertook late shifts. The other managers at the Salisbury store did not have shift patterns which matched the needs of the Amesbury store as well as those of the Claimant. The Claimant also lived near to the Amesbury store. Ms Brown and Mr Haynes considered that those matters were important and that the Claimant was best placed to go to the Amesbury store. They denied that the Claimant's letter dated 19 April 2020 or that she was collecting evidence of date stock had any influence on the decision. We accepted that Amesbury needed a deputy manager to undertake late shifts and that the Claimant's work pattern made her most suitable to undertake the role.

93. The Claimant presented her second claim on 8 September 2020, therefore the allegation that Mr Haynes' letter dated 23 April 2020 was a detriment was potentially out of time. At the case management hearing on 27 November 2020, the Claimant was given permission to amend her claim to include the allegation that her transfer to Amesbury was a detriment and that also appeared to be potentially out of time. The Claimant had worked as an adviser for the CAB in 2012 and had been trained to advise members of the public in relation to employment law disputes, grievance and disciplinary procedures and in relation to time limits to bring claims in the Employment Tribunal. The Claimant was always aware of the time limits to bring her own claims. We accepted the Claimant's evidence that she did not know whether the issue in relation to the letter would be resolved and that she was on paid leave at that time. The Claimant said that this was the reason why she did not present this part of her claim at that time. In relation to the transfer element the Claimant's evidence was that it was referred to in her claim form. She said in the claim form [p97], "Out of 8 members who had issues with lateness I was the only one transferred to another store due to my lateness.." the Claimant said that at the hearing on 27 November 2020 neither she nor Employment Judge Gray could find the reference to the transfer to Amesbury in the claim form.

The law

Direct Discrimination

94. The claim involves allegations of discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent contravened a provision of part 5 (work) of the EqA. She alleged direct discrimination and that the protected characteristic relied upon was race.

95. Under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

96. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

97. A claim of direct discrimination will fail unless the Claimant has been treated less favourably on the ground of her race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

98. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong [2005] IRLR 258 CA was also approved by the Supreme Court in Hewage v Grampian Health Board [2012] IRLR 870. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

99. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

100. In every case the Tribunal has to determine the reason why the Claimant was treated as she was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the Claimant to less favourable treatment than others? The relevant

question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the Claimant unreasonably. The mere fact that the Claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

101. "Could conclude" means that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

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

103. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the Claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

104. The Claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of her gender, because of her sex.

105. Where the Claimant has proven facts from which conclusions may be drawn that the Respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it 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 the treatment was in no sense

whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

106. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

107. If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

108. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM). In Shamoon-v-Royal Ulster Constabulary [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

109. As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

110. We reminded ourselves of Sedley LJ's well-known judgment in the case of Anya-v-University of Oxford [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

Reasonable steps defence

111. Section 109 (4) EqA reads as follows;

"*In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -*
(a) from doing that thing, or
(b) from doing anything of that description."

112. The burden of proof of establishing the defence is on the employer (Enterprise Glass Co Ltd v Miles [1990] ICR 787.

113. In considering that defence, we have had to focus upon what the Respondent did *before* the acts complained of occurred, not how it reacted after it was aware.

114. We have looked at the Respondent's policies. We also considered the EHRC's Code of Practice (2011) and, in particular, paragraph 10.50-10.53 and, in the context of the Respondent's policies, paragraph 18. The guidance suggests that reasonable steps might include: implementing an equality policy, ensuring workers are aware of the policy, providing equal opportunities training, reviewing the equality policy as appropriate and dealing effectively with employee complaints.

115. We have also borne in mind guidance from cases such as that of Canniffe-v-East Riding of Yorkshire Council [2000] IRLR 555 in which the Employment Appeal Tribunal stated that the proper approach to the defence was to consider whether the Respondent had taken any steps to prevent the employee from doing the act or acts complained of and, secondly, having considered what steps were taken, then considering whether they could have taken any further steps which were reasonably practicable. It was important to remember that an employer would not be exculpated if it had not taken reasonably practicable steps simply because, if it had taken those steps, they would not necessarily have prevented the thing from occurring.

116. We considered, in particular, paragraph 22 of the judgment of Burton J in which he considered the possibility of there being two very different scenarios; one in which there was no knowledge of the risk of any harassment or inappropriate behaviour on the part of the employer, in which case it may have been sufficient for there to have been an inadequately promulgated policy against such behaviour, and another, in which an employee's temperament or predilections were known or reasonably anticipated. In such a case, a very different expectation may be placed upon the Respondent before the statutory test might be met.

117. Canniffe was considered by the EAT in Allay (UK) Ltd v Gehlen UKEAT/0031/20 in which it was suggested that there were 3 stages to consider: (1) identify any steps that have been taken, (2) consider whether they were reasonable, and (3) consider whether any other steps should reasonably have been taken. It was further said that Canniffe supports the proposition that if there is a further step that should reasonably have been taken by the employer to prevent harassment the defence will fail even if that step would not have prevented the harassment that occurred in the case under consideration. That does not mean that in deciding the anterior question of whether a further step was one that it would have been reasonable for the employer to have taken, the tribunal cannot consider the likelihood that it would have been effective.

Protected disclosures

118. Under section 43A of the Employment Rights Act 1996 ("ERA") a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

119. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

120. Under Section 47B 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. This provision does not apply to employees where the alleged detriment amounts to dismissal.

121. Section 48(1) and (1A) ERA state that an employee may present a claim that he has been subjected to detriment contrary to s. 44 and 47B of the Act. Under section 48(2) of the Act, on a complaint to an employment

tribunal, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

122. s. 48(3) ERA provides: *An employment tribunal shall not consider a complaint under this section unless it is presented—*
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the 'date of the act' means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer[,a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonable have been expected to do the failed act if it was to be done.

123. The tests were most recently stated by the Court of Appeal in Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73.

124. First, we had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of Geduld-v-Cavendish-Munro [2010] ICR 325 in light of the caution urged by the Court of Appeal in Kilraine-v-Wandsworth BC [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances. A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly

not suffice; by contrast, one which also explains the basis for this assertion is likely to do so. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

125. Next, we had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (Western Union-v-Anastasiou UKEAT/0135/13/LA).

126. We also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(a), (b) or (d) had been or were likely to have been covered at the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that she held it (Babula-v-Waltham Forest College [2007] IRLR 3412 and Korashi-v-Abertawe University Local Health Board [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in Kraus-v-Penna [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that she reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979; [2017] IRLR 837, para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

127. 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (Ibrahim-v-HCA UKEAT/0105/18).

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

129. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Nurmohamed* [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

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

130. The Court of Appeal [2017] IRLR 837 dismissed the appeal. At paragraph 31 Underhill LJ said that he did not think "*there is much value in adding a general gloss to the phrase 'in the public interest. … The relevant context here is the legislative history explained at paragraphs 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest*."

131. Further at paragraph 36 to 37

> "36. …*The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest*.
>
> *37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character [5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at paragraph 34 above may be a useful tool*… "

132. The factors referred to are:

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
iii. the nature of the wrongdoing disclosed, and
iv. the identity of the alleged wrongdoer.

133. If a disclosure is made purely out of concern for the employees own potential liability, there would not be an element of belief in the public interest (e.g. Parsons v Airplus International Limited UKEAT 0111/17. However, belief public interest does not need to be the only motivation for the public interest element to be satisfied. In Okwu v Rise Community Action Limited [2019] UKEAT/0082/19, the Claimant in a letter of complaint about contractual matters had referred to data protection issues. The EAT held that although the ET had apparently considered that the Claimant was raising the matters as relevant the assessment of her own performance, it was made clear in Chesterton that that would not necessarily mean that she did not reasonably believe her disclosure was in the public interest. It was confirmed that the public interest need not be the only motivation. (see also Dobbie v Felton T/A Feltons Solicitors UKEAT/0130/2020)

134. Finally, we did not have to determine whether the disclosures had been made to the right class of recipient since the Respondent accepted that if they had been made, they were made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

Detriment (s. 47B ERA)

135. The next question to determine was whether or not the Claimant suffered detriment as a result of the disclosure. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in *Harrow London Borough Council-v-Knight* [2002] UKEAT 80/0790/01).

136. Section 48 (2) was also relevant, in that, "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

137. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah 1980 ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of

"materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

138. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

139. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 in Harrow London Borough Council-v-Knight [2002] UKEAT 80/0790/01). It will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower (NHS Manchester-v-Fecitt [2012] IRLR 64 and International Petroleum Ltd v Osipov UKEAT 0229/16).

140. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in NHS Manchester-v-Fecitt [2012] IRLR 64). It was important to remember, however, if there was a failure on the part of the Respondent to show the ground on which the act was done, the Claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (International Petroleum Ltd v Osipov EAT 0058/17).

141. As observed in (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

" *30. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Kahn [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:*

"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC

502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

31. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B."

Reasonable steps defence

142. An employer that is potentially liable under s. 47B(1B) ERA for something done by one of its workers acting in the course of his or her employment has a defence s. 47B(1D)ERA, which provides: "*In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*

(a) from doing that thing, or
(b) from doing anything of that description."

143. This defence is drafted in very similar terms to that which applies under S.109(4) EqA and similar considerations apply. An employer will still be liable if it has taken some, but not all, of the steps which the tribunal considers to be reasonable. Reasonable steps might include: whether the employer has put in place a whistleblowing policy, whether the policy makes it clear that victimisation of whistleblowers will not be tolerated, whether the policy has been brought to the workforce's attention via training, and how the employer deals with complaints by whistleblowers about detrimental treatment.

Time limits

144. For the purposes of s. 48(3) ERA, time starts to run from the date of the act or failure to act on which the complaint is based and not from the date the employee becomes aware of it (McKinney v Newham London Borough Council [2015] ICR 495).

145. When considering whether an act extends over a period, it is a mistake in law to focus on the detriment and whether the detriment

continued. In Flynn v Warrior Square Recoveries Ltd [2014 EWCA Civ 68, the Tribunal at first instance had determined that the complaint was in time because the threat of disciplinary action remained extant. The EAT overturned the decision and the Court of Appeal held that the Tribunal had erred by expressly concentrating on the detriment rather than the specific acts complained of.

146. A series of similar acts is distinct from an act extending over a period. In Arthur v London Eastern Railway Limited T/A One Stansted Express [2007] ICR 193, the Court of Appeal said it may not be possible to characterise the case as an act extending over a period by reference, for example to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as being in time. When determining such a question it is preferrable to determine the facts before applying the law. In order to determine that there has been a link some evidence is required. It is necessary to look at all the circumstances surrounding the acts, were they committed by fellow employees, if not, what if any connection was there between the alleged perpetrators, were their actions organised or concerted in some way? It would also be relevant to inquire as to why the perpetrators did what was alleged.

147. From 6 May 2014 a prospective Claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

148. Section 207B ERA provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

149. Where the EC process applies, the limitation date should always be extended first by s. 207B(3) or its equivalent, and then extended further under s. 207B(4) or its equivalent where the date as extended by s. 207B(3) or its equivalent is within one month of the date when the Claimant receives (or is deemed to receive) the EC certificate to present the claim (Luton Borough Council v Haque [2018] ICR 1388). In other words, it is necessary to first work out the primary limitation period and then add the EC period and then ask, is that date before or after 1 month after day B (issue of certificate)? If it is before the limitation date is one month after day B, if it is afterwards it is that date.

150. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the Claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

151. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the

obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204 on this point were preferred to those expressed in Lawal:-

152. To this end the Tribunal should consider: (1) the substantial cause of the Claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the Claimant knew of her rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the Claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Claimant or her adviser which led to the failure to present the complaint in time.

153. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees) and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

154. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

155. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "*The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public*

interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Conclusions

Did the Claimant make protected disclosures?

Was information disclosed by the Claimant which tended to show the health or safety of an individual was being put at risk, that there had been a breach of legal obligation?

On 18 February 2019 the Claimant raised concerns in the handover diary about poor stock rotation in the store and numerous out of date products found. Took pictures and showed them to the store manager and said it was a serious concern because someone might buy it.

156. On 18 February 2019, the Claimant had written in the handover diary that there was a note in Mr Duffield's drawer about date rotation and that he needed to speak to the person who had done the date checking. The note on the photograph said, 'this person did not rotate stock properly and out of date stock was hidden at the bottom. We were not provided with a copy of the photograph left in Mr Duffield's drawer. The Claimant accepted that she did not tell Mr Duffield that it was a serious concern because someone might buy it. We were not provided with any further evidence in relation to what had been said in the note or what was discussed. The information said that a colleague needed to be spoken to, however there was no evidence which tended to suggest that the Claimant had given information that the health and safety of an individual had been endangered or a suggestion that there had been a breach of a legal obligation. There was a lack of factual content to suggest that what was said tended to suggest that one of matters in s. 43B(1) applied. We were not satisfied that a protected disclosure had been made on this occasion.

On 9 July 2019 the Claimant said to Mr Moroney that she refused to sign the disciplinary sanction because she had raised concern about the ongoing situation about date rotation and out of date found in the store.

157. When the Claimant was asked to sign the Formal Performance Meeting note on 9 July 2019, she said that she did not want to, because there was an issue with out of date products in the store. The Claimant and Mr Moroney had been discussing the out of date products which the Claimant had missed on 4 July 2019. There needs to be sufficient factual content and specificity for there to be a provision of information tending to suggest that one of the matters referred to in s. 43B(1) applied. There was no suggestion that the Claimant provided any information to Mr Moroney that what had occurred had put customers' health in danger or that the

Respondent was breaching any legal obligation. What was said was a general remark. We were not satisfied that a protected disclosure had been made on this occasion.

<u>On 16 July 2019 the Claimant showed the store manager, Mr Duffield photographs of out of date stock and said it could be dangerous because it was raw meat.</u>

158. We found that the conversation did not take place on 16 July 2019, but 20 July 2019. On 16 July 2019, the Claimant took a photograph of out of date meat, which should have been removed 14 days before. On 20 July 2019, the Claimant showed Mr Duffield the photograph and said that it was a serious concern because the meat could be dangerous to customers. The Claimant had shown Mr Duffield the photograph and had identified that it posed a risk to customers and specifically said that it was dangerous. This was information which tended to suggest that the health and safety of an individual could be endangered. There was no suggestion in what was said that a legal obligation had been breached.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been or could be endangered, or that the Respondent was in breach of its legal obligations in relation to health and safety?

159. The Respondent challenged the Claimant's belief that what was said tended to suggest that the health and safety of an individual had been or could be endangered, on the basis of inconsistency in her evidence. The Claimant had in mind that if a customer ate the meat that they might get food poisoning. Food products have use by dates to prevent customers eating things which have the potential to cause food poisoning. It is common knowledge that off meat is something that could cause such sickness. The purpose of the date checks was to remove items from sale that could potentially harm customers. The Claimant believed that the meat, by remaining on sale for 14 days after its use by date, posed a risk and therefore endangered the health and safety of customers. That belief was reasonable.

Did the Claimant reasonably believe the disclosure was made in the public interest?

160. The Respondent challenged that the Claimant believed the disclosure was in the public interest on the basis that photographic evidence was not provided until 4 September 2019, which we factually rejected. It was also submitted that the disclosure was made as a smokescreen because she was being challenged with potential disciplinary proceedings and that they were raised as a defensive response. We rejected those submissions The Claimant believed that the meat posed a danger to customers. The Respondents' customers are members of the public and the meat was on general sale. Accordingly, there was a wide range of people who could have been made ill if they had eaten the meat. The sale

of products fit for human consumption is relevant to public health. The Claimant by saying that the product could be dangerous to customers and drawing it to the attention of the Respondent held a belief that it was in the public interest to make the disclosure. This was at least part of the motivation of the Claimant. We noted that the public interest need not be the sole or predominant motive for making the disclosure. While there may have been an element of self-interest to defend herself, the Claimant was also concerned about the effect on customers. We were satisfied that the Claimant had a belief that the disclosure was in the public interest and that belief was reasonable.

161. The Claimant made a protected disclosure.

<u>On 4 September 2019 at the grievance meeting the Claimant provided to her area manager numerous photographs of out of date stock and said had there been an ongoing issue in the store which was a health and safety concern for the general public, particularly for older people.</u>

162. The Claimant showed Mr Haynes photographs of out of date stock and the meeting notes recorded that the Claimant referred to the meat being dangerous and referred to reputational damage to the store. The meat was 14 days out of date when it was discovered. The Claimant had shown Mr Haynes the photograph taken on 16 July 2019 and other photographs and had specifically identified that meat found on 16 July 2019 was dangerous. It was necessary to take into account the Claimant had shown Mr Haynes the photograph and that the reason why out of date stock was removed was to protect members of the public. The Claimant provided specific information that the out of date meat was dangerous and by implication suggested the other out of date stock was also dangerous to customers.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been or could be endangered, or that the Respondent was in breach of its legal obligations in relation to health and safety?

163. The Respondent suggested that the Claimant saying that meat could cause reputational damage or could be dangerous did not suggest that the Claimant believed that the information tended to show that there had been a breach of legal obligation or that health and safety had been endangered. We accepted that the Claimant had in mind that out of date meat could potentially cause food poisoning to a customer and that as a consequence a customer's health and safety could be put in danger. The Claimant had told Mr Haynes that the meat was dangerous, this was in the context of having provided a photograph which demonstrated that the out of date product had not been removed for 14 days. The danger of the meat was to someone who consumed it. The Claimant believed that the meat was dangerous to a customer and that if it consumed was something that could endanger their health and safety. That belief was reasonable. The Claimant

did not say anything which suggested that there had been a breach of a legal obligation.

Did the Claimant reasonably believe the disclosure was made in the public interest?

164. The Respondent disputed that the Claimant reasonably believed that the disclosure was in the public interest and suggested that it was a defensive measure to being recommended for a disciplinary hearing and was a smokescreen. We rejected those submissions. Although part of her motivation was to protect herself from disciplinary proceedings, the Claimant believed that the meat posed a danger to customers. The Respondents customers are members of the public and the meat was on general sale. Accordingly, there was a wide range of people who could have been made ill if they had eaten the meat. The sale of products fit for human consumption is relevant to public health. The Claimant said that the product could be dangerous to customers and by drawing it to the attention of the Respondent held a belief that it was in the public interest to make the disclosure. This was part of the motivation of the Claimant. We noted that the public interest need not be the sole or predominant motive for making the disclosure. While there may have been an element of self-interest to defend herself, the Claimant was also concerned about the effect on customers. We were satisfied that the Claimant had a belief that the disclosure was in the public interest and that belief was reasonable.

165. The Claimant made a protected disclosure.

<u>On 12 September in her letter of appeal the Claimant said that in the grievance meeting she had stressed her genuine whistleblowing concern on grounds of health and safety towards customers where photographs taken showed raw meat of date found on shelves more than 14 days.</u>

166. In the letter of appeal, the Claimant said, *"In the grievance meeting I stressed my genuine Whistle blowing concern on grounds of health and safety towards the customers where the photographs taken showed raw meat of date found on shelves more than 14 days and was wasted on that date of discovery."* The Respondent accepted that this was a provision of information.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been or could be endangered, or that the Respondent was in breach of its legal obligations in relation to health and safety?

167. The Respondent submitted that the Claimant did not reasonably believe that the information tended to show that a legal obligation had been breached or that the health and safety of an individual had been endangered on the basis that she did not provide evidence at the time she became aware of it and that the Environmental Health Office had been

satisfied reasonable systems were in place. Further the belief was not reasonable because she had not followed the internal processes. We rejected those submissions. The Claimant had shown Mr Duffield the photograph taken on 16 July 2019, which was in accordance with the internal process. The Claimant had in mind that the out of date meat was a danger to customers. The grievance meeting record stated that the Claimant thought that the meat was dangerous. We accepted that the Claimant believed that the information she provided tended to show that there was a risk of danger to customers by consuming out of date meat and therefore that their health and safety had been endangered. That belief was reasonable. The Claimant had not provided information that tended to show that there had been a breach of a legal obligation.

Did the Claimant reasonably believe the disclosure was made in the public interest?

168. The Respondent disputed that the Claimant reasonably believed that the disclosure was in the public interest and suggested that it was a defensive measure to being recommended for a disciplinary hearing and was a smokescreen. We rejected those submissions. Although part of her motivation was to protect herself from disciplinary proceedings, the Claimant believed that the meat posed a danger to customers. The Respondents customers are members of the public and the meat was on general sale. Accordingly, there was a wide range of people who could have been made ill if they had eaten the meat. The sale of products fit for human consumption is relevant to public health. The Claimant by saying that the product could be dangerous to customers and drawing it to the attention of the Respondent held a belief that it was in the public interest to make the disclosure. This was part of the motivation of the Claimant. We noted that the public interest need not be the sole or predominant motive for making the disclosure. While there was an element of self-interest, the Claimant was also concerned about the effect on customers. We were satisfied that the Claimant had a belief that the disclosure was in the public interest and that belief was reasonable.

169. The Claimant made a protected disclosure.

<u>On 24 September 2019 at the grievance appeal meeting, she said that she had raised concerns about violating law and health and safety issues</u>

170. At the grievance appeal meeting the Claimant discussed the out of date stock she had found and that she was concerned that the Respondent had violated law and health and safety issues. The Respondent accepted that the Claimant had provided information.

In the Claimant's reasonable belief did the information tend to show that the health and safety of an individual had been or could be endangered, or that the Respondent was in breach of its legal obligations in relation to health and safety?

171. The Respondent submitted that the Claimant did not reasonably believe that the information tended to show that a legal obligation had been breached or that the health and safety of an individual had been endangered on the same basis as for the disclosure made on 12 September 2019. We accepted that the Claimant had in mind that there had been a breach of the Food Information Regulations 2013, which the Respondent did not dispute were applicable. The Claimant had in mind that the out of date meat was a danger to customers. The grievance meeting record stated that the Claimant thought that the meat was dangerous, and she had referred to the meat being dangerous in her letter of appeal. Ms Brown had read those documents when hearing the appeal and they were part of the relevant background. We accepted that the Claimant believed that the information she provided tended to show that there was a risk of danger to customers by consuming out of date meat and therefore that their health and safety had been endangered and that there had been a breach of a legal obligation. That belief was reasonable.

172. The Respondent disputed that the Claimant reasonably believed that she had made the disclosure in the public interest on the same basis as the disclosure made on 12 September 2019. We rejected that submission on the same basis. Although the Claimant was motivated in part by defending herself, she remained concerned about the potential danger to customers. For the reasons set out above the Claimant believed that the disclosure was in the public interest and that belief was reasonable.

173. The Claimant made a protected disclosure in this respect.

<u>On 19th April ’20 in a letter to Area Manager Aaron Haynes saying that’s it’s illegal to sell or display any food beyond past its use by dates as it’s poses serious risk to health. According to Food Safety and Hygiene Regulation 2013 selling food past it’s use by date is deemed to be a criminal offence and between 11th February’20 till 20th April’20 approximately 337 products were found OOD, more than 190 products with use by dates were still on sale in store.”.</u>

174. In her letter to Mr Haynes dated 19 April 2020, the Claimant said “*As a whistle blower I would like to inform you that it is illegal to sell or display any food after its use by date. According to Food Safety and Hygiene Regulations. 2013 selling any food past it’s use by date is deemed to be a criminal offence. 11th Feb’20 till 20th April 20 approximately 337 products were found OOD, more than 190 products were still on sale in the store 117 Aldi beyond past its use by dates. All information is available with its original dates when it was OOD in the wastage log in your system.”* The Respondent accepted that the Claimant provided information in that respect.

In the Claimant’s reasonable belief did the information tend to show that the health and safety of an individual had been or could be endangered, or that the Respondent was in breach of its legal obligations in relation to health and safety?

175. The Respondent submitted that the Claimant did not reasonably believe that the information tended to show that a legal obligation had been breached or that the health and safety of an individual had been endangered, or that a criminal offence had been committed on the same basis as for the disclosures made on 12 and 24 September 2019. The Claimant had raised the same concerns during the grievance process in 2019 and was concerned that if a customer had consumed out of date food that they could become ill by reason of food poisoning. The Claimant had referred to legislation and that she thought a criminal offence had been committed in her letter. The Claimant, by taking into account the historical context, believed that the information tended to show that the health and safety of an individual had been endangered, that there had been a breach of legal obligation and a criminal offence had been committed. That belief was reasonable.

Did the Claimant reasonably believe the disclosure was made in the public interest?

176. In addition to its argument in relation to the disclosures on 12 and 24 September 2019, the Respondent also submitted that the Claimant did not make a further disclosure between September 2019 and April 2020. We accepted that the Claimant had compiled a list of out of date stock and that she did not always refer the photographs she had taken to Mr Duffield. It was also submitted that the disclosure was in direct response to Mr Haynes wanting to discuss concerns with her on 11 April 2020. We accepted that part of the Claimant's motivation was to protect herself. However, the purpose of checking for out of date stock is to ensure that it does not go on sale to the public. The Claimant had collated a large list of items which had been found on sale after their use by dates. The people who would be affected by out of date stock are the customers, who are members of the general public. The Claimant considered that there was an ongoing issue in the store, sufficient enough that she complained to the Local Authority's Environmental Health Officer. It is important that customers have confidence that food they purchase is fit to be consumed. We noted that the public interest need not be the sole or predominant motive for making the disclosure. While there was an element of self-interest, the Claimant was also concerned about the effect on customers. We were satisfied that the Claimant had a belief that the disclosure was in the public interest and that belief was reasonable.

177. This was a protected disclosure.

Detriment

Was the Claimant subjected to a detriment by the Respondent on the ground that she made a protected disclosure by:

On 20 and/or 21 July 2019 recommending the Claimant should attend a disciplinary hearing

178. Recommending an employee for a disciplinary hearing is something to their disadvantage, they will have to face the potential of facing a disciplinary hearing and if the allegation is found proven a sanction against them is likely to be applied. The Claimant thought this, and we were satisfied this was a detriment.

179. When Mr Duffield had been provided with the photographs on 18 February 2018, he spoke to the person who had missed the out of date stock and increased the amount of supervision he gave. Further when the Claimant showed him the photograph she took on 16 July 2019, he asked for a copy and then identified who had also missed the out of date meat and spoke to all of them about the issue. We accepted that the Respondent took issues of out of date stock seriously and that when stock had been missed that conversations were held with the relevant manager(s). After Ms Townsend had found the out of date stock on 5 July 2019, Mr Haynes decided that if multiple issue were found in a short space of time that would lead to a performance conversation and subsequent disciplinary hearing if issues persisted. The Claimant had been subject to a Formal Performance Meeting in September 2018 and a further performance meeting as a consequence of the findings of Ms Townsend and Mr Moroney on 5 July 2019. The Claimant was subjected to a further performance meeting as a consequence. Eight days after the 5 July 2019, Mr Duffield found further multiple items of stock which the Claimant had missed. We accepted that because there had been two incidents of multiple items having been missed within the space of about a week and that the Claimant did not accept responsibility for having missed them, that this was the sole reason for the referral. We were also satisfied that Mr Duffield had decided to do this before he spoke to the Claimant on 20 July 2019, when she made her first protected disclosure. We were satisfied that the protected disclosure had no influence on the decision to recommend the Claimant for a disciplinary hearing. This element of the claim was dismissed.

Not being paid company sick leave between 1 and 7 August 2019

180. There was a delay in paying the Claimant company sick pay until October 2019, when it should have been paid in her August pay, which was to her disadvantage. The Claimant considered this was to her disadvantage and a reasonable employee could have concluded this and therefore there was a detriment.

181. The Claimant submitted that Mr Duffield had deliberately failed to supply her sick note to payroll until October 2019. We accepted that it was area managers who provided the information to payroll. There was no suggestion that Ms Scofield had any awareness about any protected disclosure made by the Claimant and the Claimant did not suggest that Ms

Schofield had subjected her to any detriment. Mr Duffield had forwarded the sick note to Ms Schofield in early August 2019, and we were satisfied that it was received by her on 12 August 2019. We were satisfied that the Claimant's protected disclosure had no influence in when Mr Duffield forwarded the sick note. Smart Time had not been updated, however because Mr Duffield had sent the sick note to the Area Manager responsible we were satisfied that the Respondent had shown that Mr Duffield believed that he had done all that he should at that time. We were satisfied that the failure to update Smart Time was in no way influenced by the protected disclosure made by the Claimant. This element of the claim was dismissed.

Not converting the Claimant's holiday between 8 and 25 August 2019 to sick leave

182. The Claimant did not speak to Mr Duffield about converting her holiday to sick leave in September and she did not provide the doctors note from her Indian GP at that time. When the Claimant provided the doctors note to the Respondent's solicitor in mid-2020, the Respondent acted quickly and confirmed that the holiday would be changed to sick leave and that she could take that holiday in that year. The Respondent also agreed that it could be subsequently rolled over to 2021. The Claimant had not provided the information to the Respondent so that it could consider converting her holiday and therefore the Claimant was not put to a disadvantage. A reasonable employee would not have considered that they were put to a disadvantage and we were not satisfied that the Claimant suffered a detriment.

183. In any event, the Respondent acted quickly when it became aware of the situation and we were satisfied that the protected disclosure had no influence for it not being converted earlier. This element of the claim was dismissed.

On 6 October 2019, 17 October 2019, 31 October 2019 the Claimant's hours were changed

184. The Claimant was scheduled to attend a meeting on 6 October 2019, which she unable to do due to religious reasons. We accepted that Mr Duffield was unaware that the Claimant could not work on the first Sunday of each month. The meeting had been scheduled so that the issues in relation to out of date stock and stock rotation could be discussed. We accepted that it would be to the Claimant's disadvantage for the meeting to be scheduled on that day and that this was a detriment.

185. Mr Duffield was unaware that the Claimant could not work on that day. The Claimant informed him that she could not attend the day of the meeting. It would have been unreasonable to have rearranged the meeting at such a late stage. We were satisfied that the Claimant's protected disclosures had no influence on the meeting being scheduled on that day,

or that it went ahead in her absence. This element of the claim was dismissed.

186. The Claimant was also unable to start shifts on Thursdays before 1500 of which Mr Duffield was aware. The Claimant was scheduled to start shifts before 1500 on 17 and 31 October 2019. The Respondent submitted that there was not a detriment because the Claimant worked in excess of her contracted shifts that week. We rejected that submission. The Respondent had a need for a deputy manager to be at work that week for the time the Claimant was unable to attend on those days. The Claimant was paid by the hour. This meant that the Respondent needed her to work an additional 1½ hours that week and she was prevented from undertaking that work and consequently received less pay. The Respondent could have arranged the shifts so that those hours were covered on different days. We accepted that this was to the Claimant's disadvantage. The Claimant considered this was to her disadvantage and a reasonable employee would also consider it to be a disadvantage and therefore was a detriment.

187. We accepted the Claimant's evidence that she informed Mr Duffield of the problem on a couple of occasions shortly after she received the rota. Mr Duffield was unable to provide any explanation as to why Claimant had been scheduled to work on those days, or when she said she could not work before 1500 it was not changed. The burden is on the Respondent to show the reason for the detrimental treatment. Mr Duffield's evidence was that if the Claimant had raised the issue early that the rota would have been changed. The Claimant did raise the issue early and it still was not changed. There was no other evidence to show that the reason for the scheduling and/or failure to change it was not influenced by the disclosure or that the disclosure was only a trivial influence. The presumption that the reason was because the Claimant had made a protected disclosure was not displaced and we concluded that she was subjected to a detriment because she made a protected disclosure.

188. The Respondent sought to rely on the statutory defence. The burden of proof is on the Respondent to establish it. Although the Respondent has an Equal Opportunities policy and trains its employees in respect of equal opportunities and carries out refresher training, there was no evidence adduced as to a whistleblowing policy, its contents, how managers were trained or what refresher training they were given. It would have been a reasonable step for a whistleblowing policy to have been implemented, training given and refresher training also carried out. We were unable to be satisfied that the Respondent had taken any such steps and it failed to prove that it should be availed of the statutory defence.

189. The Claimant was therefore subjected to a detriment, namely scheduling her to work before 1500 on 17 and 31 October 2019 and not changing her hours, because she made a protected disclosure

Not giving the Claimant an 11 hour rest break between 7 and 8 December 2019.

190. It is a requirement of the Working Time Regulations 1998 that employees have a rest break of 11 hours between shifts. The Respondent accepted that the Claimant's rest break was shorter than was required. This was and the Claimant thought it was to her disadvantage. A reasonable employee could have concluded this. It was therefore a detriment.

191. We accepted Mr Duffield's and Mr Haynes' evidence that when the rota was drawn up and checked that they believed that the correct rest break had been provided. The seriousness with which the Respondent considered rest breaks was demonstrated by Mr Haynes' evidence that rest breaks are extremely important and a break which was too short was never acceptable. We accepted the Respondent's evidence that the shift pattern might have been changed after the due diligence book had been signed and/or that a mistake had been made. There was no reason why the Respondent would deliberately schedule the Claimant for a period of rest contrary to the Working Time Regulations and we were satisfied that the Claimant's protected disclosures had no influence on the error. This element of the claim was dismissed.

Aaron Haynes sending the Claimant a letter dated 23 April 2020 (that she received on the 30 April 2020) about concerns raised by the Claimant's Store Manager regarding her performance and attitude as follows: (a) lateness, (b) lack of effort on some shifts/ rude and short with staff members, (c) Continuing to take evidence of OOD products being found in store, (d) Amesbury support, and (e) Safe control procedures.

192. The Claimant was sent a list of concerns by Mr Haynes on 23 April 2020. Being told that there are concerns with performance is something which casts doubt over an employee's ability to undertake their job properly and as such is something which is to their disadvantage. A reasonable employee could have concluded this, and the Claimant thought it was the case. This was therefore a detriment.

193. The matters raised in Mr Haynes' letter dated 23 April 2020 were all matters he attempted to discuss with the Claimant informally on 11 April 2020, when she refused to do so. We were satisfied that he had drafted the contents of the letter for his intended meeting with the Claimant on 11 April. The Claimant told him that he would have to put what he wanted to discuss in writing. We accepted that Mr Haynes went on holiday on 13 April 2020 and was unable to draft a letter before his departure. The letter also set out that he was reluctant to have to set out such matters in writing, but was only doing so at the Claimant's request. An informal discussion would enable Mr Haynes to understand the Claimant's point of view and potentially resolve any issues. Mr Haynes also said that he would address the Claimant's letter of 19 April 2020 separately. After the letter the Respondent undertook a further investigation into the Claimant's concerns. We were satisfied that Mr

Haynes took the Claimant's concerns seriously and that her disclosure on 19 April 2020 had no influence on his decision to write the letter dated 23 April 2020. This element of the claim was dismissed.

194. In any event the Claimant should have presented the claim by 22 July 2020. The claim was not presented until 8 September 2020. The Claimant also contacted ACAS on 26 July 2020, although because she had already contacted ACAS for the first claim that contact was unnecessary (Treska v The Master and Fellows of University College Oxford & ORS [2017] UKEAT/0298/16). The Claimant had previously advised members of the public in relation to employment law disputes on behalf of the Citizen's Advice Bureau and was aware of the time limits to bring a claim. She relied on that her grievance was ongoing, however that did not mean that it is was not reasonably practicable for a claim to be presented in time. The cause of the delay was that the Claimant did not know whether her grievance would be resolved in her favour. The Claimant was aware of time limits and was also aware of where she could obtain advice. It would have been reasonably practicable for her to have presented her claim in time and as such the Tribunal would not have had jurisdiction to hear this part of the claim.

Suspending the Claimant on the 2 May 2020

195. We accepted the Respondent's evidence that the Claimant was put on special paid leave, rather than suspending her. However, the Claimant wanted to attend work and was prevented from doing so. The Claimant could reasonably perceive that the measure could be interpreted as that she had done something wrong. We accepted that even though the Claimant was fully paid, that because she could not attend work, and wanted to, she was put to a disadvantage. A reasonable employee could have concluded this and it was a detriment.

196. We accepted the evidence of Ms Brown that the Respondent was in a very unusual situation in which it appeared that a Deputy Manager had raised a grievance against the Area Manager about discrimination and detriment for whistleblowing and it also involved the store manager. The Claimant and Mr Haynes had to work closely together in order to run the store. It was notable that this occurred during the first lockdown due to the covid-19 pandemic, when there were a number of logistical issues faced by the Respondent. We accepted that Ms Brown thought that it was best to separate the Claimant and Mr Haynes so that the grievance could be investigated and to minimise the risk of damaging their relationship. Ms Brown was trying to find the fairest way to investigate the grievance and concluded, in the circumstances, that it was best achieved by putting the Claimant on special paid leave and thought that it was the only way it could be properly addressed. The concerns raised by the Claimant were taken seriously by Ms Brown and the Respondent further investigated what had been said on 19 April 2020. We accepted Ms Browns evidence in relation to the effect of the letter dated 19 April 2020 and were satisfied that it had

no influence in the decision to place the Claimant on special paid leave. This element of the claim was dismissed.

Not paying the Claimant 12 days of full pay for sickness in the period 4 August 2020 to 30 August 2020, which the Claimant says she discovered on receipt of her pay details on the 28 September 2020

197. The Claimant received her sick pay for the period 4 to 17 August 2020 and Mr Haynes correctly provided her sick note to payroll. Payroll did not action the Claimant's sick note for 18 to 30 August 2020 and therefore she did not receive the correct sick pay. We accepted that receiving less sick pay than she was entitled to was to her disadvantage and she thought it was the case. A reasonable employee could have concluded this, and it was a detriment.

198. Mr Haynes had provided the first sick note correctly. Mr Haynes was not sure what had happened in relation to the second sick note and whether it was a mistake by him or payroll. As soon as the Claimant realised that she had not received the correct sick pay she contacted Mr Haynes and he promptly contacted payroll and the error was rectified. We accepted that Mr Haynes was dealing with the issue, whilst trying to manage problems due to the covid 19 pandemic and that it was a simple mistake. It was significant that the Claimant had been paid correctly for the first period of sick leave. We were satisfied that the Claimant's disclosure on 19 April 2020 had no influence in what happened. This element of the claim was dismissed.

Transferring the Claimant to another store (Amesbury) on the 3 October 2020, having notified her they would do so at the end of July beginning August 2020.

199. On 28 July 2020, the Claimant was informed that she was being transferred to Amesbury. We accepted that the Claimant did not want to be transferred to Amesbury and that she considered that the transfer was to her disadvantage. We accepted that a reasonable employee could view the decision as a disadvantage and the decision was a detriment.

200. Mr Haynes was aware that the Amesbury store only had 4 Deputy Managers and the Salisbury store had 6. Both stores should have had 5 Deputy Managers. The Claimant's contract of employment stated that the Respondent was entitled to employ the Claimant in any of its trading stores and as such had the power to move the Claimant to a different store. The Amesbury store did not have enough management cover for the closing shifts. The Claimant only worked the closing shifts. We accepted that the Respondent considered who of its Deputy Managers' shift patterns in the Salisbury store best fit the needs of the Amesbury store. The Claimant's shift patterns best fit the needs of the Amesbury store, whereas as her Salisbury colleagues did not have shift patterns which matched. Mr Haynes was also aware that the Claimant lived in Amesbury. Mr Haynes had concluded that the Claimant was the manager who was most suitable to be

transferred before his intended meeting on 11 April 2020. The Claimant suggested that the reason for the transfer was because she made the protected disclosure on 19 April 2020 and to stop her collecting evidence. Ms Brown also considered the needs of the Amesbury store and also concluded that the Claimant's shift patterns and where she lived meant that she was the Manager who best fit the needs of the store. After the Claimant made her disclosure on 19 April 2020, the Respondent investigated the matters raised and maintained close supervision over the Salisbury store. Managers were required by Mr Duffield to provide him with photographs of out of date stock. We were satisfied that the Respondent's reasons for transferring the Claimant were genuine and that her protected disclosure on 19 April 2020 had no influence on its decision. This element of the claim was dismissed.

201. In the circumstances it was unnecessary to consider whether this part of the claim had been presented in time.

Direct Race Discrimination

Did the Respondent carry out the following treatment and was it less favourable than the Claimant's comparator was treated?

On 20 July 2019 Mr Duffield told the Claimant that she was doing a crap job, but she had not had a performance review for 2 years, whereas her colleagues had.

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

202. We found on the balance of probabilities that Mr Duffield did not tell the Claimant that she was doing a crap job. Further we also found that the Claimant had been given a performance review in 2018. We also found that the Claimant had not been given a performance review in 2019 but that most of the other managers at the store had not either. As such the events alleged by the Claimant to be less favourable treatment had not occurred.

203. The Claimant compared herself to Johnny Moroney, Victoria Aldridge, Mandy Rowe, Chris Wilson, Luke Morris, Bradley Rowland and Clinton Duffield, all of whom identified as white British. The Claimant said that what had occurred was because of her racial background, but was unable to explain why that was, other than that she had a feeling it was the case. There was no evidence that Mr Duffield or any other employee had made any comment or remark that could be interpreted as having any element or tinge of racial motivation. In any event the Claimant was not told that she had done a crap job and most of the managers at the Salisbury store had not received a performance review in 2019 due to time pressures in the store. There was no evidence that the Claimant had been treated less favourably than her colleagues. In any event the Claimant was unable to

suggest anything more than a difference in treatment. Although the something more than a difference in treatment need not be a great deal, it must still be something. The Claimant failed to adduce primary facts from which we could conclude that she had been told that she had done a crap job or had not been given performance reviews because of her race. The Claimant therefore failed to discharge the initial burden of proof and as such it was unnecessary to consider the Respondent's explanation. This element of the claim was dismissed.

<u>On 20 and/or 21 July 2019 Mr Duffield recommended that the Claimant attended a disciplinary hearing regarding stock control.</u>

Did the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

204. The Claimant sought to compare herself to her white British colleagues Johnny Moroney, Victoria Aldridge, Mandy Rowe, Chris Wilson, Luke Morris, Bradley Rowland and Clinton Duffield. For the comparator to be appropriate it is necessary that their circumstances are not materially different to that of the Claimant. The Claimant had missed a large number of out of date items on two occasions in quick succession, i.e. within 8 days and the second occurred 3 days after she had a formal performance meeting. We accepted the Respondent's evidence that the Claimant's colleagues had not ever been in a similar situation. The reason for the recommendation for a disciplinary hearing was the high number of items missed and that the incidents were close together in terms of time. This was a material difference in the circumstances between the Claimant and her comparators.

205. In terms of a hypothetical comparator the comparator would be a Deputy Manager of similar experience, who had missed a large number of out of date stock on two occasions in quick succession.

206. The Claimant said that what had occurred was because of her racial background, but was unable to explain why that was, other than that she had a feeling it was the case. There was no evidence that Mr Duffield or any other employee had made any comment or remark that could be interpreted as having any element or tinge of racial motivation. Further the other Managers in the region who had been disciplined for missing out of date stock items were white and some of them received warnings for having missed fewer items than the Claimant. We accepted Mr Duffield's evidence that the trigger had been the number of items missed and that the incidents had occurred close in time. There was no evidence that the Claimant had been treated less favourably than her colleagues or that a hypothetical comparator would have been treated more favourably. In any event the Claimant was unable to suggest anything more than she had a feeling that there had been a difference in treatment. Although the something more

than a difference in treatment need not be a great deal, it must still be something. The Claimant failed to adduce primary facts from which we could conclude that she had been told that she had been recommended for a disciplinary hearing because of her race. The Claimant therefore failed to discharge the initial burden of proof and as such it was unnecessary to consider the Respondent's explanation. This element of the claim was dismissed.

Conclusion

207. Accordingly, the claim of an unlawful deduction from wages was dismissed upon its withdrawal by the Claimant. The claims of direct race discrimination were dismissed. The Claimant succeeds in her claim of detriment for having made a protected disclosure in relation to her shift rota, but otherwise the claims of detriment were dismissed.

208. Directions for remedy were provided by way of separate order.

Employment Judge J Bax
Date: 06 May 2021

Judgment sent to the Parties: 10 May 2021

FOR THE TRIBUNAL OFFICE