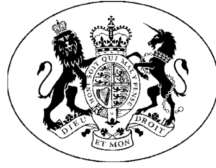

EMPLOYMENT TRIBUNALS

Claimant: Miss T Jarman

Respondent: Mark Thompson Transport Ltd

Heard at: Manchester (remote public hearing via CVP)

On: 22-23 July 2021

Before: Judge BJ Doyle
Mrs L Heath
Ms P Owen

Representation
Claimant: In person
Respondent: Ms J Ormond, solicitor

JUDGMENT

The claimant's complaints of detriment and unfair dismissal contrary to sections 44 and 100 of the Employment Rights Act 1996 respectively are not well-founded. The claim is dismissed.

REASONS

Introduction

1. Having concluded evidence and submissions on the second day of the hearing, on 23 July 2021, the Tribunal gave its oral judgment with outline reasons. The judgment (without reasons) was sent to the parties on 5 August 2021 in accordance with the usual practice. The Tribunal had reminded the parties of the provisions of rule 62, but no request for written reasons had been made at the hearing.

2. In a series of four emails sent to the Tribunal on 27 July 2021, 29 July 2021 and 3 August 2021 (2 emails), referred to Judge Doyle by the Tribunal administration on 5 August 2021, the claimant appeared to be indicating her intention to appeal the judgment and she also appeared to be asking for written

reasons and applying for a reconsideration of the judgment.

3. The judge has treated those emails as being a request for written reasons in the first instance. These are the Tribunal's written reasons for what was its unanimous decision.

4. The judge additionally addresses the question of reconsideration and appeal in the final paragraph below, to which the claimant's attention is particularly drawn.

The claim

5. Early conciliation commenced on 14 July 2020 and ended on 27 July 2020.

6. The claim (form ET1) was presented to the Tribunal on 10 August 2020. It contained a single complaint of unfair dismissal, expressly relying upon section 100(1)(c) of the Employment Rights Act 1996, although implicitly also relying upon sections 44 and 98 of the Act. Within the particulars of claim is a reference to the claimant having made a public interest disclosure to her employer on 10 July 2020, three days after her employment had ended, but the claim does not assert any reliance upon sections 47B or 103A of the Act.

7. The response (form ET3) to the claim was presented on 28 October 2020. It points out that the claimant does not have two years' service necessary to bring an ordinary unfair dismissal complaint (that is, one that relies upon section 98 of the Employment Rights Act 1996). It appears to proceed on the basis that the claimant was relying upon the public interest disclosure provisions in sections 43B (perhaps intended to be a reference to section 47B) and 103A of the Act, rather than the health and safety provisions in sections 44 and 100 of the Act.

8. At a case management hearing on 14 May 2021, Employment Judge Warren recorded that the claimant did not have two years' service and thus could not bring a complaint of ordinary unfair dismissal (that is, one under section 98 of the Employment Rights Act 1996). Judge Warren recited that the claimant was asserting that she had suffered detriment and had been dismissed because she had raised health and safety issues. That would appear to this Tribunal to be a claim brought under sections 44 and 100 of the Act rather than under sections 47B and 103A. The judge then set out a list of issues for the final hearing which seems to treat the claim as containing complaints of detriment and dismissal either for health and safety reasons and/or for having made public interest disclosures. There is a non-specific statutory reference to section 48 of the Act (which does not resolve any confusion that might or might not arise as the cause or causes of action).

9. Accordingly, this Tribunal resolved to clarify the matter at the outset of the final hearing. Both parties confirmed that the claim was one brought under sections 44 and 100 of the Employment Rights Act and not under the public interest disclosure provisions in sections 47B and 103A of that Act. That is exactly as this Tribunal had read the claimant's pleaded case. The Tribunal hearing proceeded on that basis without objection from either party.

Preliminary matters

10. At the start of the hearing the claimant took objection to the provision of a witness statement from the respondent (in respect of Ms Blackwell) the previous day. The respondent confirmed that Ms Blackwell's witness statement had been provided at an earlier date, but this version of that witness statement contained no new information or evidence, having simply been re-formatted. The Tribunal considered that this did not constitute a breach of case management orders, and that the claimant was not disadvantaged thereby. The claimant did not suggest otherwise.

11. The respondent also confirmed that its position was that there was a health and safety committee in place.

12. The respondent also drew attention to the claimant's separate provision of 33 pages of documents, despite there being an order for a joint bundle. The Tribunal did not consider that this would prevent a fair hearing for either party.

The evidence

13. The Tribunal heard witness evidence from the claimant, Miss Jarman, and from the respondent's Group HR Director, Ms Debbie Blackwell – in both instances supported by witness statements.

14. The Tribunal had before it a joint bundle of documents comprising 108 pages. References to the joint bundle appear in these reasons in square brackets. As noted, the claimant also presented a separate bundle of 33 pages (marked as TJ1 to TJ15) with an index. References to both sets of documents were made during the hearing.

Findings of fact

15. The respondent company is part of the Kinaxia Logistics Group, which consists of 13 UK businesses spread across the country. The 13 businesses are all transport and warehousing companies.

16. In her role as HR Advisor, the claimant provided HR support to the respondent company. She also provided HR support to one other company in the Group, AJ Maidens, based in Telford. She travelled to provide support once a week to the Telford site.

17. Otherwise, during her employment, she was based at the respondent's (then) Warrington site, along with approximately 40 other operational support staff, including Finance, Compliance, Operations Support, and Fleet Management. The office operated 24 hours/7 days. HGV drivers started their shift from this address.

18. Mr James Scott was the Operations Director responsible for the site, with three Transport Managers and a Facilities Manager reporting into him. There was no designated Health and Safety Manager employed on site. The claimant's

understanding was that Mr Trevor Dickinson, Area Health and Safety Manager, was responsible for health and safety at the site. Mr Mark Stevenson, Compliance Director, visited the site regularly. He had ultimate responsibility for Health and Safety as Head of Compliance within the Kinaxia Group.

19. The claimant reported into Ms Helen Walker, Regional HR Manager, and ultimately to Ms Debbie Blackwell, Kinaxia Group HR director. The claimant also had a dual reporting line into Mr James Scott, Operations Director at Mark Thompson Transport.

20. The claimant's evidence, which the Tribunal has no reason to doubt, is that at times she felt somewhat compromised as she was tasked with ensuring the company followed HR processes and procedures when it was apparent (or so she believed) that the senior management team had a negative view of the HR function. The Tribunal's experience is that there are often natural tensions between HR management and line management functions, and with senior management within any company. The role of HR often involves questioning and challenging other management, and that can lead to disagreement, tensions and even conflict.

21. The claimant gave further evidence of this, which the Tribunal is prepared to accept at face value. She says that around September/October 2019 the Group carried out a HR Key Performance Indicator audit for all companies within the group. The respondent company failed in all areas of the HR audit, the claimant says. The role of HR Advisor had been introduced 2 years previously, following the merger with Kinaxia Group in 2017. The first appointed HR Advisor had been in post for approximately one year before resigning.

22. The Tribunal also notes the observations that the claimant makes in paragraphs 8 and 9 of her witness statement. Those observations do not take the Tribunal any further in resolving the issues in this case.

23. It does not appear to be disputed that the respondent's head office in Warrington was a portacabin style structure. The site did not connect to a main sewage system. Waste was collected in a septic tank. The sanitation of the premises formed the basis of the claimant's "escalations" to management, which are the foundations upon which her claim to the Tribunal rests. She relies upon having raised four written escalations in relation to the sanitation on site and one escalation in relation to pedestrian safety in the period of 25 November 2019 to 6 March 2020.

24. Those escalations are set out in the bundle as follows: first escalation dated 25 November 2019 (Sanitation) [14]; second escalation dated 31 December 201 (Sanitation) [15-16]; third escalation dated 6 February 2020 (Sanitation) [16]; fourth escalation dated 27 February 2020 (Pedestrian risk) [16A]; and fifth escalation dated 6 March 2020 (Sanitation) [17].

25. As noted, the respondent's Group HR Director is Ms Debbie Blackwell. It also employs a Regional Compliance Manager, Mr Trevor Dickinson, who operates across all the companies within the Group in the North.

26. The respondent has a Health and Safety Committee. At the time in dispute, the committee had met on 19 September 2019 [49A-49C]. It is chaired by Mr Mark Thompson. Although she was not a member of the Health and Safety Committee, the claimant attended that meeting. She was therefore aware of its existence or she should have been so.

27. Ms Blackwell was made aware that on 25 November 2019 the claimant had sent an email to Mr Paul Clare and Mr James Scott, Operations Director, about toilet facilities at the respondent's premises in Warrington [14]. Ms Blackwell regarded the email as more of an enquiry about a smell that all concerned knew permeated through the offices from time to time. She did not regard the email as the claimant disclosing information that tended to show that the health or safety of any individual has been, is being or was likely to be endangered or that the environment has been, is being or was likely to be damaged.

28. Mr Clare and Mr Scott were part of the Health and Safety Committee. Ms Blackwell believed that that was why the claimant sent her email to them [49A]. She believed that this showed that it was reasonably practicable for the claimant to raise the matters with the Health and Safety Committee.

29. Matters escalated on 31 December 2019. Ms Blackwell was on holiday at the time. She received a call from Mr Mark Stevenson, Director Compliance Training Recruitment. He advised her that the claimant had walked off site and that she had taken her company laptop with her without saying where she was going. He advised Ms Blackwell that Mr Scott followed the claimant to the car park and a discussion took place. Mr Scott then took the claimant's laptop back to the office. Shortly afterwards, the claimant went back too. Ms Blackwell was advised that there was then an encounter between Mr Scott and the claimant.

30. It is important to set out here the claimant's perspective upon this incident. In the claimant's view, Mr Scott had attempted to dismiss her, as she had refused to accept the working conditions on site that day and she had left site shortly after arriving in the morning.

31. The claimant's account is that when she arrived at work, the main reception door was wide open. The windows in the finance office were open, even though it was a very cold December day. On entering the building, the sewage odour was very apparent and much more noticeable than previous occasions. The claimant went into the Finance department. Colleagues working in there told her that when they came into the office the smell was so bad, they needed to open all the doors and windows. She asked one colleague how he felt about having to open the windows on a cold day. He said it was not ideal, but he needed to let the air in as the smell was so bad. He also said on other occasions when the odour was bad, he did not feel comfortable using the kitchen or having his break to eat his lunch because of the awful odour that was in the kitchen/reception.

32. The claimant then went to see Mr James Scott, Operations Director, to discuss the situation. She suggested that the environment was not suitable for people to work in that morning. Mr Scott denied that there was a problem. She asked him why all the doors and windows were open. He said that the smell had

dispersed and there was not a problem. She told him that she was not accepting this and that other colleagues should not have to.

33. Mr Scott then walked round to the Finance Department and asked the colleague referred to above to go into the HR office with the claimant. He asked that colleague if he had a problem in the office and the colleague now denied this. In the claimant's view, this was because of the intimidating manner in which the conversation was being held. The claimant tried to intervene and attempt to position the conversation, but Mr Scott kept talking over her and said words to the effect "You don't have a problem with the office do you?" to the colleague.

34. After the discussion had finished, the claimant then spoke with Mr Scott again separately. She stated that she felt he had manipulated the conversation and that the colleague had been put in a difficult situation whereby he had no alternative but to back down and agree with him. She said that she was not accepting the working conditions and would be working off site that day. Mr Scott said to her that her only option was to go and work at another Kinaxia site, and that would be Trafford Park. She replied that she had brought the office environment to his attention on behalf of other colleagues and not just herself. To remove her to another location was not solving the problem for other employees. She felt that something needed to be done as it appeared to be a recurring problem. He denied this. At this point the claimant said that she was going to work off site – to which he said again that that would be Trafford Park.

35. The claimant turned to walk out of the office. Mr Scott then asked for her company laptop and company phone to be returned. She carried on walking through the office. Mr Scott got up and followed her out to the car park and her car. When she got to her car, he stood over her asking for her company equipment back again. She could not find her work phone in her bag immediately. The claimant asked Mr Scott to move away from her car and she would bring the phone and laptop into the building. She took the request to return her company equipment to mean that she had been dismissed as it was not usual for her to return her laptop and phone when going off site. She found her phone and went back into the office. Mr Scott was in the conference room with another manager. The claimant knocked on the door. She tried to open it, but Mr Scott shut it in her face. He also asked her to write down the pin code to unlock the phone and to leave it at the office.

36. The claimant then took the phone and laptop to the management office. She told the Facilities Manager that she had been asked to leave her company equipment. She then left site to go home. She left a voicemail message for Ms Helen Walker, the Regional HR Manager, asking her to call her so that she could talk her through what had happened that morning. As it was New Year's Eve, most of the HR Managers were on annual leave. She also emailed an account of what had happened. She requested to discuss the situation with her.

37. Ms Walker called the claimant on her return to work in January 2020. The claimant explained what had happened regarding the incident on 31 December 2019, and that by requesting for her company equipment to be returned she had presumed she had been dismissed. Ms Walker said that this was not the

case, as Mr Scott was not her direct line manager. She said that she would speak with him to understand what had happened. The claimant advised that she did not feel comfortable returning to work immediately or until this had been investigated. She had some holidays booked, which she felt would enable some time for the situation to cool off.

38. She later returned to work following her holiday. Both Mr Scott and she agreed to put the situation behind them and to move forward. That was around mid-January 2020.

39. Although setting out the claimant's account of, and perspective upon, the incident with Mr Scott has broken the Tribunal's narrative findings of fact, it is important to have done so in order that the claimant's case can be properly understood. The Tribunal makes no findings of fact in relation to Mr Scott as it has heard no evidence from him. He is not properly open to any criticism as a result of the Tribunal's setting out the claimant's evidence above. What is clear to the Tribunal is that the claimant was not being dismissed by Mr Scott on 31 December 2019. He is more likely to have been attempting to protect company property in circumstances where the claimant was walking off site in an uncooperative frame of mind. A more dispassionate and reliable account can be gleaned by picking up Ms Blackwell's account, as follows.

40. The claimant sent an email to Mr Scott at 9.41pm on 1 January 2020. She set out that it had been reasonable of her to walk off site the day before for lack of ventilation. She refused an offer to work at one of the respondent's alternative sites, Trafford Park. She wanted to work from home instead. She said that the smell of sewage was unacceptable. It would not be compliant "with HSE" [58].

41. At 11.43am on 2 January 2020 Mr Scott sent an email to the claimant. He explained that the ventilation was not inadequate and that the smell had dispersed. He discussed the Trafford Park site as being a reasonable alternative to work at if she was not comfortable. He discussed how all the problems on site were being discussed by the Health and Safety Committee. Mr Scott pointed out that while the claimant had felt it necessary to leave site, 9 other staff members had been happy to continue working on site. He also explained that the female toilets did have running cold water. He did his best to reassure the claimant that the matters she had complained of were under control [50-51].

42. The claimant replied at 1.06pm the same day. She agreed that the smell in the office had disappeared. She persisted with the view that there were problems in the ladies' toilet [52-53].

43. At 2.15pm that day, Mr Scott replied to the claimant. He assured her that he would get hot and cold running water in the ladies' toilet. He gave the claimant the chance to work at Trafford Park again. He said that once matters were attended to, she would have to come back to the Warrington office [54].

44. At 3.46pm Mr Scott sent the claimant another email to confirm that hot and cold running water had been restored to the ladies' toilet and that a heater was being ordered. The claimant thanked him for the update at 3.48pm [55].

45. On her return from holiday, Ms Blackwell was also made aware that the claimant had emailed Ms Walker at 11.30am on 3 January 2020. She reported that on 31 December 2019 the office had smelt of a "disgusting smell of sewage yet again". She also said that "the facilities were not fit for people to be working in". However, she also had a discussion with Mr Scott about the situation and confirmed the same in writing. Despite acknowledging Mr Scott's email of the day before that hot and cold running water had been restored, the claimant added that there had never been any hot and cold running water in the female toilets since she started.

46. The claimant confirmed that Mr Scott had offered her the chance to work at the Trafford Park depot, but she did not consider that a resolution because it was "not personal to [her]". Rather than relocate to Trafford Park, which is about 20 miles from the claimant's house, the claimant explained that she would take two weeks' annual leave. She also set out measures that Mr Scott had said would be put in place to deal with the problems [56-57].

47. At 2.09pm on 3 January 2020, the claimant sent a further email to Mr Scott. She had returned to work and felt that the hot and cold water in the ladies' toilet was not running properly. She had by then spoken with Ms Walker, who had assured her that a full review of facilities would be carried out and that Ms Blackwell would become involved.

48. Despite being on annual leave, at 5.31pm on 3 January 2020, Mr Scott replied to the claimant. He agreed that a full review of facilities would be a good idea [61].

49. The claimant replied to that at 6.23pm. She talked about the water and ended by saying that she was on annual leave and not available for further emails.

50. At 8.29pm that evening, however, the claimant sent Ms Walker the email reply she had received from Mr Scott [63-64]. The claimant then set about preparing a "statement…relating to the escalation of toilet facilities/adequate ventilation at [the respondent]". In it, she confirmed that the detriment that she was subjected to for raising concerns was being "asked to return to site after leaving to work remotely" [65-69]. This was the incident on 31 December 2019 when Mr Scott confronted her for walking off site.

51. At 7.49pm on 5 January 2020 the claimant sent an email to Ms Walker and attached Mr Scott's emails to her. She said that "I feel that I have been put at a detriment". She set out the history, but then said, "I would like this escalation to remain informal at this time" [70].

52. The claimant sent an email to Ms Walker on 6 January 2020 in which she said that "the smell is in the office at the same level it was on 31 December…I would prefer you not to say anything". She confirmed that she had a meeting with Mr Scott that day, but she would not be raising the issue, as a move was planned. She also confirmed that there had been an interim report into the smell problem. She repeated that she wanted Ms Walker to keep the complaint confidential [16].

53. At 10.39am on 7 January 2020, Ms Walker sent an email to Mr Stevenson, Director Compliance Training Recruitment. She set out the key concerns that the claimant had raised because he was going to undertake yet more investigations into her complaints [71-73].

54. At 11.49am that day, Mr Stevenson replied to say that he would go through the report in detail with Mr Dickenson, Regional Compliance Manager - North [71-73].

55. At 2:29pm on 9 January 2020, Mr Stevenson sent a report into his investigations back to Ms Walker [75-78]. She replied that she would send a copy of the report to Mr Thompson himself [75].

56. Mr Dickenson emailed Ms Walker at 3:51pm on 9 January 2020. He said that the cause of the odours seemed to have been resolved. He also confirmed that new arrangements had been made to empty the “interceptor” part of the septic tank, once a week. He also said that he would monitor the situation on a regular basis. He intended to visit the site once a week [74].

57. On 13 January 2020 Ms Walker emailed to request confirmation of a telephone call with Ms Kay Cross, a female colleague of the claimant. She replied to confirm that there had been no issues with water in the ladies’ toilet [79].

58. As far as Ms Blackwell was concerned, and the managers generally too, the claimant’s complaints about the intermittent smell were probably well-founded, although not perhaps about the water. The offices where she worked were in a rural location and there was sometimes a bad odour. That said, Ms Blackwell regarded the matter as being closed by 13 January 2020.

59. Ms Walker wrote to the claimant on 16 January 2020 to confirm that she had only been made aware of issues on 3 January 2020 and that by 9 January 2020 the audit had been completed. She discussed the occasion when the claimant had left site and her laptop had been taken from her. She reminded the claimant that she had apologised for her behaviour that day. She set out the claimant’s complaints and how they had been resolved and how she did not see that she had suffered any detriment. She confirmed that the matter was closed [80-82].

60. However, despite having agreed to move forward, the claimant felt there was a change of approach towards her from that point. In February 2020 her workload had increased with the onset of Covid-19. In her assessment, there was a clear and urgent requirement to retain HR Support on site. The decision had been made in December 2019 to recruit an additional full time HR Advisor into the Telford site due to the impact of the additional workload generated and the impact upon the hours she was working. She was working additional hours to support HR activity across both sites.

61. In the claimant’s assessment, in December 2019 it had been agreed that an additional HR Advisor would be recruited to provide support to Telford and her role would provide dedicated support to Mark Thompson Transport. The decision had previously been put on hold to enable time to review activity to

see if it was manageable across the two sites. During December 2019 she had kept a log of the HR activity across the two sites, and she stressed to Ms Blackwell how reactional the business was. She would go to Telford on a Wednesday and return on Thursday to a number of high-level HR escalations from Mr Scott or other managers.

62. The claimant felt comfortable in challenging and prioritising her workload. She had an established career in HR. She would be able to respond to matters that were urgent or critical as priority. This was generally the way of working.

63. The claimant found Mr Scott to be erratic on occasions in that (in her assessment) he would ask her to become involved in an HR situation part way through or sometimes he would make decisions himself which would then have further consequences. Sometimes she felt as if he would give her a one-sided approach and deliberately withhold information that would have altered any potential decision or outcome. The Tribunal makes no judgement as to whether that is correct or not.

64. On 6 February 2020 the claimant sent another email to say that the smell was as bad as it had been in December 2019. Again, she asked for this to be kept confidential [83].

65. On 27 February 2020 the claimant sent an email to Mr Scott about an incident with an HGV on site. Mr Scott sent a return email asking if the claimant had reported the incident formally [16A].

66. The claimant sent Ms Blackwell an email on 6 March 2020 (see below). She did not regard it as disclosing any information to her about any wrongdoing [17]. When Ms Blackwell received the claimant's email, she happened to know that Mr Dickinson was on site. She immediately asked him to investigate the smell again.

67. When, on 6 March 2020, the claimant raised the smell in the office again, it is important to note that, as part of the disclosure procedure for these proceedings, the claimant produced a copy of that email [85]. The email she produced started with "I can sense…". The original email, however, started with "Apologies for using the s*** on the phone to you. I can sense…" [86]. Ms Blackwell in her evidence suggested that this is a matter that goes to the claimant's credibility.

68. Ms Blackwell thought no more about the smell issue, and she heard nothing more about it either. The country was at the start of the Covid-19 pandemic and preparing for the first full lockdown. She was busy with other matters.

69. On 2 April 2020 Ms Blackwell wrote to the claimant to inform her of a temporary downturn in work due to the impact of the coronavirus on the business. She told her that she was to be placed on furlough leave with effect from 6 April 2020 [88-89].

70. The Claimant was not the only person to be placed on furlough leave. The members of the HR team placed on furlough leave were (1) the claimant,

Stephanie Grieve, Rebecca Oyefeso and Beverly Read (HR Advisors); (2) Valentina Eaco (Apprentice HR Administrator); and (3) the three Regional HR Managers – Helen Walker, Carol Chapman and Gerard Knowles. This last group were placed on a three-week furlough rotation, with one manager in the office and the other two on furlough leave. This lasted for approximately six weeks when all three managers went on furlough.

71. On 21 April 2020, at 5:09pm, Ms Blackwell wrote to the claimant to request confirmation that she had agreed to be placed on furlough leave. The claimant replied immediately to say she understood the position [87].

72. Prior to the restructure, the HR team at that time was comprised of the following HR Administrators: (1) Valentine Eaco (Apprentice HR Administrator based at David Hathaway Transport in Bristol); (2) Ellie Martin (HR Administrator based at Foulgers in Norfolk); (3) Nadine Brophy (HR Administrator based at Panic in Rugby); and (4) Grayce Burgess (HR Administrator based at AKW in Manchester).

73. It also contained the following HR Advisors: (5) Tania Jarman (the claimant) (HR Advisor, based in Warrington and serving Mark Thompson Transport and Maidens of Telford); (6) Stephanie Grieve (HR Advisor, based in Adlington and serving William Kirk and Bay Freight); (7) Rebecca Oyefeso (HR Advisor, based in Colchester and serving NC Cammack); (8) Beverly Read (HR Advisor, based in Norfolk and serving Foulgers); (9) Jane Thornton (HR Advisor, based in Telford and serving Maidens, handed over from the claimant); (10) Teara Forsythe (HR Advisor, based in Southampton and serving Lamberts); and (11) Lydia Gosling (HR Manager, based in Manchester and serving AKW Global Logistics and AKW Global Warehousing).

74. The team also contained the following Regional HR Managers: (12) Helen Walker (Regional HR Manager for the Midlands based in Panic at Rugby and serving Panic Transport and AKW Global Logistics Birmingham); (13) Carol Chapman (Regional HR Manager for the South based in Foulgers at Norfolk and serving David Hathaway's Transport); (14) Gerard Knowles, Regional HR Manager for North based in Adlington and serving Fresh Freight Logistics).

75. In the hearing bundle, the claimant has annotated the initial HR structure as it was on 1 January 2020 [87A]. Ms Blackwell in her evidence has provided the correct names of the HR personnel, as the Tribunal has set out above.

76. During the furlough absences, the HR team developed new ways of working, including using Microsoft Teams for meetings, and offering support across the whole group and not just to the designated businesses. Then, due to the reduction in business due to Covid-19, the Group was asked by the Board to complete a "right-sizing project" in order to reduce cost. It was agreed with the Board that the process would start with the HR team so that the remaining HR team would be able to fully focus on supporting the Group with the right-sizing project without fear for their own roles.

77. Ms Blackwell carried out a review of the HR function. It was then agreed with the Board that there would be one central administrative team with all enquiries

pushed through one central portal. HR would then offer a national HR advisor support rather than the local support it had previously offered. Since Covid-19, the HR team had reduced by more than half, but it had still been able to offer a high level of support to each of the 13 businesses within the Group. Prior to that, each company had their own or shared designated HR Advisor who completed all the HR duties, including administration. Some of the larger companies also had HR Administrators for additional support, as explained above.

78. Ms Blackwell's review consisted of looking at what support the Group had, and in which locations, and where support was actually required in the new structure. Of the list set out above, and using the same order, the following changes were made to the HR Administrators post-restructure: (1) Valentine Eaco (Apprentice HR Administrator, based in Bristol) left the HR function and took an alternative role within her local business as an apprentice in its warehouse; (2) Ellie Martin (HR Administrator, based in Foulgers) was dismissed for short service on 3 July 2020 as being surplus to requirements because of the restructure); (3) Nadine Brophy (HR Administrator based at Panic in Rugby) remained in the HR function, but in an administration role; (4) Grayce Burgess (HR Administrator based at AKW in Manchester) remained in the HR function, but in an administration role.

79. The HR Advisors post-restructure emerged as follows: (5) Tania Jarman (the claimant) (HR Advisor, based in Warrington and serving Mark Thompson Transport and Maidens of Telford) was dismissed for short service; (6) Stephanie Grieve (HR Advisor, based in Adlington and serving William Kirk and Bay Freight) left the company on 31 July 2020 having negotiated amicable exit due to length of service; (7) Rebecca Oyefeso (HR Advisor, based in Colchester and serving NC Cammack) left on 31 July 2020 having negotiated amicable exit due to length of service; (8) Beverly Read (HR Advisor, based in Norfolk and serving Foulgers) took an alternative role as Senior HR Administrator responsible for the new central HR Administration function based at Foulgers; (9) Jane Thornton (HR Advisor, based in Telford and serving Maidens) remained in the business as she was local to that group member; (10) Teara Forsythe (HR Advisor, based in Southampton and serving Lamberts) remained in the business as Ms Blackwell had no other HR support within that location; (11) Lydia Gosling (HR Manager, based in Manchester and serving AKW Global Logistics and AKW Global Warehousing) remained in the business due to her experience in the operational complexities of the AKW businesses.

80. The Regional HR Managers post-restructure emerged as: (12) Helen Walker (Regional HR Manager for Midlands based in Rugby) took a demotion and an alternative role as HR Advisor for Panic Transport and AKW Global Logistics, Birmingham; (13) Carol Chapman (Regional HR Manager for the South based at Foulgers in Norfolk) remained in the business following a redundancy consultation process; (14) Gerard Knowles (Regional HR Manager for the North based at Adlington) remained in the business following a redundancy consultation process.

81. As will be apparent from the account above, the Group approached the redundancy exercise within the HR team in two parts. It distinguished those HR specialists, such as the claimant, who had less than two years' service, from those who had more than two years' service. No doubt that reflected a pragmatic, and potentially lawful, policy based upon treating those who had redundancy compensation entitlement and unfair dismissal protection separately from those who did not. Thus, those with less than two years' service were generally at risk of redundancy, whereas those who had more than two years' service were not – or were afforded greater procedural safeguards and/or the privilege of a negotiated exit.

82. Prior to her furlough leave, the claimant had worked as a HR Advisor for Mark Thompson Transport. She had been based in Warrington, but she also provided remote support for another of the companies in the Group, Maidens of Telford, which she visited once a week with an approximate daily mileage of 120 miles. Within the Northwest region, the HR unit comprised Ms Blackwell as HR Director, Mr Knowles as Regional HR Manager North, Ms Gosling as HR Manager, Ms Grieve as HR Advisor and the claimant (also as an HR Advisor).

83. Ms Blackwell's decision was that as HR would no longer be offering the local support that it had done pre-Covid-19, she needed to reduce the headcount within the Northwest region. The claimant was the only HR Advisor or HR Manager within the region with less than 2 years' service. An extra daily commute of about 120 miles to Telford was not reasonable to expect. Ms Blackwell decided that the claimant should be dismissed for redundancy.

84. On 5 June 2020, Ms Blackwell sent a letter to the claimant inviting her to a meeting. She explained that the impact of Covid-19 had reduced business activity across the Group and that it did not envisage business activity returning to pre-Covid levels. The Group was therefore considering a reduction in headcount. She also explained the new changes [90-91].

85. Mr Simon Hobbs, the Chief Executive Officer of the respondent's Group, produced a Covid-19 weekly update bulletin on 5 June 2020. The bulletin was intended to be upbeat, but it reported that volumes across the Group per week were down about 3% lower than the pre-Covid-19 benchmark of March 2020. The average volume reduction across all 13 businesses was 3%. The worst hit business was showing a 25% reduction.

86. On 8 June 2020, Ms Blackwell held a meeting with the claimant by video conference, which had to be concluded via telephone. She explained that there had been a reduction in business activity across the Group, which was expected to be retained in the foreseeable future. She explained that it was not envisaged that business activity would return to pre Covid-19 levels. There had been some improvement, but there was no consistency. Ms Blackwell also explained that the claimant's role was not needed going forward. The claimant said that from a commercial perspective she agreed [92-93].

87. At 5:22pm on 8 June 2020, the claimant emailed Ms Blackwell. The subject was "Questions regarding restructure of HR" [96]. The claimant asked Ms Blackwell for a copy of the original HR structure and the new structure. She did

not complain that her redundancy was related to her complaints about her workplace from November 2019 to March 2020.

88. On 9 June 2020, Ms Blackwell wrote to the claimant to confirm the outcome of their meeting of the previous day. Ms Blackwell explained the Covid-19-related reduction in work. She explained the centralisation of the HR function and how, over the previous two months, the HR team had been reduced by more than half, while still maintaining a high level of support to the businesses. She explained that there was an established HR team in Manchester that was going to provide the HR Advisor support to the respondent company, while the central administration team was going to provide the HR administrative support. Ms Blackwell explained that due to the claimant's short length of service, the respondent was not going to follow a full redundancy process. Ms Blackwell dismissed the claimant on one months' notice. Her contract of employment was to terminate on 7 July 2020 [94-95].

89. On the 9 June 2020, at 9:49am, Ms Blackwell replied to the claimant's email of the previous evening. She gave the claimant a copy of the current HR structure. She explained that she could not send the proposed HR structure as it was confidential. It had not yet been issued to the business or members of the HR team.

90. The claimant emailed again at 10:49am on 9 June 2020. She asked for the name of the respondent's data controller.

91. At 4:33pm on 9 June 2020, Ms Blackwell again emailed the claimant, who had been pressing to see the proposed HR structure [100].

92. The background to all this activity on the claimant's part can be gleaned from her witness evidence. The Tribunal considers it helpful to set this out from her perspective.

93. The claimant did not understand why a decision had been taken to completely remove HR Support from Mark Thompson Transport when there had been concerns about management practices and high employee turnover. She questioned why she had been asked to provide full-time cover to the site and hand over Telford in December 2019, only to find her role was no longer required by June 2020. It did not make sense to her. She was suspicious there were other reasons leading to her dismissal.

94. The claimant understood the cautious approach of the business during Covid-19. However, she regarded this as being only short-term. She notes in her evidence that the business appears to have grown substantially in the months following August 2020. It has moved to a new site, including a large warehousing facility, which is a new function, and which resulted in volume recruitment for warehousing staff in September 2019.

95. The claimant anticipates that the respondent employed over 300 employees by the end of 2020. The CIPD staff ratio for HR to employees is 1 HR Manager to every 100 employees. Her argument is that it would seem that the business would be able to justify a permanent HR Advisor on site given the additional

revenue generated. The Furlough Scheme was still available to support her salary. She thus had growing suspicions there were other reasons why she was dismissed. She attributed this to the escalations she had made regarding welfare, health and safety before she was placed on furlough and before being given notice of dismissal in June 2020.

96. In May 2020 the claimant became aware that Ms Thornton, the newly appointed HR Advisor at Telford, was not placed on furlough. She was surprised to see an email from Ms Thornton regarding HR activity that the claimant had been involved in at Telford prior to her joining. She was taken aback to learn that Ms Thornton had not been furloughed and that she was still carrying out her role. She believed the volume of work at Telford was considerably less than Warrington at the time of her being placed on furlough. To the claimant, it did not seem to make sense that Ms Thornton was still working in her role whereas the claimant had been furloughed. Ms Thornton held the same role, had 3 months' service, whereas the claimant had 12 months' service. She believed that Ms Thornton's role had been protected and not put at risk of redundancy. She did not understand why she was furloughed at the time, as she regarded herself as having a particularly high work load due to the HR support generated by Covid-19.

97. Returning to the Tribunal's narrative, on 18 June 2020, during what was a difficult period for all companies (but for logistic companies like the respondent, in particular), Ms Blackwell instructed Employment Law Solutions to write to the claimant on the respondent's behalf. She was dismissed with immediate effect. This cancelled out any remaining notice. The respondent paid her an equivalent amount of money to that which she would have earned during her notice period, as compensation for the loss of it.

98. The reason that Ms Blackwell took this action was because she did not have the capacity to deal with the claimant's continual repeated requests. Ms Blackwell had offered the claimant a right to appeal her dismissal for redundancy, but she had "bombarded" Ms Blackwell with emails. She had made veiled threats of legal action. Some of her emails related to the earlier complaints that she had made about the facilities at the Mark Thompson site, and which had not (in Ms Blackwell's view) had anything to do with the redundancy or the restructure. The claimant was causing Ms Blackwell huge distraction from her work with irrelevant matters, and it was quicker and easier for Ms Blackwell to withdraw the offer of an appeal and to terminate her employment contract.

99. As regards the complaints that the claimant had made from November 2019 to early March 2020, Ms Blackwell did not see, and she did not hear, any complaints about a change of attitude being shown to the claimant. She knew that her complaints had all been investigated and dealt with properly (in her view). There was a lot of discussion at management level about the smell in particular, but it was in the past and it was not brought up again by management after 13 January 2020.

100. When the Coronavirus Job Retention Scheme was introduced, and the decision made by Ms Blackwell to place the claimant on furlough leave on 2

April 2020, Ms Blackwell gave no consideration at all to the matter of the claimant's complaints about the smells, water or the incident with the HGV, of which Ms Blackwell had been unaware. The decision was entirely economic and business-related.

101. Similarly, when it came to restructuring the HR function, the fact of the claimant's complaints did not form part of the discussion at all. It was a matter of recognising how efficient the business could be with fewer staff. The claimant's short service was the reason she was selected for dismissal.

Submissions

102. Both parties presented oral submissions to the Tribunal. Those submissions have been recorded in the Tribunal's record of the hearing. They are not reproduced here. Instead, the Tribunal sets out the claimant's case immediately below.

Claimant's case

103. The claimant's case, set out in her witness statement, is that she was dismissed by the respondent by reason of redundancy on 7 July 2020. She claims that her dismissal was unfair and that it followed on from five "escalations" that she says she raised to the respondent's management regarding the welfare facilities at her place of work. She cites, in particular, the sanitation/toilet facilities, removal of waste from site, and emitting of odours of sewage in areas that were located near to designated break/eating areas. She also relies upon having raised escalations pertinent to the safety of staff and visitors entering and exiting the office from the staff car park. She asserts that the site was a designated transport depot and that the respondent failed to comply with health and safety regulations for pedestrians working at a transport site. Her claim expressly relies upon sections 44 and 100(1)(c) of the Employee Rights Act 1996.

104. The claimant claims that the reasons presented to justify her redundancy were under the guise of the Covid-19 pandemic, suggesting that business levels had reduced due to the impact of the Covid-19 and the figures been largely inflated for this purpose. She suggests that the real time results for the business during the months of the pandemic suggest there was a small dip in financial performance, followed by a period of growth due to many businesses moving to online services, which would therefore increase the requirement for road transport and logistics services to support the demand for online sales. She argues that the Kinaxia Group posted strong profits and growth, also being recognised as the "logistics company with the largest growth during 2020." An extract from the Company's website confirmed to her that in fact the company had been acclaimed as being the "fastest growing logistics provider of the year".

105. The claimant contends that the redundancy procedure followed was unfair and inconsistent and the outcome was predetermined. The company did not follow its own redundancy policy. The policy states that the company will consider any other option before making staff redundant. This is set out in the Redundancy Policy. The re-structure was not communicated to the national HR

team. It was carried out while the claimant was on furlough. She did not see any communications as would be usual if a restructure was taking place in a company. She questions the procedure applied to her and the possible alternative motives for the instigation of her exit from the business.

Relevant law

106. Part V of the Employment Rights Act 1996 affords protection from suffering detriment in employment. Section 44 deals with health and safety cases. The present claim relies upon section 44(1)(c).

107. So far as is relevant to the present claim, section 44(1)(c) provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that, being an employee at a place where (i) there was no health and safety representative or safety committee, or (ii) there was such a representative or safety committee, but it was not reasonably practicable for the employee to raise the matter by those means, she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

108. So far as could potentially be relevant if it had been a pleaded part of the claimant’s claim, section 47B(1) affords protection from suffering detriment in employment on the ground of protected disclosures. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that she has made a protected disclosure.

109. Section 48 addresses complaints made to employment tribunals under Part V of the 1996 Act. It is for the employer to show the ground on which any act, or deliberate failure to act, was done.

110. Subject to the extension of time limits to facilitate conciliation before institution of proceedings, an employment tribunal shall not consider a complaint under section 48 unless it is presented 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. Where that act or failure is part of a series of similar acts or failures, the relevant date is the last of them. Time may be extended to 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.

111. Where an act extends over a period, the “date of the act” means the last day of that period. A deliberate failure to act shall be treated as done when it was decided on. In the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when it does an act inconsistent with doing the failed act or, if it has done no such inconsistent act, when the period expires within which it might reasonably have been expected to do the failed act if it was to be done.

112. Turning next to the complaint of automatic unfair dismissal, so far as is relevant to the claimant’s pleaded case, section 100(1)(c) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded

for the purposes of Part X of the Act (unfair dismissal protection) as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being an employee at a place where (i) there was no health and safety representative or safety committee, or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

113. For the avoidance of any doubt about the extent of the claimant's complaints, section 103A of the 1996 Act provides that an employee who is dismissed shall be regarded for the purposes of Part X of the Act as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

114. The time limits for bringing an unfair dismissal complaint were not in issue in these proceedings, but they are dealt with in section 111 of the 1996 Act.

115. No case law has been cited to the Tribunal. No case authorities appear to the Tribunal to be especially helpful in deciding the claim.

Discussion

116. The Tribunal starts with the detriment complaint.

117. Any complaint of detriment should have been brought to the Tribunal, subject to the extension of time limits to facilitate Acas early conciliation, within the period of three months beginning with the date of the act or failure to act to which the complaint relates. Where that act or failure is part of a series of similar acts or failures, the relevant date is the last of them.

118. The possible detriments of which the claimant complains extend no later than the date upon which the claimant was furloughed. That date was 6 April 2020. Provided the claimant commenced early conciliation by 5 July 2020, she would then have one month's extension of the time limit, potentially to 5 August 2020. That assumes for present purposes that there was a series of detriments culminating in being placed on furlough.

119. However, early conciliation did not commence until 14 July 2020 and it ended on 27 July 2020. Thus, the claimant did not benefit from any extension of time afforded by the early conciliation provisions. Her claim was already time-barred when she commenced early conciliation, at least so far as any detriments claim is concerned. In the event, the claim (form ET1) was presented to the Tribunal on 10 August 2020, by which time the limitation problems for the detriment complaint were compounded.

120. Of course, time may be extended to 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. The claimant has provided no adequate explanation as to why she could not have presented a detriment complaint to the Tribunal in

time. It is not satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. It is satisfied that it was reasonably practicable for the complaint to be presented before the end of that period of three months. The Tribunal would be entitled to time-bar the detriment complaint. However, the Tribunal considers that the detriment complaint can be dealt with in the alternative on its merits.

121. The Tribunal is satisfied that the claimant's concerns about welfare and about health and safety – in respect of toilet and washing facilities, smells and the HGV incident – were treated seriously by the respondent. That is clear from the evidence of Ms Blackwell and from the Tribunal's findings of fact above. She was not subject to detrimental action as a result. There was no verifiable change of attitude towards her. The incident on New Year's Eve 2019 between the claimant and Mr Scott did not amount to an attempt to dismiss her or to harass her or treat her adversely. A perfectly acceptable explanation for what occurred on that day has been given by Ms Blackwell and it has been accepted by the Tribunal. The decision to furlough the claimant cannot be regarded as a detriment when viewed in the context of the furloughing of HR team members during the initial stages of the Covid-19 pandemic. For completeness, the handling of the claimant's redundancy was not a detriment, properly viewed and understood.

122. If the Tribunal were to be wrong about that, and the proper inference to draw is that the claimant was subject to detrimental action, in the alternative the Tribunal is not satisfied that any detrimental act or failure to act was done by or on behalf of her employer on health and safety grounds. The respondent has discharged the burden upon it of providing an innocent or lawful explanation for the actions and decisions it took towards the claimant.

123. Nevertheless, there is a more fundamental reason why the detriment complaint cannot proceed. The conditions of section 44(1)(c) are not satisfied. The respondent had a health and safety committee. The claimant was aware of it because she had attended at least one meeting of it. Section 44(1)(c) can only apply if the claimant is an employee at a place where (i) there was no health and safety representative or safety committee, or (ii) there was such a representative or safety committee, but it was not reasonably practicable for her to raise the matter by those means. There was a health and safety committee, and it was reasonably practicable for her to raise her concerns through that committee. The alternative method of bringing to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety does not arise in these circumstances.

124. Accordingly, by one means or another, the claimant's complaint of detriment under section 44(1)(c) cannot succeed.

125. If her pleaded case includes an alleged public interest disclosure detriment, then she is in no better position. Section 47B(1) affords protection from suffering detriment in employment on the ground of protected disclosures. A worker has the right not to be subjected to any detriment by any act, or any

deliberate failure to act, by her employer done on the ground that she has made a protected disclosure.

126. If the Tribunal assumes (but does not here decide) for argument's sake only that time limitation is not an issue (it is an issue and remains so); that the claimant has suffered a detriment (the Tribunal has found that she did not); and that she had made a qualifying protected disclosure about welfare, health and safety matters (the Tribunal assumes that for present purposes only) – then the complaint founders on the rock of the respondent employer having shown the reasons or grounds upon which it took action (or failed to take action) in relation to the claimant. The claimant's concerns (disclosures, for present purposes only) about welfare, health and welfare matters were treated seriously by her employer, but crucially they were not the reasons why, or the grounds upon which, the respondent treated her in the way that it did. The Tribunal has already rehearsed its reasoning in relation to section 44 and it applies equally to section 47B.

127. Accordingly, by one means or another, any complaint of detriment that might have been intended under section 47B cannot succeed.

128. The Tribunal then turns to the unfair dismissal complaint. There is no time limitation issue to address here. Her complaint in that regard is comfortably in time. However, she cannot bring an ordinary unfair dismissal complaint in reliance on section 98 of the 1996. She does not have two years' service. The general substantive or procedural fairness of her dismissal cannot be contested. Instead, she must rely upon an automatically unfair dismissal under section 100(1)(c), as pleaded, or potentially under section 103A (as Judge Warren's case management summary appeared to suggest).

129. The complaint under section 100(1)(c) cannot succeed for much the same reasons that her complaint under section 44 has not succeeded. Section 100(1)(c) provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that, being an employee at a place where (i) there was no health and safety representative or safety committee, or (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, she brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

130. First, there was a health and safety committee, and it was reasonably practicable for her to have raised the matters that concerned her through that route. She does not satisfy either of the alternative conditions for protection set out in section 100(1)(c)(i) and (ii).

131. Second, and more fundamentally, the reason (let alone the principal reason) for the dismissal was not that she had brought to her employer's attention (whether by reasonable means or not) circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

132. The reason for her dismissal was redundancy. That was not a sham reason, as the evidence clearly demonstrates. The reason for her selection for redundancy, like others in the HR team at risk of redundancy, was that she did not have two years' service, and so she was not entitled to a redundancy package (negotiated or not), and she had no expectation that an exhaustive procedure of warnings, selection criteria, consultation, consideration of alternatives to redundancy and a possible appeal would be extended to her. She was selected for redundancy (and, in turn, not safeguarded from redundancy) for the reasons explained by Ms Blackwell in her evidence and not in any sense at all because some months earlier she had raised welfare, health and safety concerns. The respondent had sound and defensible reasons for making her redundant, and not making others redundant in similar circumstances, wholly unconnected with the claimant's welfare, health and safety complaints in late 2019 and early 2020.

133. Accordingly, by one means or another, the claimant's complaint of unfair dismissal under section 100(1)(c) cannot succeed.

134. Section 103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. The reason (and the principal reason) was that she was redundant. She was selected for redundancy because the respondent had sound and understandable business reasons for making her redundant, as previously explained. She was not selected redundancy and she was not then dismissed by reason of redundancy because she had in any sense at all made a protected disclosure.

135. Accordingly, any complaint of unfair dismissal that might have been intended under section 103A also cannot succeed.

Disposal

136. In conclusion, the claim is not well-founded. It is dismissed.

Reconsideration and appeal

137. This paragraph and paragraphs 138-140 below are addressed to the claimant. They form no part of the written reasons for the judgment.

138. To the extent that the claimant's four emails referred to at paragraph 2 above anticipate a possible appeal and a possible application for reconsideration, the claimant now has the written reasons upon which she might base either or both courses of action.

139. Any appeal must be addressed to the Employment Appeal Tribunal in accordance with its procedural rules, as explained in the literature that accompanies any Employment Tribunal judgment. This Tribunal cannot assist the claimant in that regard.

140. Any application for reconsideration may now be made or renewed in writing to this Tribunal in accordance with rules 70-71 in Schedule 1 of the Employment Tribunals Rules of Procedure 2013. The claimant should observe the time limit for doing so.

____

Judge Brian Doyle
Date: 24 August 2021

WRITTEN REASONS SENT TO THE PARTIES ON
27 August 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.