Case Number: 3304140/2020

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss E Hortas	and	Copart UK Limited

Held by CVP on 1 and 2 December 2021

Representation	**Claimant:**	Mr N Hortas. Grandfather
	Respondent:	Mr C Howells, Counsel
	Members:	Ms C Smith
		Mr I Middleton

Employment Judge Kurrein

Statement on behalf of the Senior President of Tribunals

This has been a remote hearing that has not objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 926 pages, the contents of which I have recorded.

JUDGMENT

The Claimants claims are not well founded and must be dismissed

REASONS

The Claims and Issues

1 On 22 April 2020 the Claimant, having completed early conciliation, presented a claim to the tribunal alleging she had been automatically unfairly dismissed and discriminated against.

2 The Respondent presented a response in which it denied those allegations and asserted that the Claimant had been dismissed for misconduct.

3 A preliminary hearing took place before EJ Moore on 2 February 2021 at which the issues in the case were defined. The discrimination claims were withdrawn. A List of Issues was subsequently agreed, as follows:-

Protected disclosure

1. Did the email sent by C to Jane Pocock on 25 March 2020 contain a qualifying disclosure (s.43B(1)(b) and (d))?

1. If so, were those qualifying disclosures made in accordance with s.43C ERA 1996?

Automatically unfair dismissal- s.103A ERA 1996

3. Was the reason or principal reason for dismissal that C made a protected disclosure?

H&S dismissal- Section 100(1)(c) ERA 1996

4. Was it not reasonably practicable for C to raise her concerns with R's H&S representative?

5. If so, did C raise her concerns with R by reasonable means?

6. Did the concerns raised by C reflect circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety?

7. If so, was the reason or principal reason for C's dismissal that she had raised that concern?

Remedy

8. What loss has C suffered?

9. Has C taken reasonable steps to mitigate her loss?

10. Should any *Polkey* reduction be made?

11. Did C's conduct cause or contribute to the dismissal?

12. Was C's PID made in good faith? If not, should any compensation be reduced? (s.103A claim only)

13. Should an award for injury to feelings and/or aggravated damages be made?

Procedural matters

Documents etc

4 The Presidential Guidance on Remote and In Person Hearings has been in force for over a year. Unfortunately it does not appear to have come to the attention of the Respondent's solicitor. The bundle, quite apart from being of grossly excessive length (containing almost 700 pages relating to mitigation), failed to comply in the following respects:-

4.1 The vast majority of the pages had not been the subject of optical character recognition and could not be copied and pasted;

4.2 The pages had all been assembled, regardless of their actual orientation, as being portrait oriented.

5 In addition, the Respondent's witness statements could not be marked up or annotated because they had been password protected, something the Respondent's solicitor initially denied.

Application to recuse

6 In the mid-afternoon of 1 December 2021 the Respondent made an application that the Employment Judge should recuse himself on the ground that:-

6.1 His interventions had gone beyond what was reasonable:

6.2 Their nature showed bias;

6.3 He had indicated that he would give his non-legal Members directions on the weight to be attached to any evidence adduced in re-examination of the Respondent's witnesses in light of the terms in which the Claimant had been cross examined.

7 We retired to consider that decision in light of the decisions in Porter v McGill 2002 2AC 357 and Ansar v Lloyds TSB Bank plc 2006 EWCA Civ 1462.

8 We concluded that the application was not well founded. In particular:-

8.1 The interventions of the Employment Judge were reasonable and proper in light of the overriding objective and the requirement that the Employment Tribunal should ask such questions and make such enquiries and as it thought necessary.

8.2 Such interventions did not show bias, but were part of the essential dialogue between the Tribunal and the Respondent's representative as referred to in Peter Simpler and Co Ltd v Cook 1986 IRLR 19.

8.3 it was part of the duties of the Employment Judge to advise the non-legal members of the relevant law.

The Evidence

9 We heard the evidence of the Claimant on her own behalf and took account of the written statement of her witness, Ms S Stovell. We heard the evidence of Mrs T Brown, customer support centre manager, and of Mrs S Barnard, former director of performance management.

10 We read the documents to which we were referred in the bundle and considered the written and oral submissions made on behalf of the parties. We make the following findings of fact.

Findings of Fact

11 The Claimant was born on 25 September 2000 and started her employment with the Respondent as a customer service representative on 22 October 2019.

12 The Respondent is the UK arm of an international business that works with leading insurance companies to dispose of vehicles that have been involved in accidents. Many of those vehicles are disposed of by way of an online auction.

13 The Claimant received a detailed contract of employment and was the subject of an induction process during which she was made aware of the Respondent's grievance and disciplinary procedures. Her employment was subject to a six-month probationary period which was reviewed from time to time.

14 There was an initial delay in the Claimant's former employer, Sainsbury's, providing the Respondent with a reference.

15 In late January 2020 the Respondent's staff were informed that a health and safety committee had been formed by Sam Bates and on 5 February 2020 the Respondent CEO, Jane Pocock, circulated a memo concerning the Respondent's health and safety policy.

16 It was the Claimant's case that, because she was told that she successfully completed her probation on 5 March 2020, there were no issues in the course of her employment that had given the Respondent cause for concern.

17 We find that is not the case. We accepted Mrs Brown's evidence that when it was time to consider whether or not the Claimant had successfully completed her probation she spoke to HR about her reluctance to sign off the Claimant's probation. She was told that because none of the issues that concerned her had been documented she had no alternative but to sign the document.

18 That evidence was not set out in Mrs Brown's statement. It was given, entirely spontaneously, in response to a question put to her in cross examination. This was only one of several occasions on which Mrs Brown gave evidence on matters that were raised by questions put to her which were entirely credible and appeared to us as clearly prompted by the question and recalled by her. We thought her to be a convincing witness.

19 In contrast the Claimant, though personable, was uncertain in many of her responses. She also accepted, contrary to the central plank of her case, that she had been spoken to about her conduct on more than one occasion.

20 As a consequence, where there was a conflict between the evidence of Mrs Brown and that of the Claimant, we have preferred the evidence of Mrs Brown.

21 The following matters had caused the Claimants managers concerns both during and after the relevant period: –

21.1 The Claimant failed to keep up-to-date with her online personal development plan, and had to be reminded to do so on 14 and 21 February and 16 and 24 March.

21.2 Mrs Brown had to remind her almost daily, and by naming her in front of her colleagues, of the Respondent's policy that she be logged in to the system to take telephone calls unless specifically exempted.

21.3 On 12 March some of the Claimant's colleagues expressed concern to Mrs Brown about the extent and manner in which the Claimant and her colleague, Molly Balchin, were discussing issues concerning Covid, which made them feel anxious.

21.4 On the following day Mrs Brown noticed, and other staff complained, that a number of staff had simultaneously taken cigarette breaks. It was Mrs Brown's evidence that thereafter she kept a log of such breaks but had not retained it following the Claimant's dismissal.

21.5 On 16 March Mrs Brown asked the team leader Ms Civilkaite to monitor the Claimant's breaks and was informed that she was taking far more breaks than other staff.

21.6 On 16 March the HR manager emailed Mrs Brown to ask her to speak to the Claimant and Miss Stovell to ask them not to spread rumours concerning other staff members' COVID status as it might cause anxiety or panic. Miss Stovell had been in the same cohort as the Claimant at school, and they had become reacquainted, and good friends, when their paths crossed in the Respondent's employment.

21.7 Mrs Brown held a short meeting with the Claimant and Miss Stovell and repeated what she had been asked to say. The Claimant's response was, "Why is it always us?", laughing as she did so. Mrs Brown reprimanded her and asked her and Miss Stovell not to behave like naughty children or they would she would get into trouble. She told them that in her short experience with the Respondent it was always the Claimant and Miss Stovell that she had to raise issues with. She gave them a short oral reprimand to improve their behaviour

22 We thought it was unfortunate that none of the Respondents' staff involved in the above matters, or the later decision to dismiss the Claimant, made or retained contemporaneous notes of what took place. That was particularly the case with Mrs Brown who, as an experienced manager, should have known better.

23 The above events coincided with other relevant matters: –

23.1 On 8 February the Claimant's colleague, Molly Balchin, sent her an email attaching a BBC news item about a British cruise passenger dying of Covid in Japan.

23.2 On 3 March Ms Civilkaite, the team leader, sent an email to her teams about the poor performance that had been exhibited by a recent audit.

23.3 Also on 3 March Mrs Brown sent an email to remind all staff of the requirement that they be logged onto phones.

23.4 On 4 March 2020 the Respondent sent a circular to all staff regarding Covid issues and reminding them of the need to take appropriate precautions. This

was the first of several such reminders, which came frequently in the following period.

23.5 On 12 March Mrs Brown emailed all staff who smoked to ask them to ensure that no more than two of them were absent from the office at any one time. She sent a further email the same day to remind staff to remain logged on to the telephone/computer system throughout the day so as to ensure that all calls were distributed evenly.

23.6 On 16 March Mrs Brown sent an email to all staff to ask them to keep any discussion of Covid to a minimum.

23.7 On 19 March Mrs Brown sent an email to the Claimant and Miss Stovell to give a "gentle reminder" that they had an undocumented privilege to take two 5 minutes smoking breaks per day and to ask them to abide by that privilege. The Claimant responded to object to her and her colleague being "singled out". The Claimant later asked to see Mrs Brown about this exchange and again asked, "Why is it always us?". Mrs Brown repeated her view that it was always the Claimant and Miss Stovell that she had to pull up on matters, and that they should improve their behaviour.

24 On 23 March the Respondent took the decision that all except essential staff should be asked to work from home.

25 The Claimant was absent that day and the following day so attended a meeting on 25 March at which it was explained that one member of each team would be required to continue working in the office because the work carried out by the Respondent meant that its staff were considered to be "key workers". The Claimant was given a letter to this effect on headed notepaper in the event she was stopped by the police when travelling to work.

26 The Claimant was working at that time in a team of two. She and Molly Belchin dealt with issues arising from the cars the Respondent dealt with having private numberplates. At this time however, Ms Belchin was not at work because she had to shield herself.

27 Following this announcements many questions were raised by staff and answered, but the Claimant did not say anything. When Mrs Brown asked her if she wish to say anything she simply shrugged her shoulders.

28 After the meeting finished some staff went home and others made preparations for the necessary changes to distance people by moving desks and staff from the usual locations. Mrs Brown asked the Claimant to sit at a desk in Member Services. This was positioned such that Mrs Brown would be able to see the Claimant's screen when she was working. The Claimant was vocal in her opposition to working in that location and Mrs Brown explained that she wished to keep an eye on the Claimant because of her concerns regarding her failure to comply with the Respondent's requirements.

29 Thereafter the Claimant was not seen to carry out any work at her designated desk. She became awkward, difficult and disruptive: she sat on Miss Stovell's desk chatting to her and, when asked to return to her desk, laughed at Mrs

Brown. She failed to follow the social distancing guidelines and did not log on to her computer.

30 Later that day the Claimant asked to speak to Mrs Brown and they had a meeting in her office. Once again, Mrs Brown explained to the Claimant her reasons for wishing the Claimant to continue to work in the office and why she wished her to be located at the particular desk appointed. The Claimant was more concerned, it appeared, about Molly Belchin's return to work. The Claimant objected to having to work in the office and referred Mrs Brown to the Prime Minister's statement on essential workers. Mrs Brown took the view that as the Respondent had been deemed to be an essential business by the Financial Conduct Authority the Prime Minister's guidance only applied if the Claimants work could be done from home. We accepted her evidence that it could not be. The conversation ended with the Claimant saying, "I don't want to work for a company that doesn't care about me."

31 At 4:30 pm that day Mrs Brown went to the Members Services offices and asked the Claimant and Miss Stovell to return to their respective desks and get back to work. Miss Stovell and the Claimant said they both needed to move their cars, something that occurred regularly due to the limited space available, and she and the Claimant left the office together laughing. Mrs Brown took the view that they took overlong to move their cars and on their return told them that she had had enough of their behaviour and if they did not improve they would have to leave. The Claimant and Miss Stovell laughed. Mrs Brown's evidence was that she had never been treated to such insubordination in the past. She concluded that it was unacceptable.

32 The Claimant asked Mrs Brown for the email addresses of Jane Pocock and Mrs Barnard because she was not happy about having to work in the office and wanted to ask if she could work from home. Mrs Brown gave her those email addresses but suggested that she should think hard before sending any such email because management were working hard to deal with the issues facing the business.

33 Shortly after the Claimant left the building Ms Civilkaite informed Mrs Brown that she had had a similar conversation with the Claimant.

34 We accepted that by close of business that day Mrs Brown had taken the decision to dismiss both the Claimant and Miss Stovell because of their unacceptable conduct. She intended to tell them that when they returned to the office the next day. She spoke to Mrs Barnard about the government guidelines, and her view that the Claimant was required to work in the office was confirmed. She also discussed the behaviour of the Claimant and Miss Stovall with Mrs Barnard and told her of her intention to dismiss them the following

35 At 20:26 on 25 March 2020 the Claimant sent an email to Jane Pocock. She introduced herself and asserted that the work she did could be done from home but she was not being allowed to do so. She went on to explain that her mother had "underlying health conditions" and of fear and concern for her and her family's safety. She explained that she was writing to Liz Pocock as a last

resort in the hope that Ms Pocock would overrule Mrs Brown and allow her to work from home.

36 Ms Pocock responded to the Claimant at 22:19 to say that her email had been referred to Mrs Barnard, who would contact her.

37 On the morning of 26 March Mrs Brown learned from Mrs Barnard that the Claimant had emailed Miss Pocock to raise her concerns. Mrs Barnard indicated that in light of Mrs Brown's concerns and the contents of the email both the Claimant and Mis Stovell should be sent home and be told that the Respondent would be in touch. Mrs Brown did not see the Claimant's email until after the dismissal had taken effect.

38 Shortly after that conversation Mrs Brown invited the Claimant and Miss Stovell to the boardroom to tell them that in light of concerns regarding their conduct they were being sent home and she would be in touch. The Claimant sought clarification as to whether she was working from home, being furloughed or dismissed. Mrs Brown was noncommittal.

39 We did not accept the Claimant's evidence that in the course of this meeting Mrs Brown said words to the effect that Ms Pocock had been "furious" at the receipt of the Claimant's email.

40 Mrs Brown considered her position and reflected on the decision she had taken the previous evening to dismiss the Claimant and Miss Stovell for reasons relating to their conduct. She wrote to the Claimant that day in the following terms,

> "Despite a number of conversations relating to your behaviour whilst working at Copart, I am sorry to say that your behaviour has not met the standards required of its employees and therefore I have decided that your contract of employment will be terminated with one weeks notice. As you will have received payment up to 31 March 2020, this will be deducted from the notice owing to you.
>
> You will be paid a sum in respect of accrued and taken annual leave entitlement minus any overpayment as outlined above"

41 By email of 27 March 2020 the Claimant appealed against her dismissal. The email was addressed to Ms Pocock and asserted that the decision had been made personally by her because of the Claimants email sent on 25 March.

42 That appeal was dealt with by Mrs Barnard. Bearing in mind her earlier involvement in the decision to send the Claimant home, and her discussions with Mrs Brown, we thought it surprising that she did not recognise that it might be more appropriate for someone wholly uninvolved to deal with the appeal. However, this is not a case of ordinary unfair dismissal and we do not need to deal with that issue further.

Submissions

43 We received both oral and written submissions from both parties. It is neither necessary nor proportionate to set them out here.

The Law

44 Protected disclosures are dealt with in Part IVA Employment Rights Act 1996.

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) 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.

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—

(a) to his employer, or

45 Health and Safety Dismissals are set out in S.100 of the same Act:-

100 Health and safety cases

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) …

(b) …

(c) being an employee at a place where—

(i) there was no such 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,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

Further Findings and Conclusions

46 For ease of cross referencing we repeat the issues and deal with each, as necessary, in turn.

Protected disclosure

2. Did the email sent by C to Jane Pocock on 25 March 2020 contain a qualifying disclosure (s.43B(1)(b) and (d))?

2. If so, were those qualifying disclosures made in accordance with s.43C ERA 1996?

47 The Respondent accepted that this email contained information and that the public interest test was capable of being satisfied. The issue we were asked to determine is whether the Claimant reasonably believed that the information she disclosed tended to show either or both of the categories of failure at s.43B(1)(b) and (d) ERA 1996.

48 We had considerable doubt as to whether the Claimant satisfied the test on 'public interest'. The only persons potentially effected were the Claimant herself and, allegedly, her mother, who had a wholly unspecified 'underlying health condition'.

49 We had similar misgivings as to whether she held a reasonable belief that the Respondent's conduct might amount to a criminal offence or be putting a person's health and safety at risk: at that time, as now, everyone was 'at risk' and we question whether such general risks qualify.

50 However, we are unanimous in accepting Mrs Brown's evidence that she took the decision to dismiss the Claimant, and Miss Stovell, in the late afternoon of 25 March 2020, before the disclosure was made. That decision was not communicated until later, but the decision was made then, and the disclosure could not have been in Mrs Brown's mind at that time. The fact that Mrs Brown knew of the fact of the email and its general content at the time she decided to confirm her decision and communicate it to the Claimant does not alter the position.

51 In the circumstances of this case the onus is on the Claimant throughout to establish that the reason for her dismissal was the disclosure made in that email. She has failed to establish, on the balance of probabilities that was the case. This claim is not well founded and must be dismissed.

H&S dismissal- Section 100(1)(c) ERA 1996

8. Was it not reasonably practicable for C to raise her concerns with R's H&S representative?

9. If so, did C raise her concerns with R by reasonable means?

10. Did the concerns raised by C reflect circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety?

11. If so, was the reason or principal reason for C's dismissal that she had raised that concern?

52 We have concluded unanimously that the Claimant's case falls at the first hurdle. Sam Bates had, to her admitted knowledge, been recently appointed as a Health and Safety Representative. She offered no explanation why it was not reasonably practicable for her to have raised her issue with that representative.

53 Once again, the onus lay with the Claimant to establish this fundamental fact on the balance of probabilities, and she has failed to do so.

54 This claim is not well founded and must be dismissed.

Employment Judge Kurrein

Dated: 11 January 2022

Sent to the parties and

entered in the Register on

11 February 2022

For the Tribunal